In the case of Masson and Van Zon v. the Netherlands (1),

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A (2), as a Chamber composed of the following judges:

Mr R. Ryssdal, President,
Mr R. Macdonald,
Mr S.K. Martens,
Mrs E. Palm,
Mr I. Foighel,
Mr A.N. Loizou,
Mr F. Bigi,
Mr B. Repik,
Mr P. Jambrek,

and also of Mr H. Petzold, Registrar,

Having deliberated in private on 28 April and 2 September 1995,

Delivers the following judgment, which was adopted on the last-mentioned date:

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Notes by the Registrar

1. The case is numbered 30/1994/477/558-559. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The third number indicates the case's position on the list of cases referred to the Court since its creation and the last two numbers indicate its position on the list of the corresponding originating applications to the Commission.

2. Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.
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PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 9 September 1994, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in applications (nos. 15346/89 and 15379/89) against the Kingdom of the Netherlands lodged with the Commission under Article 25 (art. 25) by two Netherlands nationals, Mr Adrianus Johannes Marie Masson and Mr Jacobus van Zon, on 8 and 2 June 1989 respectively.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the Netherlands recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 6 para. 1 and 13 (art. 6-1, art. 13) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicants stated that they wished to take part in the proceedings and designated the lawyers who would represent them (Rule 30).

Mr Masson died on 13 December 1994. His heirs expressed the wish that the proceedings should be continued but declined to take further part.

For reasons of convenience Mr Masson will continue to be referred to as the applicant in so far as this judgment concerns him.

3. The Chamber to be constituted included ex officio Mr S.K. Martens, the elected judge of Netherlands nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 24 September 1994, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr R. Macdonald, Mrs E. Palm, Mr I. Foighel, Mr A.N. Loizou, Mr F. Bigi, Mr B. Repik and Mr P. Jambrek (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Netherlands Government ("the Government"), the applicants' lawyers and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the memorial of the applicant Mr van Zon on 1 February 1995 and the Government's memorial on 3 February. The Delegate of the Commission did not submit any observations in writing.

5. On 7 February 1995 the Commission produced certain documents from the file on the proceedings before it, as requested by the Registrar on the President's instructions.

6. On 15 March 1995 the Registrar received a document setting out the claims under Article 50 (art. 50) of the heirs of Mr Masson.

7. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 25 April 1995. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr K. de Vey Mestdagh, Ministry of Foreign Affairs, Agent,
Mr J.L. de Wijkerslooth de Weerdesteijn,
Landsadvocaat, Counsel;

(b) for the Commission

Mr B. Marxer, Delegate;

(c) for the applicant Mr van Zon

Mr A.F.M. Duynstee, advocaat en procureur,
Mr J.A.D. de Graaf, advocaat en procureur, Counsel.

The Court heard addresses by Mr Marxer, Mr Duynstee and Mr de Wijkerslooth de Weerdesteijn.

AS TO THE FACTS

I. Particular circumstances of the case

A. The "ABP Affair"

8. In 1983 a so-called "Black Book" (zwartboek) containing allegations of irregularities with regard to the financial dealings of the Civil Service Pension Fund (Algemeen Burgerlijk Pensioenfonds, "ABP") was published anonymously.

9. Following a criminal investigation, the two applicants were charged with forgery and corruption. At the time, Mr Masson was the Investments Manager of ABP. Mr van Zon was a businessman with interests in real estate development.

B. The criminal proceedings

1. Mr Masson

(a) Restrictions on liberty

10. On 10 May 1984 Mr Masson was arrested and taken into police custody (verzekering). He was subsequently placed in detention on remand (voorlopige hechtenis).

By order of 21 February 1985 (effective on 22 February) the review chamber (raadkamer) of the Regional Court (arrondissementsrechtbank) of Maastricht suspended the detention on remand, allowing Mr Masson to return to his home on condition, inter alia, that he surrender his passport and report to the local police every day. In addition, he was not allowed to communicate in any way with his co-accused, Mr van Zon. The obligation to report daily to the police was lifted by the review chamber on 26 March 1986.

(b) Proceedings in the domestic courts up to acquittal

11. Towards the end of July 1984 the public prosecutor (officier van justitie) summonsed Mr Masson to appear before the Maastricht Regional Court on 3 August 1984 on four counts of forgery, being an accessory to fraudulent bankruptcy, corruption and swindling.

Mr Masson filed an objection (bezwaarschrift) on 26 July 1984, as a result of which the summons lapsed (section 262 of the Code of Criminal Procedure ("CCP") as it then read). The objection was dismissed by the Regional Court on 14 September 1984.

On appeal the 's-Hertogenbosch Court of Appeal decided on 7 November 1984 to clear Mr Masson of one charge, that of being an accessory to fraudulent bankruptcy, but found that there was a prima-facie case against him as regards the remainder. The decision of the Court of Appeal was upheld by the Supreme Court (Hoge Raad) on 26 March 1985.

12. Mr Masson was again summonsed to appear before the Maastricht Regional Court on 20 May 1985, this time on the charges allowed by the Court of Appeal on 7 November 1984.

13. On 21 May 1987, after various adjournments and hearings, the Regional Court acquitted Mr Masson of one of the charges but convicted him of the remainder. It sentenced him to one year's imprisonment and ordered him to pay to the State 108,000 Netherlands guilders (NLG), that being the court's estimate of the benefit derived by Mr Masson from the crimes of which he had been found guilty.

14. Both Mr Masson and the public prosecutor appealed against this judgment to the 's-Hertogenbosch Court of Appeal. On 7 June 1988 the Court of Appeal acquitted Mr Masson on all charges.

2. Mr van Zon

(a) Restrictions on liberty

15. Mr van Zon was arrested on 11 May 1984. Like Mr Masson, he was taken into police custody and subsequently detained on remand. He remained in detention until 29 January 1985.

On 29 January 1985 his detention on remand was suspended on condition that he report every week to the investigating judge and provide a surety of NLG 350,000. The order to report to the investigating judge was lifted on 14 February 1986. On 30 September 1987, at Mr van Zon's request, the 's-Hertogenbosch Court of Appeal rescinded the order of detention on remand altogether and ordered the return of the surety.

(b) Proceedings in the domestic courts up to acquittal

16. Mr van Zon was summonsed to appear on 3 August 1984 before the Regional Court of Maastricht.

17. On 24 June 1987, after various adjournments and hearings, the Regional Court convicted him on a number of counts of fraud, corruption and forgery and sentenced him to one year's imprisonment.

18. Both the public prosecutor and Mr van Zon appealed against the Regional Court's judgment to the 's-Hertogenbosch Court of Appeal.

On 7 June 1988 the Court of Appeal acquitted Mr van Zon on all charges.

C. Damage sustained, legal costs incurred and compensation proceedings

1. Mr Masson

19. Mr Masson was suspended from his duties on 26 August 1983 by the Minister for Home Affairs (Minister van binnenlandse zaken) following the opening of the criminal investigation. On 24 December 1984 the Minister decided to withhold one-third of his salary for a period of six weeks and to stop his salary entirely thereafter. This apparently left him without an income from public employment from 5 February 1985 until 1 September 1987, when he became entitled to a pension.

In September 1988, following the acquittal, the Minister for Home Affairs paid Mr Masson half the amount which had been stopped.

20. Mr Masson's costs of legal assistance in the national proceedings totalled NLG 804,090.99. Of this sum NLG 787,243.56 remained unpaid.

2. Mr van Zon

21. Mr van Zon had to pay his counsel NLG 610,049.61 for their assistance in the national proceedings. Other expenses included the cost of the banker's guarantee which served as surety in lieu of detention.

3. Proceedings brought

22. On 5 and 6 September 1988 respectively, Mr van Zon and Mr Masson filed requests to the Court of Appeal, under section 591a CCP for reimbursement by the State of their legal costs and of travel and subsistence expenses incurred in connection with the proceedings (see paragraph 28 below) and under section 89 for financial compensation for the restrictions on their liberty (see paragraph 27 below).

23. On 9 December 1988 the review chamber of the Court of Appeal rejected both applicants' claims under section 89 on the ground that there were no reasons in equity to award the applicants compensation.

The review chamber, which was composed of three judges, included two (one of them the presiding judge) who had participated in the appeal hearing; the third member of the original chamber had in the meantime left the 's-Hertogenbosch Court of Appeal.

24. In decisions of the same date the presiding judge of the review chamber awarded NLG 5,853.55 to Mr Masson and NLG 3,559.80 to Mr van Zon by way of reimbursement for travel and subsistence expenses incurred in connection with the hearings of the courts and in respect of the costs of defence witnesses, but rejected the remainder of their claims entirely. These decisions explicitly referred to the decisions of the review chamber mentioned in the previous paragraph, including the reasoning on which they were based.

25. Both applicants brought proceedings against the Netherlands State before the Regional Court of The Hague, Mr van Zon on 27 May 1993 and Mr Masson on 6 June 1993. Alleging a wrongful act in civil law (onrechtmatige daad), they claimed compensation for the damage caused to them by the detention on remand and full reimbursement of their legal costs. It appears that these proceedings are still pending.

II. Relevant domestic law and practice

A. The Code of Criminal Procedure

26. The relevant provisions of the Code of Criminal Procedure were amended by the Act of 8 November 1993, Staatsblad (Official Gazette) 1993, no. 591, which entered into force on 1 January 1994 (see paragraph 31 below).

1. Relevant provisions of the Code of Criminal Procedure as they read in 1988

27. Sections 89 and 90 CCP, in so far as relevant, provided:

Section 89

"1. If a case ends without the imposition of a punishment or measure, or when such punishment or measure is imposed but on the basis of a fact for which detention on remand is not allowed, the court may, at the request of the former suspect, grant him compensation at the expense of the State for the damage which he has suffered as a result of police custody or detention on remand. Such damage may include non-pecuniary damage.

...

3. The request may only be submitted within three months following the termination of the case. The petitioner shall be heard, or at least summoned, and may be assisted during the hearing by a lawyer. At the hearing the lawyer shall be offered the opportunity to make any observations required.

4. The review chamber shall consist as far as possible of the judges who have dealt with the case at the trial.

5. The court competent to grant compensation shall be the court with jurisdiction as to both facts and law (gerecht in feitelijke aanleg) before which, at the time of its termination,

the case was or would have been prosecuted or else was last prosecuted, or, if that court is a District Court (kantonrechter), the Regional Court of that judicial district.

..."

Section 90

"1. Compensation shall be awarded in each case if and to the extent that the court, taking all circumstances into account, is of the opinion that there are reasons in equity to do so.

2. In the determination of the amount, the personal circumstances (levensomstandigheden) of the former suspect shall also be taken into account.

3. The decision shall be reasoned. The decision shall immediately be notified to the former suspect or to his heirs, but in case of a rejection the grounds shall be omitted. In that case the former suspect or his heirs may consult the statement of grounds at the registry."

It was not possible to file an appeal on points of law against a decision based on these provisions.

28. Sections 591 and 591a CCP, in so far as relevant, provided as follows:

Section 591

"1. Compensation shall be paid to the former suspect or his heirs at the expense of the State for costs borne by the former suspect under or pursuant to the provisions of the Act on Fees in Criminal Cases (Wet tarieven in strafzaken), in so far as the appropriation of these costs has served the investigation or has become devoid of purpose by the withdrawal of summonses or legal remedies by the public prosecution (openbaar ministerie).

2. The amount of compensation shall be determined at the request of the former suspect or his heirs. This request must be submitted within three months following the termination of the case. The determination shall be made in the court with jurisdiction as to both facts and law before which, at the time of its termination, the case was or would have been prosecuted or else was last prosecuted, by the District Court judge or by the presiding judge as the case may be. The presiding judge may appoint one of the judges of the Court of Appeal or the Regional Court who have dealt with the case to do so. The District Court judge or the Regional Court [or Court of Appeal] judge will issue an order of payment (bevelschrift van tenuitvoerlegging) for the amount of the compensation.

3. Petitioners can be heard. If they so wish they will be heard, or at least summoned. They may be assisted by a lawyer. Section 24, last paragraph, applies.

..."

Section 591a

"1. If the case ends without imposition of a punishment or measure ..., the former suspect or his heirs shall be granted compensation at the expense of the State for his travel and subsistence expenses incurred for the investigation and the

examination of his case, calculated on the basis of the Act on Fees in Criminal Cases.

2. If the case ends without imposition of a punishment or measure ..., the former suspect or his heirs may be granted compensation at the expense of the State for the damage which he has actually suffered through loss of time as a result to the preliminary investigation (gerechtelijk vooronderzoek) and the examination of his case at the trial, as well as the costs of counsel. This will include compensation for the costs of counsel during police custody and detention on remand. Compensation for such costs may furthermore be granted when a case ends with the imposition of a punishment or measure on the basis of a fact for which detention on remand is not allowed.

...

4. Sections 90 and 591, subsections 2 to 5, shall apply by analogy."

29. The Code of Criminal Procedure, which was adopted in 1921 and entered into force in 1926, assumed that matters dealt with therein were to be decided either by the trial court, following a hearing which in principle was public, or by the review chamber following a hearing in camera to which the public had no access. Proceedings before the review chamber were governed by sections 21 to 26.

Section 21 CCP, in so far as relevant, provided as follows:

"1. All cases in which a decision is not required by law to be taken by the trial court at the trial hearing or taken at the trial hearing ex officio shall be dealt with by the review chamber. However all applications, requests and proposals made at the trial shall be examined and decided at the trial.

2-4. ..."

Section 24 CCP, in so far as relevant, provided as follows:

"1. The accused is entitled to be assisted by counsel at all hearings.

2-3. ...

4. The counsel or the lawyer will be offered the opportunity to make any observations required at the hearings."

30. Requests based on sections 89 and following and on sections 591 and 591a were heard by the review chamber. As is indicated in the preceding paragraph, review chamber proceedings were not intended to be public. However, since the Convention is directly applicable in the Netherlands, taking precedence over domestic law, it was open to petitioners to claim that a request based on one of these provisions related to a "civil right" for the purposes of Article 6 para. 1 (art. 6-1) of the Convention and that they were therefore entitled to a public hearing. It appears from the case-law of the Supreme Court that if the review chamber hearing the request accepted this argument, they were obliged to grant a public hearing. It was also open to the review chamber hearing the request to decide of its own motion that Article 6 para. 1 (art. 6-1) was applicable, with the resultant obligation to hear the request in public unless the petitioner preferred a hearing in camera (see, inter alia, the Supreme Court's judgment of 23 November 1990, Nederlandse Jurisprudentie (Netherlands Law Reports, "NJ") 1991, no. 184).

In an appeal on points of law for safeguarding the law (cassatieberoep in het belang der wet) against a decision of 27 March 1992 by the 's-Hertogenbosch Court of Appeal, the Procurator-General (procureur-generaal) to the Supreme Court addressed the question, which he answered in the negative (see paragraphs 19-21 of his statement of grounds of appeal), whether a request for compensation based on section 89 CCP led to the determination of a "civil right". In its judgment rejecting the appeal (judgment of 2 February 1993, NJ 1993, no. 553) the Supreme Court expressly declined to rule on this issue.

2. Changes in the law as from 1 January 1994

31. The Act of 8 November 1993 (see paragraph 26 above) is intended to ensure the conformity of review chamber proceedings with Article 6 (art. 6) of the Convention as the legislature considers that this provision (art. 6) is to be interpreted in the light of the Court's case-law. The legislature has chosen to retain the general principle that review chamber proceedings are not public but to prescribe public hearings where Article 6 (art. 6) makes that necessary.
Section 22 CCP, in so far as it is relevant, now reads:

> "1. Review chamber proceedings shall not be public unless they are required to be by law.
>
> 2-4. ..."

The explanatory memorandum (Kamerstukken (Parliamentary Documents) II, 1991-1992, 22,583 no. 3, pages 11 and following) enumerates the review chamber proceedings which, in the view of the Government, are covered by Article 6 (art. 6) of the Convention. In this connection, the following passage taken from the explanatory memorandum is of relevance (page 17):

> "The actions for obtaining compensation for damage or costs* are of a composite nature (gemengd van aard) (sections 89, 90, 591 and 591a). The close link between the action and criminal proceedings admittedly justifies placing them in the Code of Criminal Procedure, but what is at stake in the proceedings can be qualified as of a civil-law nature. The applicability of Article 6 (art. 6) is thus established." (*emphasis in the original)

Accordingly, the third paragraph of section 89 now reads:

> "The request may only be submitted within three months following the termination of the case. It shall be dealt with by the review chamber in public."

Similarly, the third paragraph of section 591 now reads:
"The request shall be dealt with by the review chamber in public."

As a further consequence of the fact that Article 6 (art. 6) is now considered applicable to the proceedings brought pursuant to section 89, the third paragraph of section 90 has been amended so as to read:

> "The decision shall be notified without delay to the former suspect or his heirs."

The explanatory memorandum states the following:

"Section 24 requires the decision to be reasoned. It is incompatible with the proposed publicity of the proceedings and of the decision to omit reasoning in a decision rejecting the request."

B. Claims for compensation in equity as compared with an entitlement to compensation

32. In its judgment of 7 April 1989, NJ 1989, no. 532, the Civil Division of the Supreme Court ruled that section 89 CCP did not prevent the former suspect who considered himself a victim of unlawful detention from bringing proceedings in tort against the State and claiming full compensation for any damage suffered. The Supreme Court held, inter alia, that

"[section 89] did not purport to do more than offer the courts the possibility of granting compensation `for detention that was lawful but nevertheless shown afterwards to be unjustified'".

Further to that judgment, the Criminal Division of the Supreme Court, in its judgment of 2 February 1993, NJ 1993, no. 552, held, inter alia:

"Sections 89 and following CCP offer the former suspect a speedy and inexpensive but, in view of what is laid down in section 90, first and second paragraphs, limited possibility of obtaining compensation for damage suffered on grounds of equity. This procedure therefore does not extend to the determination by the courts of complete compensation for damage on the basis of a tort committed by the State vis-à-vis the (former) suspect and therefore does not affect the possibility open to the former suspect of bringing his claim before the civil courts on that basis. Given the limited purport of the procedure established by sections 89 and following, what is laid down in those provisions as regards the procedure to be followed does not inhibit their application even in cases of unlawful detention."

33. Recently the Civil Division of the Supreme Court has confirmed that a former suspect may bring an action before the civil courts only if he or she wishes to claim compensation on the basis of unlawful detention and that otherwise the only remedy available is to bring proceedings under sections 89 and following CCP (judgment of 23 December 1994, Rechtspraak van de Week (Weekly Law Reports, "RvdW") 1995, no. 12).

It thus appears from the case-law that former suspects may choose between proceedings before the criminal courts and proceedings before the civil courts. For their claim to be allowed by the civil courts, they must state, and prove, that the detention was unlawful in their regard; if they are successful, they are entitled to full compensation. For their claim to be accepted by the criminal courts, no more is required than that the case should end without the imposition of a punishment or measure and that the review chamber should consider that reasons in equity exist to award compensation.

34. There was formerly some controversy in legal writing as to when deprivation of liberty in connection with criminal proceedings constituted a tort, but this has now been settled by two recent judgments of the Supreme Court.

In its judgment of 29 April 1994, RvdW 1994, no. 104, the Supreme Court rejected the suggestion that pre-trial detention undergone in connection with a criminal act of which the suspect is afterwards acquitted should invariably be considered to be retrospectively

unlawful and that the State should therefore be held liable to pay compensation for all damage suffered by the former suspect. The Supreme Court held that, on the contrary, only additional circumstances could lead to such a finding. These additional circumstances were referred to in this judgment and further elaborated in the Supreme Court's above-mentioned judgment of 23 December 1994. From this statement of the law it envisages that pre-trial detention can only engage the State's liability in tort, and entitle the former suspect to full compensation, in two cases:

- firstly, if it is established, either by the judgment acquitting the former suspect or on the basis of other evidence contained in the case file of the criminal proceedings, that the suspicion which existed when the pre-trial detention was ordered and which at that time justified the detention had no basis in fact; or

- secondly, if the pre-trial detention was ordered in breach of written or unwritten law, that is to say, if the legal requirements for such detention were not fulfilled, if the detention was ordered in violation of the fundamental rights of the accused (for example, without hearing him) or if in the circumstances of the case the orders were so disproportionate as to be incompatible with the authorities' obligation to exercise due care.

PROCEEDINGS BEFORE THE COMMISSION

35. Mr van Zon and Mr Masson lodged their applications (nos. 15379/89 and 15346/89) with the Commission on 2 and 8 June 1989, respectively.

Mr Masson, relying on Article 3, Article 5 paras. 1, 2, 3 and 5, Article 6 paras. 1, 2 and 3 and Article 13 of the Convention, Article 1 of Protocol No. 1 and Article 2 of Protocol No. 7 (art. 3, art. 5-1, art. 5-2, art. 5-3, art. 5-5, art. 6-1, art. 6-2, art. 6-3, art. 13, P1-1, P7-2), formulated various complaints concerning his police custody and detention on remand as well as the failure to grant him compensation for his pre-trial detention and reimbursement of his legal costs.

Mr van Zon, relying on Article 6 paras. 1 and 2 and Article 13 (art. 6-1, art. 6-2, art. 13), complained only of the failure to grant him compensation for his pre-trial detention and reimbursement of his legal costs.

36. On 1 April 1992 the Commission decided to adjourn its examination of both applicants' complaints under Article 6 para. 1 (art. 6-1) concerning their requests for compensation of legal and other costs and to declare the remainder of their applications inadmissible. The Commission joined the applications and declared them admissible for the remainder on 8 January 1993, and decided in addition that Mr Masson's complaint under Article 13 (art. 13) was so closely related to his complaint under Article 6 para. 1 (art. 6-1) that the two complaints could not be dissociated at that stage.

In its report of 4 July 1994 (Article 31) (art. 31), it expressed the opinion that there had been a violation in each case of Article 6 para. 1 (art. 6-1) (fifteen votes to nine) and that it was not necessary to examine Mr Masson's complaint under Article 13 (art. 13) (twenty-one votes to three).

The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment (1).

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1. Note by the Registrar: for practical reasons this annex will appear

only with the printed version of the judgment (volume 327-A of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

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FINAL SUBMISSIONS TO THE COURT

37. The Government concluded both their memorial and their argument at the Court's hearing by expressing the view that Article 6 para. 1 (art. 6-1) was not applicable in the present case and, even if it were, had not been violated.

38. At the hearing, counsel for the applicant Mr van Zon (the only applicant to take part in the proceedings before the Court - see paragraph 2 above) concluded that "[f]or the reasons set out in the introductory application, the additional observations submitted in the proceedings before the Commission, the written submission in the proceedings before the Court and the reasons expressed during the hearing", Article 6 para. 1 (art. 6-1) applied and had been violated.

AS TO THE LAW

I. SCOPE OF THE CASE

39. The applicant Mr van Zon asked the Court to consider his complaint under Article 6 para. 2 (art. 6-2), which the Commission had declared inadmissible as being manifestly ill-founded.

40. The Court reiterates that the compass of the case before it is delimited by the Commission's decision on admissibility (see the recent authority, the McMichael v. the United Kingdom judgment of 24 February 1995, Series A no. 307-B, p. 50, para. 71). Consequently, the Court has no jurisdiction to entertain this complaint.

II. ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 (art. 6-1) OF THE CONVENTION

41. Article 6 para. 1 (art. 6-1) of the Convention, in so far as relevant, provides as follows:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal ..."

42. The applicants submitted that, contrary to the requirements of Article 6 para. 1 (art. 6-1), their requests for financial compensation for the restrictions on their liberty (section 89 para. 1 CCP) and their requests for reimbursement of their legal costs incurred in connection with the criminal proceedings (section 591a para. 2 CCP) had not been dealt with in public by an impartial tribunal.

43. The Government contested this allegation, whereas the Commission accepted it.

Applicability of Article 6 para. 1 (art. 6-1)

Whether there was a "dispute" over a "right"

(a) Relevant principles

44. For Article 6 para. 1 (art. 6-1) under its "civil" head to be applicable, there must be a "dispute" (contestation in the French text) over a "right" which can be said, at least on arguable grounds, to be recognised under domestic law. The "dispute" must be genuine and

serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise (see inter alia the Zander v. Sweden judgment of 25 November 1993, Series A no. 279-B, p. 38, para. 22). The outcome of the proceedings must be directly decisive for the right in question, mere tenuous connections or remote consequences not being sufficient to bring Article 6 para. 1 (art. 6-1) into play (see inter alia the Fayed v. the United Kingdom judgment of 21 September 1994, Series A no. 294-B, pp. 45-46, para. 56).

(b) Arguments before the Court

45. The applicants argued that there existed between them and the State a "dispute" over a "right" which was recognised under Netherlands law. The right they claimed - which, in their view, followed from the presumption of innocence enshrined in Article 6 para. 2 (art. 6-2) - was that of a former suspect to reimbursement of his or her necessary legal costs and compensation for damage suffered in the course of criminal proceedings ending in a complete acquittal.

They sought to distinguish the present case from the earlier cases of Lutz v. Germany, Englert v. Germany and Nölkenbockhoff v. Germany (judgments of 25 August 1987, Series A nos. 123-A, 123-B and 123-C), which had not ended in a complete acquittal but had been discontinued for other reasons.

They contended that, although sections 89 para. 1 and 591a para. 2 CCP stated that the trial court "may" award compensation, the wording of section 90 ("Compensation shall be awarded in each case if ..." - see paragraphs 27 and 28 above) proved that upon acquittal the former suspect was in principle granted an entitlement to compensation, albeit that it was within the discretion of the trial court to make exceptions to this principle and also to determine the amount of compensation. They argued that this interpretation was supported by a judgment of the Supreme Court in which it was held that an entitlement to damages arose from criminal-investigation measures against a person who was subsequently shown to be innocent. Similarly, in the applicants' view, the proceedings for compensation under sections 89 para. 1 and 591a para. 2 CCP enabled a former suspect to claim compensation for detention and prosecution which - as appeared from the acquittal - had retrospectively been shown to lack justification.

In their submission, such a right to compensation was a "civil" right.

46. In the Commission's opinion, an acquitted person was entitled to seek compensation for damage allegedly suffered as a result of his detention on remand and reimbursement of the legal and ancillary costs incurred in the criminal proceedings against him. This, in its view, meant that the applicants could claim on arguable grounds to have a "right" recognised under Netherlands law. Furthermore, the right claimed consisted of financial reparation for pecuniary and non-pecuniary damage; it was therefore "civil" in nature, notwithstanding the origin of the dispute and the jurisdiction of the criminal courts.

47. The Government contested the applicability of Article 6 (art. 6).

They argued firstly that there was no "dispute". The State had not taken any stance as to whether or not the applicants should be awarded compensation. Accordingly, in proceedings under sections 89 para. 1 and 591a para. 2 CCP no position of the State was in issue. Nor was the State a party to those proceedings. The prosecution was heard, not as a party, but as an adviser to the court. In addition,

unlike actions in tort in the civil courts, the proceedings in question raised no issue of "lawfulness".

Secondly, there was in the Government's submission a clear distinction to be drawn between claiming compensation on the basis of tortious liability and requesting compensation on the basis of equity. Only when restrictions on liberty constituted a tort did a right to compensation arise. Sections 89 para. 1 and 591a para. 2 CCP were concerned with discretionary compensation to be granted on the basis of equity. That no entitlement as such to compensation was involved was clear from the wording of these provisions: sections 89 para. 1 and 591a para. 2 stated that the trial court "may" award compensation and section 90 specified that it might do so only "if [it was] of the opinion that there [were] reasons in equity ..." (see paragraphs 27 and 28 above).

(c) Application of the relevant principles

48. As to whether a "dispute" over a "right" existed so as to attract the applicability of Article 6 para. 1 (art. 6-1), the Court will first address the issue whether a "right" to the compensation claimed could arguably be said to be recognised under national law.

49. In view of the status of the Convention within the legal order of the Netherlands, the Court observes firstly that the Convention does not grant to a person "charged with a criminal offence" but subsequently acquitted a right either to reimbursement of costs incurred in the course of criminal proceedings against him, however necessary these costs might have been, or to compensation for lawful restrictions on his liberty. Such a right can be derived neither from Article 6 para. 2 (art. 6-2) nor from any other provision of the Convention or its Protocols. It follows that the question whether such a right can be said in any particular case to exist must be answered solely with reference to domestic law.

In this connection, in deciding whether a "right", civil or otherwise, could arguably be said to be recognised by Netherlands law, the Court must have regard to the wording of the relevant legal provisions and to the way in which these provisions are interpreted by the domestic courts.

50. Sections 591 para. 1 and 591a para. 1 CCP provide that in given circumstances various specified expenses "shall" be refunded to a former suspect (see paragraph 28 above). A duty is thereby imposed on the State to reimburse the sums involved if the applicable conditions are met, and consequently the former suspect is granted a right. It is to be recalled that the judge presiding over the chamber of the 's-Hertogenbosch Court of Appeal which heard the cases did in fact order the repayment of certain sums to the applicants under section 591a para. 1 (see paragraph 24 above) and that neither applicant made a claim under section 591 para. 1 (see paragraph 22 above).

51. On the other hand, sections 89 para. 1 and 591a para. 2 lay down that the competent court "may" award the former suspect compensation for certain damage not covered by sections 591 para. 1 and 591a para. 1. In contrast to these latter provisions, sections 89 para. 1 and 591a para. 2 do not require the competent court to hold the State liable to pay even if the conditions set out therein are met. Moreover, section 90 para. 1 CCP makes the award of compensation contingent on the competent court being of the opinion "that reasons in equity" exist therefor (see paragraph 27 above). The grant to a public authority of such a measure of discretion indicates that no actual right is recognised in law.

Finally, the Court cannot overlook the relevant rulings of the Netherlands Supreme Court, in particular that of 2 February 1993, NJ 1993, no. 552, and that of 29 April 1994, RvdW 1994, no. 104. Admittedly, as the applicants argued, the Supreme Court's case-law has created a measure of jurisdiction in the matter for the civil courts (see paragraph 32 above). However, the first-mentioned judgment of the Supreme Court, although subsequent to the events complained of, shows that a right to full compensation (enforceable by the civil courts) is recognised only with regard to unlawful detention (see paragraph 33 above). The latter judgment, which is even more recent, makes it clear that acquittal per se does not render pre-trial detention retrospectively unlawful (see paragraph 34 above). The applicants have not contended before this Court that their case meets any of the conditions stated in the latter judgment for holding the restrictions on their liberty to have been unlawful.

52. In view of the above considerations, the Court concludes that, whether or not the impugned proceedings involved a "dispute" for the purposes of Article 6 para. 1 (art. 6-1), the claims asserted by the applicants did not in any event concern a "right" which could arguably be said to be recognised under the law of the Netherlands. This being so, Article 6 para. 1 (art. 6-1) of the Convention was not applicable to the impugned proceedings and has therefore not been violated in relation to either applicant.

III. ALLEGED VIOLATION OF ARTICLE 13 (art. 13) OF THE CONVENTION

53. Article 13 (art. 13) of the Convention provides as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

Before the Commission, Mr Masson argued that, contrary to Article 13 (art. 13) of the Convention, he had no effective remedy in domestic law against the decisions complained of.

54. Having found a violation of Article 6 para. 1 (art. 6-1), the Commission did not find it necessary to examine the complaint under Article 13 (art. 13).

55. The allegation of violation of Article 13 (art. 13) was not referred to in the proceedings before the Court, which sees no cause, either on the facts or in law, to address the matter of its own motion.

FOR THESE REASONS, THE COURT

1. Holds unanimously that it has no jurisdiction to entertain Mr van Zon's complaint under Article 6 para. 2 (art. 6-2) of the Convention;

2. Holds by eight votes to one that Article 6 para. 1 (art. 6-1) of the Convention is inapplicable;

3. Holds unanimously that Article 6 para. 1 (art. 6-1) of the Convention has not been violated in relation to either applicant;

4. Holds unanimously that it is not necessary to examine Mr Masson's complaint under Article 13 (art. 13) of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 28 September 1995.

Signed: Rolv RYSSDAL
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of Rules of Court A, the concurring opinion of Mr Martens is annexed to this judgment.

Initialled: R. R.

Initialled: H. P.

CONCURRING OPINION OF JUDGE MARTENS

1. I concur with the Court's finding that Article 6 (art. 6) has not been violated, but not with its reasoning.

2. The applicants' complaints concern non-contentious proceedings before a criminal court. In those proceedings the applicants asked the Court to grant them financial compensation for the restrictions on their liberty which they had suffered during, and the lawyers' fees which they had incurred in connection with, a criminal prosecution brought against them, their claim being based (solely) on their acquittal. However, the objective of the impugned proceedings was not enforcement of a civil right to compensation, since under the law of the Netherlands, as under that of several other Contracting States (1), acquittal does not ipso facto entail a right to compensation for lawfully imposed detention on remand; nor, for that matter, to reimbursement of lawyers' fees. In my view that suffices (2) to conclude that Article 6 para. 1 (art. 6-1) was not applicable under its "civil" head.

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1. See the Sekanina v. Austria judgment of 25 August 1993, Series A no. 266-A, p. 14, para. 25.

2. In non-contentious proceedings there is ipso facto no "dispute" (see the separate opinion of Judge De Meyer in the case of H. v. Belgium, Series A no. 127-B, pp. 48 et seq.) and, since the applicants have had access to a court there is no scope for applying the "arguability" test (see my concurring opinion in the case of Salerno v. Italy, Series A no. 245-D, pp. 57 et seq.).

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3. I consider, however, that Article 6 para. 1 (art. 6-1) was applicable under its "criminal" head. In my opinion the Netherlands proceedings under consideration belong to the same category as those in the Sekanina v. Austria case (3): proceedings in which the former accused, having been acquitted, is offered the opportunity to ask the trial court to grant him compensation in respect of his detention on remand and the costs of his defence. Proceedings of this type, which according to that judgment are known in several Contracting States, are to be characterised as a kind of extension of, or appendix to, the criminal proceedings which ended as such with the judgment of acquittal. Consequently, in conformity with the purposes of the Convention, such proceedings are also governed by Article 6 para. 1 (art. 6-1) under its "criminal" head.

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3. See note 1.

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4. Underlying proceedings of this type is, evidently, the notion

that acquittal does not ipso facto entail a right to compensation for lawfully imposed detention on remand, but that the question whether equity requires payment of compensation to an acquitted accused and, if so, to what extent depends on all the circumstances of the case and therefore is best left to the discretion of the trial court, which has the fullest knowledge of the circumstances. I see nothing wrong in such a notion. Under the Convention there is no right to compensation (4), and according to the Hauschildt doctrine (5) the mere fact that the decision on compensation is taken by the same judge or judges who acquitted does not affect the tribunal's impartiality, since the questions to be answered when settling these two issues are completely different.

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4. See the Sekanina judgment (note 1 on page 19), pp. 13-14, para. 25.

5. See the Hauschildt v. Denmark judgment of 24 May 1989, Series A no. 154, pp. 21-22, paras. 49-50.

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Moreover, under this approach there are good reasons for hearing such cases in camera, since it may very well be that there are facts which, notwithstanding the acquittal, militate against granting the former accused any compensation and which, in order to protect his or her private life, are better not ventilated in public. The same applies to the requirement in Article 6 para. 1 (art. 6-1) of the Convention that judgment should be pronounced publicly: here again the nature of the particular proceedings justifies an exception (6).

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6. In this context I refer to the Schuler-Zgraggen v. Switzerland judgment of 24 June 1993, Series A no. 263, p. 20, para. 58 (third sub-paragraph), where the Court seems to suggest that the nature of the issue involved may be considered decisive in regard to the publicity requirements under Article 6 para. 1 (art. 6-1).

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5. In sum, although I find that Article 6 para. 1 (art. 6-1) is applicable, I share the Court's conclusion that it has not been violated.