Article II of the aforementioned Protocol, applies in all criminal proceedings concerning offences which were not intentionally committed, in which the accused's liability at civil law, arising from the elements of the offence for which he is being prosecuted, is in question or on which such liability might subsequently be based.

In Case 157/80

REFERENCE to the Court under the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters by the Hoge Raad [Supreme Court] of the Netherlands for a preliminary ruling in the criminal proceedings against

SIEGFRIED EWALD RINKAU

on the interpretation of Article II of the Protocol annexed to the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters,

THE COURT

composed of: J. Mertens de Wilmars, President, P. Pescatore, Lord Mackenzie Stuart and T. Koopmans (Presidents of Chambers), A. O'Keeffe, G. Bosco, A. Touffait, U. Everling and A. Chloros, Judges,

Advocate General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community may be summarized as follows:

I — Facts and written procedure

Siegfried Ewald Rinkau, of Gelsenkirchen in the Federal Republic of Germany, was prosecuted in the Netherlands for driving in a vehicle equipped with a radio-electrical transmitting device, whether or not a radio telegraph or a radio telephone installation, within the meaning of Article 3 of the Netherlands Law on telegraphs and telephones of 1904 (Staatsblad 7), without being the holder of a licence required by that Law for the installation, operation or use of the device.

He was convicted on 27 July 1977 by the Magistrate of the Arrondissementsrechtbank [District Court] Zutphen, after the Magistrate had given his Counsel leave to represent him in application of Article II of the Protocol annexed to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. That article states:

"Without prejudice to any more favourable provisions of national laws, persons domiciled in a Contracting State who are being prosecuted in the criminal courts of another Contracting State of which they are not nationals for an offence which was not intentionally committed may be defended by persons qualified to do so, even if they do not appear in person.

However, the court seised of the matter may order appearance in person; in the case of failure to appear, a judgment given in the civil action without the person concerned having had the opportunity to arrange for his defence need not be recognized or enforced in the other Contracting States."

The Public Prosecutor appealed and in an interlocutory judgment of 28 August 1979 the Gerechtshof [Regional Court of Appeal] Arnhem decided that Counsel for Mr Rinkau could not be instructed to defend the accused, who did not appear at the hearing. By a judgment of 11 September 1979 that court upheld the judgment appealed against.

Mr Rinkau lodged an appeal in cassation and by a judgment of 17 June 1980, received at the Court of Justice on 3 July 1980, the Hoge Raad of the Netherlands referred the following two questions to the Court;

"1. Must the expression 'an offence which was not intentionally committed' appearing in the first paragraph of Article II of the said Protocol be understood as including any offence for which the legal definition does not require specific intent in regard to any element of the offence, or should the expression

be understood in a narrower sense as relating only to offences in the definition of which there is reference to some element of guilt *(culpa)* on the part of the offender?

2. If the conditions set out in Article II of the said Protocol are fulfilled, does the right granted to 'the accused' by that article apply without restriction, or does the accused person have that right only where he has to defend himself against a civil claim made in the relevant criminal proceedings, or at any rate where the interests of the accused under civil law are affected by the outcome of the criminal proceedings?"

Pursuant to Article 5 of the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the European Communities of the Convention of 27 September 1968, the Netherlands Government and the Commission of the European Communities submitted written observations in accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

II — Written observations submitted to the Court

A — Observations of the Netherlands Government

In its observations the Netherlands Government proposes an answer to the second question which it believes makes consideration of the first question unnecessary.

In its opinion the right to be defended, provided by Article II of the Protocol annexed to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968 is given to the accused person only in so far as he must defend himself against a civil action brought in the context of criminal proceedings or at any rate in so far as his interests under civil law are affected by the outcome of the criminal proceedings.

The first basis for the solution which it proposes is seen by the Netherlands Government in the origin of the provision in question. Article II of the Protocol is in fact based on Article 2 of the Protocol annexed to the Treaty between the Kingdom of the Netherlands, the Kingdom of Belgium and the Grand Duchy of Luxembourg on Jurisdiction, Bankruptcy and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instruments.

That provision was inserted in the Benelux Treaty in order to overcome the hesitancy of the Netherlands authorities in regard to judgments given in the civil action by a criminal court and guaranteed the accused the right to be represented in such proceedings if he did not wish to appear in person.

Furthermore, just as Article 2 of the Protocol annexed to the Benelux Treaty on enforcement should be viewed in the light of the Benelux Treaty itself which applies to criminal courts only in respect of the judgments which they give in civil

or commercial matters, Article II of the Protocol annexed to the Convention of 1968 should be considered on the basis of the Convention itself which, by Article 1, applies to civil and commercial matters only. That is clear from the second paragraph of Article II of the Protocol annexed to the Convention, which relates exclusively to the civil action on which the criminal court has to rule.

The Netherlands Government further points out that the second paragraph indicates that the provision in question contains an additional reason for not recognizing and not enforcing judgments delivered in another contracting State.

In conclusion it proposes that the Court should reply to the Hoge Raad as follows:

(a) Article II of the Protocol annexed to the Convention of 1968 applies only to civil cases dealt with by a criminal court.

(b) In view of the link between the first and second paragraph, Article II of the Protocol annexed to the Convention of 1968 indicates that it contains an additional reason for not recognizing and not enforcing judgments delivered in another contracting State.

B — Observations of the Commission of the European Communities

In its observations the Commission first looks at the origins of Article II of the Protocol annexed to the Convention of 1968. It acknowledges that they go back to Article II of the Protocol to the Benelux Treaty which however had a wider aim than to allow a foreigner charged with an offence not to appear and to be represented in criminal proceedings in which the court also has to give a decision on matters of civil law. In the Commission's opinion that right to be represented extends to any criminal proceedings which might have an effect on any civil action, even one brought later, because of the conclusive force of the judgment in the criminal case. That interpretation is moreover the one adopted in the general report on the Convention of 1968 and in the report of the Benelux Study Commission on the Benelux Treaty. In this context the Commission points out that in this case the criminal proceedings seem to have had consequences in civil law in so far as they led to the confiscation of the transmitting device in question.

The Commission then examines the concept of "offence ... not intentionally committed" contained in Article II of the Protocol annexed to the Convention of 1968. It believes that the concept must not be considered in a literal sense but rather as a more or less abstract concept which is referring to the content of the offence as given by its legal definition. In its opinion it cannot in fact be accepted that the provision makes a distinction between offences according to whether they are committed intentionally or not. In the first place that would require the court to consider the facts of the offence prior to allowing the accused to be represented and thus without his being able to defend himself. Secondly, the wording and history of Article 2 of the Protocol to the Benelux Treaty, which is the basis of Article II of the Protocol annexed to the Convention of 1968, give reason to believe that the provision

should be applied each time an accused is prosecuted for any offence about which there is no question, in the legal definition, of any intent. It seems in fact that the draftsmen of the Protocol annexed to the Convention basically had in mind criminal proceedings brought subsequently to a road traffic accident for minor offences whose definitions do not indicate that an element of intent is involved.

As regards the second question on whether the application of Article II of the Protocol annexed to the 1968 Convention depends on any civil interest, the Commission emphasizes that a provision of criminal procedure is involved and argues that it is appropriate to apply the general principle of law by which any rule of criminal procedure which is for the benefit of the accused must be widely construed and in his favour. Therefore the application of Article II of the Protocol should not be made to depend upon the existence in the trial of a civil interest. As the Commission explained in the first part of its observations, the history of that provision moreover shows that it was not designed solely for a case in which a criminal court is also taking a decision on the civil action at the same time.

In conclusion the Commission proposes that the Court should answer the questions raised by the Hoge Raad as follows:

1. An "offence which was not intentionally committed" in the wording of the first paragraph of Article II of the Protocol annexed to the Convention of 1968 should be understood as meaning any offence for which the legal definition does not require the existence of specific intent with respect to any element thereof in order that there may be an offence.

2. The right accorded by Article II of the Protocol annexed to the Convention of 1968 to the person concerned is unconditional in the sense that it is not necessary for civil interests to be affected in any respect by the outcome of the criminal case.

III — Oral procedure

At the sitting on 24 February 1981 oral argument was presented on behalf of Siegfried Ewald Rinkau, represented by Mr Wijnen, and the Commission, represented by J. L. W. Sillevis Smitt, Advocate at the Hoge Raad of the Netherlands. At that sitting Mr Rinkau stated that he shared the views expressed by the Commission in its written observations.

The Commission pointed out the difficulties which it thought would arise if the application of Article II of the Protocol were confined to criminal cases involving also the accused's civil interests. Establishing whether such interests exist would pose serious problems which might be avoided only by the application of Article II of the Protocol to every criminal case.

The Advocate General delivered his opinion at the sitting on 8 April 1981.

Decision

1 By a judgment dated 17 June 1980 which was received at the Court on 3 July 1980 the Hoge Raad [Supreme Court] of the Netherlands referred to the Court for a preliminary ruling under the Protocol of 3 June 1971 on the Interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (hereinafter referred to as "the Convention") two questions as to the interpretation of Article II of the Protocol annexed to the Convention (hereinafter referred to as "the Protocol").

2 After being summoned to appear before the Politierechter [Magistrate] of the Arrondissementsrechtbank [District Court], Zutphen (Netherlands), for driving in the Netherlands a vehicle equipped with a radio-electrical transmitting device without holding the requisite licence, Siegfried Rinkau, resident in the Federal Republic of Germany, did not appear at the hearing. His Counsel asked for leave to defend him. Notwithstanding the opinion of the Public Prosecutor the Magistrate took the view that the accused should be allowed to avail himself ot the right granted by the first paragraph of Article II of the Protocol and gave his Counsel leave to defend him. Mr Rinkau was sentenced in his absence to a fine or failing payment thereof to one day's imprisonment and the radio-electrical device was ordered to be confiscated.

3 Following an appeal by the Public Prosecutor, the Gerechtshof [Regional Court of Appeal], Arnhem, held in its interlocutory judgment of 28 August 1979 that Article II of the Protocol had application in all criminal proceedings concerning offences which were not intentionally committed but that the offence with which the accused was charged was not such an offence. The Gerechtshof accordingly decided not to grant the accused's Counsel leave to defend him in his absence and, as regards the substance of the case, by a judgment of 11 September 1979 upheld the judgment given at first instance.

4 Mr Rinkau appealed in cassation against those two judgments. He claimed that Article II of the Protocol had been infringed. The Hoge Raad decided

before making any further ruling to refer the following questions to the Court for an interpretation:

"1. Must the expression 'an offence which was not intentionally committed' appearing in the first paragraph of Article II of the said Protocol be understood as including any offence for which the legal definition does not require specific intent in regard to any element of the offence, or should the expression be understood in a narrower sense as relating only to offences in the definition of which there is reference to some element of guilt *(culpa)* on the part of the offender?

2. If the conditions set out in Article II of the said Protocol are fulfilled, does the right granted to 'the accused' by that article apply without restriction, or does the accused person have that right only where he has to defend himself against a civil claim made in the relevant criminal proceedings, or at any rate where the interests of the accused under civil law are affected by the outcome of the criminal proceedings?"

General considerations

According to Article 65 of the Convention the Protocol forms an integral part thereof. The scope of the Convention, which is defined in Article 1, is confined to civil and commercial matters. The question to be asked at the outset, therefore, is why a rule of criminal procedure like Article II of the Protocol came to be inserted in a Convention on civil and commercial matters. That article reads:

"Without prejudice to any more favourable provisions of national laws, persons domiciled in a Contracting State who are being prosecuted in the criminal courts of another Contracting State of which they are not nationals for an offence which was not intentionally committed may be defended by persons qualified to do so, even if they do not appear in person.

However, the court seised of the matter may order appearance in person; in the case of failure to appear, a judgment given in the civil action without the person concerned having had the opportunity to arrange for his defence need not be recognized or enforced in the other Contracting States."

6 In the report submitted to the national governments at the same time as the draft Convention (Official Journal 1979, C 59, p. 1) that extension to the criminal field is justified by reference to the consequences which a judgment of a criminal court may entail in civil and commercial matters if those consequences themselves come within the ambit of the Convention.

7 The first paragraph of Article II of the Protocol appears to have been the transposition into the Convention of Article II of the Protocol annexed to the Treaty between Belgium, the Netherlands and Luxembourg on Jurisdiction, Bankruptcy and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instruments. That provision in fact provides:

"Without prejudice to any more favourable provisions of national laws the nationals of any one of the three countries who are resident in their country may appear before the courts of the other two countries by special attorney if they are being prosecuted there for an offence other than one which was intentionally committed".

The commission responsible for drawing up the draft Benelux Treaty explained in its report that it believed that it was "essential" that the accused "should be able to conduct his defence during the criminal stage of the proceedings" without having to appear in person.

8 That same reason is also cited in the report on the Brussels Convention in connexion with Article II of the Protocol annexed to the Convention. However, that right is conferred by the Convention only on accused persons being prosecuted for an "offence which was not intentionally committed". That concept is not further defined or clarified in the Convention. However, the report does say that it "includes road accidents" which thus appear to be a particularly important area of application of Article II of the Protocol.

9 It is necessary to stress once more that, as Article II expressly provides, the right granted to the accused person to be defended without appearing in person does not prejudice the court's power to order appearance in person. If, notwithstanding such an order, the accused person does not appear, the court may deliver judgment without granting the accused's Counsel leave to defend him. The result of the absence of a defence, according to the second paragraph of Article II of the Protocol, is that a judgment given in the civil action need not be recognized or enforced in the other contracting States.

10 The questions framed by the Hoge Raad of the Netherlands must be answered in the light of those various considerations.

The concept of an "offence which was not intentionally committed"

11 Although the concept of an "offence which was not intentionally committed" is not defined in the Convention, in order to ensure as far as possible that the rights and obligations of the contracting States and of the persons concerned arising from the Convention are equal and uniform, it must nevertheless be regarded as an independent concept which must be explained by reference, first, to the objectives and scheme of the Convention and, secondly, to the general principles which the national legal systems have in common. That is all the more necessary where, as in this case, terminological differences exist between the various language versions of the Convention.

12 The aim of the Convention to cover offences connected with road accidents through its use of the concept of an offence which was not intentionally committed has already been mentioned in connexion with the objectives of the Convention. Another more general guide is the fact that by restricting the right to be defended without appearing in person, which is made available to persons who have committed certain offences, the Convention clearly seeks to deny that right to persons being prosecuted for offences which are sufficiently serious to justify its denial.

13 It is therefore necessary to ascertain whether there is a criterion for classification which is common to the national legal systems of all the contracting States, by which offences may de distinguished according to their seriousness and on the basis of which most, if not all, of the offences connected with road accidents may be classified amongst the less serious offences.

14 The national laws of most of the contracting States distinguish in one way or another between offences committed intentionally and those not so committed. Even though that distinction may lead to the classification of offences into categories of which the content may vary appreciably from one legal system to another, it still serves the aforementioned purpose.

15 Whereas offences which were intentionally committed, if they are to be punishable, require an intent to commit them on the part of the person concerned, offences which were not intentionally committed may result from carelessness, negligence or even the mere objective breach of a legal provision. They are therefore, first, generally less serious in nature and, secondly, cover most offences connected with road accidents which are to be ascribed to carelessness, negligence or the mere actual breach of a legal provision.

16 Consequently the answer to the first question of the Hoge Raad must be that the expression "an offence which was not intentionally committed" within the meaning of Article II of the Protocol annexed to the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters should be understood as meaning any offence the legal definition of which does not require, either expressly or as appears from the nature of the offence defined, the existence of intent on the part of the accused to commit the punishable act or omission.

The second question

17 The Hoge Raad asks in the second place whether the right granted to the accused by Article II of the Protocol has application in all criminal proceedings which affect the accused's interests at civil law or only in those in which a criminal court has to decide a civil claim at the same time.

18 The Netherlands Government points out in its observations that the scope of the Convention is restricted to civil and commercial matters. It considers that that restriction should be borne in mind when Article II of the Protocol is construed, as appears from the second paragraph of that article. The Netherlands Government accordingly concludes that the right granted to the accused by the first paragraph has application only if the criminal court has to decide a civil claim at the same time.

19 The Commission does not deny that the aim of Article II of the Protocol is to lay down a rule of criminal procedure in so far as criminal proceedings may have an effect on the accused's interests at civil law. However, having regard to the fact that a rule of criminal procedure which is for the benefit of the accused should receive a wide interpretation and in view of the difficulty which frequently exists, in the Commission's view, in deciding whether or not criminal proceedings are likely to affect the accused's interests at civil law, the Commission considers that the right granted to the accused by Article II of the Protocol must apply in all criminal proceedings.

20 Although it is not expressly provided by the first paragraph of Article II of the Protocol that the right therein granted to the accused applies only during criminal proceedings in which his liability at civil law (arising from the elements of the offence for which he is being prosecuted) is in question or on which such liability might subsequently be based, it should nevertheless not be forgotten that that was the actual intention behind the insertion in the Protocol of the provision in question. That intention precludes the right to be defended without appearing in person from having application in criminal proceedings in which the accused is not open to a civil claim in the circumstances described above.

21 The answer to the second question of the Hoge Raad should therefore be that the accused's right to be defended without appearing in person, granted by Article II of the Protocol annexed to the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, applies in all criminal proceedings concerning offences which were not intentionally committed, in which the accused's liability at civil law, arising from the elements of the offence for which he is being prosecuted, is in question or on which such liability might subsequently be based.

Costs

22 The costs incurred by the Government of the Netherlands and the Commission which have submitted observations to the Court are not recoverable. As the proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Hoge Raad by judgment of 17 June 1980, hereby rules:

1. The expression "an offence which was not intentionally committed" within the meaning of Article II of the Protocol annexed to the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters should be understood as meaning any offence the legal definition of which does not require, either expressly or as appears from the nature of the offence defined, the existence of intent on the part of the accused to commit the punishable act or omission.

2. The accused's right to be defended without appearing in person, granted by Article II of the Protocol annexed to the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, applies in all criminal proceedings concerning offences which were not intentionally committed, in which the accused's liability at civil law, arising from the elements of the offence for which he is being prosecuted, is in question or on which such liability might subsequently be based.

Mertens de Wilmars Pescatore Mackenzie Stuart Koopmans O'Keeffe

Bosco Touffait Everling Chloros

Delivered in open court in Luxembourg on 26 May 1981.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 8 APRIL 1981 [1]

Mr President,
Members of the Court.

This reference concerns a German national, a resident of the Federal Republic of Germany, who was summoned before the Politierechter [Magistrate], Zutphen (Netherlands), for driving on 10 March 1977 in the District of Aalten a vehicle equipped with a radio-electrical transmitting device without possessing the licence which is required for that purpose in the Netherlands.

Whilst a licence for the possession and use of such a device is required in the Federal Republic of Germany, it appears that the accused did have one. No action was taken against him when he crossed the border between the Federal Rebublic and the Netherlands. What is more, the device was switched off at the time in question, the car aerial was retracted and the microphone lay on the back seat.

The accused was not ordered to appear in person and he did not appear at the

1 — Translated from the German.