AS TO THE ADMISSIBILITY OF

Application No. 13143/87
by L.T.
against the Netherlands

The European Commission of Human Rights sitting in private on 9 November 1989, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
S. TRECHSEL
G. SPERDUTI
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
G. BATLINER
J. CAMPINOS
H. VANDENBERGHE
Sir Basil HALL
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY
Mr. L. LOUCAIDES

Mr. H.C. KRÜGER, Secretary to the Commission

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

Having regard to the application introduced on 10 August 1987 by L.T. against the Netherlands and registered on 13 August 1987 under file No. 13143/87;

Having regard to the report provided for in Rule 40 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Dutch citizen, born in 1946. He is at present detained in a prison in The Hague. He is represented in the proceedings before the Commission by Mr. Vincent Kraal, a lawyer practising in Amsterdam.

The facts, as submitted by the parties, may be summarised as follows:

In the course of a criminal investigation regarding narcotics offences, a Dutch police officer, in February-March 1984, heard a number of witnesses in Malaysia. Some of the declarations made by these persons implicated the applicant, who was therefore arrested on 30 August 1984.

In the subsequent criminal proceedings before the Regional Court (Arrondissementsrechtbank) of Amsterdam the applicant requested, inter alia, that the case be referred back to the investigating judge in order to allow this judge to hear under oath the persons who had testified before the police officer and in order to ensure the rights of the defence during such further investigation.

He further submitted that the persons who had testified before the police officer concerned had sought to harm him because of an alleged financial dispute he had with one of them.

By judgment of 1 February 1985 the Regional Court convicted the applicant and sentenced him to ten years' imprisonment. It held, inter alia, that it was unlikely that the persons who had testified before the police officer would give different testimony before an investigating judge. It also held that it was not plausible that the witnesses had only intended to harm the applicant since their evidence also implicated others.

The applicant appealed to the Court of Appeal (Gerechtshof) of Amsterdam. He again requested that his case be referred to an investigating judge. He also submitted, inter alia, that the evidence given before the police officer had not been freely given as the police officer, before he heard the witnesses for the second time, had promised that the Dutch authorities would not request their extradition.

By judgment of 16 July 1985 the Court of Appeal quashed the Regional Court's judgment but convicted the applicant on the basis of the evidence given before the police officer in Malaysia and on the applicant's admission at the trial that he bore the nickname "Tiger". He was sentenced to ten years' imprisonment. The Court held, inter alia, that the witness testimony concorded in substance with what the witnesses had testified before the investigating judge of The Hague in another case and that, therefore, the interests of the defence did not make a further investigation by an investigating judge necessary. In addition the evidence given after the promise that the Dutch authorities would not ask for extradition of the witnesses, could be considered to be voluntary evidence since it accorded in the main with the evidence given before this promise was made.

The applicant appealed to the Supreme Court (Hoge Raad). By judgment of 17 February 1987 the Supreme Court rejected the appeal. It rejected, inter alia, the applicant's objection that the Court of Appeal had not examined his request to have the case referred back to an investigating judge in order to re-hear the witnesses for the prosecution. It accepted the Court of Appeal's reasoning that the interests of the defence did not require a new investigation.

COMPLAINTS

The applicant complains that it was not possible for him to hear witnesses against him in the course of a supplementary preliminary investigation by an investigating judge. He alleges that his conviction was almost completely based on the testimony of witnesses whom he could not examine. The applicant submits that he has the right to examine witnesses against him, even though the courts are of the opinion that the evidence of these witnesses is reliable. The applicant invokes Article 6 paras. 1 and 3(d) of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 10 August 1987 and registered on 13 August 1987.

On 19 January 1989 the Commission decided to invite the respondent Government, pursuant to Rule 42 para. 2 (b) of its Rules of Procedure, to submit written observations on admissibility and merits, before 31 March 1989.

At the Government's request, the President agreed to extend the time limit to 21 April 1989. Upon a request for an indefinite

extension of the time limit, the President granted an extension until 12 June 1989. The Government's observations were submitted on 13 June 1989. An English translation was submitted on 22 June 1989.

The applicant was invited to submit observations in reply before 3 July 1989. At the request of the applicant, the President extended the time limit to 3 August 1989. The applicant's observations were submitted on 11 July 1989.

THE LAW

The applicant complains that he has not had a fair trial because he has not had the opportunity to examine or have examined the witnesses against him, upon whose testimony his conviction was almost entirely based. He submits that the domestic courts' opinion that these witnesses would not testify differently if questioned again, does not affect his right to question them. He invokes Article 6 paras. 1 and 3 (d) (Art. 6-1, 6-3-d) of the Convention.

Article 6 para. 1 (Art. 6-1) provides, inter alia:

"In the determination of ... any criminal charge against him ... everyone is entitled to a fair and public hearing ..."

Article 6 para. 3 (d) (Art. 6-3-d) provides:

"3. Everyone charged with a criminal offence has the following minimum rights:
...
d. to examine or have examined witnesses against him and to obtain the attendence and examination of witnesses on his behalf under the same conditions as witnesses against him."

The respondent Government submit that the applicant has not raised in substance before the domestic courts the complaint which he makes before the Commission. At no stage during the proceedings against him did the applicant request the right to question the witnesses against him, either through an investigating judge or in open court. Furthermore, the Public Prosecutor, as well, did not have an opportunity to question these witnesses. Finally, numerous witnesses were, in fact, heard for the defence.

The applicant submits in reply that his request to have the case referred back to the investigating judge was for the explicit purpose of securing the rights of the defence. The desire to question the witnesses for the prosecution was explicitly expressed by the applicant's counsel in his memorial as submitted to the Court of Appeal at the hearing.

The Commission recalls that it is sufficient for the exhaustion of domestic remedies if the applicant has raised "in substance" before the national authorities the complaint that he makes before the Commission and that, even in a State where the Convention is directly applicable (as in the Netherlands), "the person concerned may rely before the domestic courts on other arguments to the same effect" (cf. No. 7367/76, Dec. 10.3.77, D.R. 8 p. 185, 210).

The Commission considers that the applicant's request before the domestic courts to have his case referred back to an investigating judge was inspired by the desire to have an opportunity of questioning the witnesses for the prosecution and to secure thereby the rights of the defence as protected by Article 6 para. 3 (d) (Art. 6-3-d) of the Convention. Although the applicant did not expressly mention that he wished, after the case had been referred back to the investigating judge, to question the witnesses, he must be considered in substance

to have raised the matter which now forms the basis of his complaint to the Commission.

With regard to the Government's assertion that the applicant could have requested the appearance of the witnesses at the trial, the Commission recalls that it was unlikely that they would have come voluntarily to the Netherlands to give evidence and that they had also been promised that the Netherlands would not request their extradition. Moreover, a request to have them heard by way of letters rogatory before a Malaysian court would hardly have been an effective remedy, once the courts had concluded that a referral of the case back to the investigating judge for the purpose of a new hearing was unnecessary.

It follows that the application cannot be declared inadmissible under Article 27 para. 3 (Art. 27-3) on the ground that the applicant has failed to exhaust domestic remedies, as required by Article 26 (Art. 26) of the Convention.

Furthermore, the Commission considers that the applicant's complaints raise complex issues of fact and law which can only be resolved by an examination of the merits. The application is not, therefore, 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

DECLARES THE APPLICATION ADMISSIBLE
without prejudging the merits of the case

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (C.A. NØRGAARD)