AS TO THE ADMISSIBILITY OF

Application No. 25706/94
by Hubert M.J.H. ROESTENBURG
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 14 November 1994 by Hubert M.J.H. ROESTENBURG against the Netherlands and registered on 18 November 1995 under file No. 25706/94;

Having regard to :

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 10 August 1995 and the observations in reply submitted by the applicant on 29 August 1995;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Dutch citizen, born in 1935, and residing in Haaren, the Netherlands. Before the Commission he is represented by Mr. G. Spong, a lawyer practising in the Hague, the Netherlands.

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

A. The particular circumstances of the case

On 19 September 1990, the applicant was arrested. He was subsequently detained on remand. He was released on 17 October 1990.

On 30 January 1991, the applicant was summoned to appear before the Regional Court (Arrondissementsrechtbank) of 's-Hertogenbosch. The Regional Court heard the case on 10 May 1991. Both the applicant and his lawyer were present.

On 24 May 1991, the Regional Court convicted the applicant of fraud and incitement to commit perjury and sentenced him to two years'

imprisonment, less the time spent in detention on remand.

The applicant filed an appeal against the judgment with the Court of Appeal (Gerechtshof) of 's-Hertogenbosch.

On 12 January 1993, the Court of Appeal examined the case. The applicant did not appear. His lawyer, however, was present. The applicant's lawyer stated that he had not been in contact with his client before the Court of Appeal's session. The Court of Appeal declared the applicant in default of appearance and continued its examination of the case. It heard one witness. The applicant's lawyer was not given the opportunity to conduct the applicant's defence.

On 26 January 1993, the Court of Appeal quashed the Regional Court's judgment for technical reasons, convicted the applicant of fraud and incitement to commit perjury and sentenced him to two years' imprisonment, less the time spent in detention on remand.

The applicant filed an appeal in cassation with the Supreme Court (Hoge Raad). He complained, inter alia, that the Court of Appeal had not allowed his lawyer to conduct his defence in his absence. He invoked Article 6 of the Convention. He argued that it is not required that a lawyer must explicitly request permission to conduct the defence of an absent client. Moreover, he added, when a lawyer appears at a court session, it is obvious that he intends to conduct the defence of his client.

On 15 March 1994, the Advocate General (Advocaat-Generaal) to the Supreme Court submitted his written conclusions. He advised the Supreme Court to reject the applicant's appeal in cassation because the minutes of the hearing before the Court of Appeal did not indicate that the applicant's lawyer had requested the Court of Appeal's permission to conduct the defence of his client.

In its judgment of 17 May 1994, the Supreme Court rejected the applicant's appeal in cassation.

B. Relevant domestic law and practice

The Netherlands Code of Criminal Procedure (Wetboek van Strafvordering) does not ensure the right of a lawyer to conduct the defence of an accused before a court, where the latter has been declared in default of appearance.

There are, however, according to the Netherlands Supreme Court's case-law, two situations in which a court must allow a lawyer to conduct the defence in the absence of the accused:

- in cases concerning nationals of EU member states in which civil liability issues arise (Hoge Raad, judgment of 17 November 1981, N.J. 1982 nr. 269), and

- in cases where there are compelling reasons (klemmende redenen) preventing the appearance of an accused at the hearing of his case (Hoge Raad, judgment of 26 February 1988, N.J. 1988 nr. 794) and where a lawyer has made an explicit request to that effect to the court (Hoge Raad, judgment of 14 November 1986, N.J. 1987 nr. 862 and judgment of 18 September 1989, N.J. 1990 nr. 145).

COMPLAINT

The applicant complains under Article 6 paras. 1 and 3 (c) of the Convention that at the hearing before the Court of Appeal of 's-Hertogenbosch, his lawyer was not allowed to conduct his defence in his absence and that he was therefore deprived of a fair trial in the determination of the criminal charges against him.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 14 November 1994 and registered on 18 November 1994.

On 18 May 1995 the Commission decided to communicate the application to the respondent Government and to invite them to submit written observations on its admissibility and merits.

The Government's observations were submitted on 10 August 1995. The applicant replied on 29 August 1995.

THE LAW

The applicant complains that in the determination of the criminal charges against him he did not receive a fair hearing as the Court of Appeal did not allow his lawyer to conduct the defence in his absence.

The applicant invokes Article 6 paras. 1 and 3 (c) (Art. 6-1, 6-3-c) of the Convention, which, insofar as relevant, provide:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by a ... tribunal ... .
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
> ...
> c. to defend himself in person or through legal assistance of his own choosing ... ."

The Government submit that the facts in the case at issue are similar to those in the cases of Lala and Pelladoah in which the Court found a violation of Article 6 paras. 1 and 3 (c) (Art. 6-1, 6-3-c) of the Convention (Eur. Court H.R., Lala and Pelladoah judgments of 22 September 1994, Series A nos. 297-A and 297-B respectively). Following these judgments, counsel for an accused who has not appeared in court is now always given the opportunity to speak in his client's defence. The Government are also considering amending the law on this point.

In view of the above, the Government defer to the opinion of the Commission.

The applicant contends that a change in practice and a possible change of the law following the Lala and Pelladoah judgments do not detract from the fact that he did not receive a fair trial.

The Commission notes that this application raises the same issues as the cases of Lala and Pelladoah (above-mentioned judgments of 22 September 1994).

Having regard to the parties' submissions and the case-law of the Convention organs, the Commission considers that the complaint under Article 6 paras. 1 and 3 (c) (Art. 6-1, 6-3-c) of the Convention raises questions of fact and law which require an examination of the merits. This part of the application cannot, therefore, be declared inadmissible as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other grounds for inadmissibility have been established.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION ADMISSIBLE, without prejudging the merits of the case.

Secretary to the Second Chamber	President of the Second Chamber
(M.-T. SCHOEPFER)	(H. DANELIUS)