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 What is more, the device was switched off at the time in question, the car aerial was retracted and the microphone lay on the back seat.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.

hearing. However, Counsel from Maastricht (Netherlands) appeared and sought leave to defend him. Contrary to the submissions of the Officier van Justitie [Public Prosecutor], the Politierechter gave Counsel leave to defend the accused pursuant to 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 since the accused was resident in a State signatory to that Convention and was being prosecuted in another State signatory to that Convention; nevertheless the accused was still sentenced in his absence.

The Magistrate rejected the defence argument that Mr Rinkau was not guilty owing to his pardonable misapprehension as to the existence of a prohibition. The Magistrate further took the view that the offence was an "offence which was not intentionally committed" and sentenced Mr Rinkau to a fine of 50 guilders or, failing payment thereof, to one day's imprisonment and ordered the confiscation of the equipment seized, the value of which far exceeded the amount of the fine.

The Public Prosecutor's Office appealed against that judgment to the Gerechtshof [Regional Court of Appeal], Arnhem.

That court did not follow a proposal of the Public Prosecutor's Office to refer a question to the Court of Justice as to what was to be understood by an "offence which was not intentionally committed" for the purposes of Article II of the Protocol. In an interim judgment it held that the act with which the accused was charged did not constitute an "offence which was not intentionally committed" for the purposes of that article and that the Magistrate was wrong to grant Counsel leave to defend the accused in his absence.

In its final judgment the court upheld the Magistrate's decision on the substance of the case.

Mr Rinkau then lodged an appeal in cassation. Contrary to the opinion of the Procureur-Generaal [Public Prosecutor], the Hoge Raad referred the following questions to the Court in accordance with Article 3 (1) of the Protocol of 3 June 1971 on the Interpretation by the Court of Justice of the Convention of 27 September 1968:

"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?"

My opinion on those questions is as follows, and I deal with the second question first, which I consider to be expedient.

I — Article II of the Protocol annexed to the Convention, which, according to

Article 65, forms an integral part of the Convention, reads as follows:

"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."

For the purpose of construing this provision reference to the preparatory documents is of considerable help.

1. The provisions of the Protocol are based largely on considerations which were taken into account by the Benelux countries; that is particularly so in the case of Article II.

Article 13 of the Treaty signed in Brussels on 24 November 1961 between Belgium, the Netherlands and Luxembourg on Jurisdiction, Bankruptcy and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instruments provides:

"(1) Judgment given in civil or commercial matters in any one of the three countries shall be recognized in the other two even if delivered by a criminal court, provided that they fulfil the following conditions:

...

(4) The parties were duly represented or their default after a summons had been duly served was established and, if they had a known address, the summons to appear reached them in good time.

..."

Article 14 (1) provides:

"Judgments given in civil or commercial matters in any one of the three countries even if delivered by a criminal court and including those ordering penalty payments may be enforced in the other two countries when they have been declared enforceable in those countries.

..."

Article 2 of the Protocol annexed to that Treaty reads as follows;

"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 (in Dutch: 'een niet opzettelijk gepleegd strafbaar feit')".

According to the preamble to the Netherlands Law of 1961 ratifying that Treaty, application for the enforcement of judgments in civil and commercial matters may be made under Articles 11 and 12 of the Agreement of 28 March 1925 made between the Netherlands and Belgium on the enforcement of judgments: the question arose whether that provision also covered an order to pay damages made by a criminal court upon application by the person injured.

In a judgment of 16 March 1931 (Nederlandse Jurisprudentie 1931, p. 689) the Hoge Raad of the Netherlands held that a judgment given by a criminal court requiring payment of damages could not be regarded as a judgment in a civil or commercial matter for the purposes of the Agreement. The preamble further explained that in order to avoid the Agreement's being interpreted differently in the contracting States the new Treaty expressly provided that judgments given by a criminal court in civil and commercial matters came under the Treaty as well.

The preamble continues:

"The Netherlands Bar Council, whose views were heard by the Netherlands Delegation to the Benelux Study Commission, favoured the adoption of the view of the Hoge Raad, one of its reasons being that the rule proposed would have resulted in compelling a Netherlands national suspected of committing an offence on the territory of another Contracting State to appear in person before the Belgian or Luxembourg court which would be irreconcilable with the general principle that Netherlands nationals are not extradited and are free to decide whether to appear before a foreign criminal court. That objection was met by Article 2 of the Protocol which gives a national of any of the three States who is being prosecuted for an offence which was not committed intentionally the right to be defended before the courts of the other two States by duly qualified persons".

2. The report by P. Jenard on the Convention of 27 September 1968 (Official Journal C 59 of 5 March 1979, p. 1) confirms that the experts who drew up the draft Convention had the same considerations in mind:

"The Convention covers civil proceedings brought before criminal courts, both as regards decisions relating to jurisdiction, and also as regards the recognition and enforcement of judgments given by criminal courts in such proceedings. It thereby takes into account certain laws in force in the majority of the Contracting States, tends to rule out any differences of interpretation such as have arisen in applying the Convention between Belgium and the Netherlands and, finally, meets current requirements arising from the increased number of road accidents.

The formula adopted by the Committee reflects the current trend in favour of inserting in conventions clauses specifying that they apply to judgments given in civil or commercial matters by criminal courts. This can in particular be seen in the Benelux Treaty of 24 November 1961 and in the work of the Hague Conference on private international law.

...

As regards both jurisdiction and recognition and enforcement, the Convention affects only *civil* proceedings of which those courts are seised, and judgments given in such proceedings.

However, in order to counter the objection that a party against whom civil proceedings have been brought might be obstructed in conducting his defence if

criminal sanctions could be imposed on him in the same proceedings, the Committee decided on a solution identical to that adopted in the Benelux Treaty. Article II of the Protocol provides that such persons may be defended or represented in criminal courts. Thus they will not be obliged to appear in person to defend their civil interests".

The report contains these further comments on Article II of the Protocol:

"Article II of the Protocol also has its origin in the Benelux Treaty. The latter applies *inter alia* to judgments given in civil matters by criminal courts, and this puts an end to a controversy between Belgium and the Netherlands on the interpretation of the 1925 Convention between Belgium and the Netherlands. As the report annexed to the Treaty explains, the reluctance of the Netherlands authorities to enforce judgments given by foreign criminal courts in civil claims is due to the fact that a Netherlander charged with a punishable offence committed in a foreign country may be obliged to appear in person before the foreign criminal court in order to defend himself even in relation to the civil claim, although the Netherlands does not extradite its nationals. This objection is less pertinent than would appear at first sight under certain systems of law, and in particular in France, Belgium and Luxembourg, the judgment in a criminal case has the force of *res judicata* in any *subsequent* civil action.

In view of this, the subsequent civil action brought against a Netherlander convicted of a criminal offence will inevitably go against him. It is therefore essential that he should be able to conduct his defence during the criminal stage of the proceedings.

For this reason the Convention, like the Benelux Treaty, provides (see the Protocol) that a person domiciled in a Contracting State may arrange for his defence in the criminal courts of any other Contracting State.

Under Article II of the Protocol, that person will enjoy this right even if he does not appear in person and even if the code of criminal procedure of the State in question does not allow him to be represented. However, if the court seised of the matter should specifically order appearance in person, the judgment given without the person concerned having had the opportunity to arrange for his defence, because he did not appear in person, need not be recognized or enforced in the other Contracting States.

This right is, however, accorded by Article II of the Protocol only to persons who are prosecuted for an offence which was not intentionally committed; this includes road accidents".

3. It may be readily seen from that commentary that Article II of the Protocol requires application not only in criminal proceedings as part of which civil claims are also to be tried but also in criminal proceedings in which the judgment of the criminal court may have the force of *res judicata* in a subsequent civil action under the relevant national law. On the other hand the provision may not be extended so far as to apply to *all* criminal proceedings. The first paragraph of Article II of the Protocol may not in fact be removed from its

context; it may not be treated as a general rule of *criminal* procedure applicable in the contracting States. The scope of its application is restricted to that of the Convention which, according to Article 1 thereof, "shall apply in civil and commercial matters" and to those matters *only*. It is only from that point of view that criminal proceedings could have concerned the draftsmen of the Convention.

The first paragraph of Article II of the Protocol must therefore be read together with the second paragraph. It then becomes apparent that the right granted in the first paragraph is available only if "a civil action" must or might have to be tried. Such a civil claim will be for compensation for the damage caused by a criminal act to the person injured or his successors in law.

The person injured may bring that claim for damages:

— *Either* before the criminal court having jurisdiction to decide upon the charge — in which case one speaks of "Adhäsionsverfahren" [action for damages which may be joined with criminal proceedings] in the Federal Republic of Germany and of "constitution de partie civile" in France, Belgium and Luxembourg; as a prerequisite for such proceedings, damage to property, personal injury or non-material damage must have been caused to the victim as a direct result of the criminal act; it is not sufficient for the damage or injury to have occurred simply on the occasion of the criminal act;

— Or *later*, before a civil court — here again a distinction must be drawn between the actual claim for damages and other civil claims which may have been occasioned by the criminal act and which may be based on breaches of contract for example.

The meaning and object of the provision is however to safeguard the opportunity of being heard, which the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters guarantees in all civil actions, even where a decision is being taken in criminal proceedings on "civil and commercial matters".

In the cases in which a civil action is not brought before a civil court until later it must indeed be assumed as a matter of principle that the general provisions of the Convention on the protection of the accused operate in the last-mentioned case. But the problem of legal protection then arises if the civil court is bound by the earlier judgment of the criminal court since those general provisions are then redundant. It is only in such cases that the provision in question allows an accused person to be defended by persons suitably qualified if the conditions set out therein are fulfilled.

The Commission makes the point here that it may be assumed that all the States which signed the Convention recognize the unwritten rule that rules concerning the defence of the accused must be construed broadly and in his favour. To support that argument it adduces in evidence the report in connexion with the 1961 Treaty drawn up by the joint Belgian, Netherlands and Luxembourg Study Commission on the Harmonization of Laws.

Commenting on Article 13 of the Treaty that report states at p. 63 that under Belgian and Luxembourg law "the judgment in a criminal case has the force of *res judicata* in any *subsequent* civil action ... In view of this, the *subsequent* civil action brought against a Netherlander convicted of a criminal offence

will inevitably go against him. It is therefore essential that he should be able to conduct his defence during the criminal stage of the proceedings". Those observations were adopted word for word in the Jenard report. The report on the Benelux Treaty contains this additional comment on Article II of the Protocol: "Since this provision is meant to protect the rights of the defence it is to be construed in favour of the accused". Those comments must however be viewed in their context; they are qualified by the phrase "in relation to any subsequent civil action". So their scope may not be considered to be absolute: They apply only where a civil claim for damages is tried together with criminal proceedings or in a subsequent civil action for compensation for the damage caused to a third party by the accused himself.

Therefore Article II may have application only where a third person who is injured as a result of an offence which was not intentionally committed brings or may bring claims in conjunction with the criminal proceedings as long as the criminal court has not arrived at a final verdict with regard to the charge, or where the accused's liability at civil law is at any rate already in question at that stage.

4. Returning to the case in point, I am unable to see, subject to the findings of the trial judge, how a third party could have been injured as a direct result of an offence of the type in question or how that party could at a later date bring an action in which the issue of the accused's criminal liability could play a decisive part in determining any consequences in civil law.

It cannot be argued that the accused might later be sued by the owner of the seized equipment with which the vehicle was equipped if the accused had borrowed or rented that vehicle. That is not a "civil action" within the meaning of Article II of the Protocol. The assumption underlying Article II is that the legal interests of a third party have been infringed by the *unintentional offence* and that that infringement may also lead to civil claims being brought on the part of the third party or his successors in title. However, the legal interest infringed by the offence with which the main proceedings were concerned does not consist in the property rights of a third party. The protection of radio communications, which is in the public interest, or the monopoly in postal services might possibly have been jeopardized, but that is all.

Moreover, no private individual appeared as plaintiff in any concurrent civil action in the main proceedings; except for the sentence itself, no judgment has been or is to be delivered in the Netherlands which could be recognized or enforced in another Member State.

II — As a result of this conclusion in regard to Question 2 I believe that consideration of Question 1 is unnecessary. In the event of the Court's taking a different view I should like to make the following brief remarks on Question 1.

In view of the considerable differences existing between the relevant legal provisions of the Member States I do not feel that it is practicable to give an exhaustive definition of what is meant by an "offence which was not intentionally committed" in the first paragraph of Article II of the Protocol.

The Jenard report does not address itself to this question. The expression "fahrlässig begangene Straftat" [offence

which was not intentionally committed] which is the same in both the 1961 and 1968 Protocols (subject to the Dutch variation of "niet opzettelijk" for "onopsettelijk") varies in the French wording of the two provisions — from "infraction autre qu'une infraction intentionnelle" in the 1961 version to "infraction involontaire" in the 1968 version. In my opinion the concept "infraction autre qu'une infraction intentionnelle" is to be preferred from the legal point of view.

The draftsmen of the 1968 provision, like the draftsmen of the 1961 provision, intended the provision to cover *less serious* "offences". The question whether such acts, which, in order to reduce the number of criminal offences, particularly traffic offences, are no longer treated as "offences" but as contraventions, in other words as infringements of administrative rules, still fall under that provision does not need to be resolved for the purposes of this case. In any case the draftsmen of the 1968 Convention appear to have assumed that, irrespective of the differences existing between the legal systems of the Member States, *deliberate* acts should not fall under Article II of the Protocol.

The term "an offence which was not intentionally committed" appearing in the first paragraph of Article II of the Protocol should therefore be construed as covering any act which is punishable even if it is *not deliberately* committed. It thus covers not only offences which were not committed "intentionally" but also those which do not require criminal guilt to exist or to be proved in order to be punishable.

III — In my opinion therefore the Court should rule that the right accorded under the first paragraph of Article II of the Protocol annexed to the Convention of 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters is available only if a person suffering injury as a result of an offence which was not deliberately committed has brought a claim for damages in criminal proceedings or it is to be expected that the accused's liability at civil law might later be invoked by that injured person or his successors in title.