CONFIDENTIAL

COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

Or. English

EUROPEAN COMMISSION OF HUMAN RIGHTS

Applications Nos. 14084/88, 14085/88, 14086/88, 14087/88, 14088/88, 14109/88, 14173/88, 14195/88, 14196/88 and 14197/88

R. V., J. L., C. van S., F. van M., J. O., C. K., K. K., S. E., R. P. and B. van V.

against

the Netherlands

Report of the Commission

(Adopted on 3 December 1991)

Strasbourg

EUROPEAN COMMISSION OF HUMAN RIGHTS

Applications Nos. 14084/88, 14085/88, 14086/88, 14087/88, 14088/88, 14109/88, 14173/88, 14195/88, 14196/88 and 14197/88

R. V., J. L., C. van S., F. van M., J. O., C. K., K. K., S. E., R. P. and B. van V.

against

THE NETHERLANDS

DRAFT

REPORT OF THE COMMISSION

(adopted on 3 December 1991)

14084/88, 14085/88, 14086/88, 14087/88, 14088/88, 14109/88, 14173/88, 14195/88, 14196/88 and 14197/88

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I. INTRODUCTION

1. The following is an outline of the case as submitted to the European Commission of Human Rights and of the procedure before the Commission.

A. The applications

2. The applicants

(1) Application No. 14084/88. The applicant (R. V.) is a Dutch national, born in 1956 and at present a resident of Utrecht, the Netherlands. He is by profession.

(2) Application No. 14085/88. The applicant (J. L.) is a Dutch national and at present a resident of Utrecht, the Netherlands. He is a by profession.

(3) Application No. 14086/88. The applicant (C. van S.) is a Dutch national and at present a resident of Vleuten, the Netherlands. He is a by profession.

(4) Application No. 14087/88. The applicant (F. van M.) is a Dutch national, born in 1959 and at present a resident of Utrecht, the Netherlands. He is a by profession.

(5) Application No. 14088/88. The applicant (J. O.) is a Dutch national, born in 1956 and at present a resident of Amsterdam, the Netherlands. She is an by profession.

(6) Application No. 14109/88. The applicant (C. K.) is a Dutch national, born in 1948 and at present a resident of Utrecht, the Netherlands. He is

(7) Application No. 14173/88. The applicant (K. K.) is a Dutch national, born in 1951 and at present a resident of Utrecht, the Netherlands. He is

The above seven applicants were represented before the Commission by M. E. Th. Hummels, a lawyer practising in Utrecht.

(8) Application No. 14195/88. The applicant (S. E.) is a Dutch national, born in 1962 and at present a resident of Amsterdam, the Netherlands. He is

(9) Application No. 14196/88. The applicant (R. P.) is a Dutch national, born in 1958 and at present a resident of Utrecht, the Netherlands.

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(10) Application No. 14197/88. The applicant (B. van V.) is a Dutch national, born in 1957 and at present a resident of Utrecht, the Netherlands.

The above three applicants were represented before the Commission by Mr. Th. A. de Roos, a lawyer practising in Amsterdam.

3. The applications are directed against the Netherlands. The respondent Government were represented by their Agent, Mrs. D.S. van Heukelom, succeeded by Mr. Karel de Vey Mestdagh, both of the Netherlands Ministry of Foreign Affairs.

4. The applicants complain of secret surveillance by the intelligence and security services and the gathering and storing of information about them and the authorities' refusal to grant them access to the files.

B. The proceedings

5. Application No. 14084/88 was introduced on 25 July 1988 and registered on 1 August 1988. Application No. 14085/88 was introduced on 25 July 1988 and registered on 1 August 1988. Application No. 14086/88 was introduced on 25 July 1988 and registered on 1 August 1988. Application No. 14087/88 was introduced on 25 July 1988 and registered on 1 August 1988. Application No. 14088/88 was introduced on 28 July 1988 and registered on 1 August 1988. Application No. 14109/88 was introduced on 3 August 1988 and registered on 11 August 1988. Application No. 14173/88 was introduced on 23 August 1988 and registered on 31 August 1988. Application No. 14195/88 was introduced on 26 August 1988 and registered on 7 September 1988. Application No. 14196/88 was introduced on 26 August 1988 and registered on 7 September 1988. Application No. 14197/88 was introduced on 26 August 1988 and registered on 7 September 1988.

6. On 9 November 1989 the Commission joined the applications and decided in accordance with Rule 48 para. 2 (b) of its Rules of Procedure to give notice of the applications to the respondent Government and to invite them to present before 9 February 1990 their observations in writing on the admissibility and merits of the applications insofar as they raised an issue under Article 8 of the Convention. These observations were submitted on 8 February 1990. Following an extension of the time-limit, the applicants' observations in reply were received on 25 April 1990.

7. On 4 March 1991 the Commission declared the applications admissible.

8. The parties were then invited to submit additional observations before 17 April 1991. The Government submitted their further observations on 16 April 1991, followed by the applicants' on 20 June 1991.

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9. After declaring the case admissible, the Commission, acting in accordance with Article 28 (b) of the Convention, placed itself at the disposal of the parties with a view to securing a friendly settlement of the case. In the light of the parties' reactions, the Commission now finds that there is no basis upon which a friendly settlement can be effected.

C. **The present Report**

10. The present Report has been drawn up by the Commission in pursuance of Article 31 of the Convention and after deliberations and votes, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
G. JÖRUNDSSON
A. WEITZEL
J.-C. SOYER
H. DANELIUS
Mrs. G. H. THUNE
Sir Basil HALL
MM. F. MARTINEZ RUIZ
C.L. ROZAKIS
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
A.V. ALMEIDA RIBEIRO
M.P. PELLONPÄÄ
B. MARXER

11. The text of this Report was adopted by the Commission on 3 December 1991 and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with Article 31 para. 2 of the Convention.

12. The purpose of the Report, pursuant to Article 31 para. 1 of the Convention, is:

(i) to establish the facts, and
(ii) to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.

13. A schedule setting out the history of the proceedings before the Commission is attached hereto as Appendix I and the Commission's Decision on the admissibility of the applications forms Appendix II.

14. The full text of the parties' submissions, together with the documents lodged as exhibits, are held in the archives of the Commission.

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II. ESTABLISHMENT OF THE FACTS

A. The particular circumstances of the case

15. The following description of the facts submitted by the applicants has as a whole been neither confirmed nor contested by the Government, who only denied certain allegations (cf. para. 17 below).

16. In the night of 18 to 19 November 1984, an anti-militarist activist group, known as "Onkruit", raided the offices of the Utrecht team of the 450 Counter-Intelligence Detachment (450 Contra-Inlichtingen Detachement; 450-CID) of the Army Intelligence Service (Landmacht Inlichtingendienst). Previously, the CID was part of the Army Intelligence Service, now it belongs to the Military Intelligence Services (Militaire Inlichtingendiensten; MID). "Onkruit" found, inter alia, the names of 178 civilians and 64 organisations which were "noted" (gesignaleerd) on the planning board of the so-called Infiltration-Influencing Outline (Infiltratie Beinvloedings Schema; IBS) as dangerous to the State. Fifteen of these civilians were denoted by a red tag as hazardous to a military mobilisation.

It appeared from other documents that files containing reports and photographs concerning the civilians and organisations noted in the IBS were held in a central 450-CID storehouse.

The applicants' names were among those found on the planning board of the IBS.

17. "Onkruit" published all the information that they found (the so called "CID files") and portions of this information were published in national daily newspapers, including names of civilians and organisations noted in the IBS. Also, it appeared from the "Onkruit" material that there was collaboration between the military 450-CID and the civilian Internal Security Service (Binnenlandse Veiligheidsdienst; BVD) and Police Intelligence Service (Politie Inlichtingen Dienst; PID), and possibly also with the Central Detective Intelligence Service (Centrale Recherche Inlichtingen dienst; CRI). In the course of debates in Parliament in March 1985, it became apparent that the 450-CID might have over-stepped its authority by investigating persons and organisations active in the so-called "Peace Movement". The Government denied that the "Peace Movement" as such had been investigated by the intelligence and security services.

On 1 January 1987, a reorganisation of the military intelligence and security services took place which resulted in an increased influence of the Ministry of Defence on them. The Government also denied any possible link between the parliamentary debates concerning the 450-CID incident and the subsequent reorganisation of the military intelligence and security services.

18. In May 1986, the applicants requested the Minister of Defence (Minister van Defensie) and the Minister for Home Affairs (Minister van Binnenlandse Zaken) to grant them access to the information contained in files concerning them held by, respectively, the 450-CID and the BVD. They based their request on the information gathered by

"Onkruit" and on their right to information held by public organisations as guaranteed by the Publicity of Public Administration Act (Wet Openbaarheid van Bestuur; WOB). They claimed a legitimate interest to know what was contained in these files because it could have harmful effects on their future, i.e. when seeking employment. Furthermore, it was apparent that this information was insufficiently secure from outside interference, as the raid by "Onkruit" had demonstrated. They alleged that any form of observation or registration by intelligence or security services was an unjustified interference with their private life.

19. Both Ministers refused to acknowledge that any files concerning the applicants were held by intelligence or security services. The Minister of Defence reiterated that the 450-CID did not investigate the "Peace Movement". The Minister for Home Affairs pointed out that, in the interest of national security, no information about the existence of files held by the BVD could be divulged. He cited the exception contained in Article 4 (b) of the Publicity of Public Administration Act (WOB) (see below Relevant domestic law and practice).

The applicants requested a review of these decisions. This was unsuccessful.

20. Thereupon the applicants appealed to the Judicial Division of the Council of State (Afdeling Rechtspraak van de Raad van State). They invoked, inter alia, Article 8 of the Convention.

On 28 February 1988, in two separate decisions, the Council of State rejected the appeals. It stated that the Ministers had justifiably based their decisions on the national security exception contained in Article 4 (b) of the WOB. Furthermore, there had been no violation of Article 8 of the Convention because the decisions under appeal only constituted refusals to acknowledge the existence of information, which, of themselves, could not constitute an interference with the applicants' private life.

21. In the meantime, on 3 December 1987, the Royal Decree of 5 August 1972 was replaced by a parliamentary Act, the Intelligence and Security Services Act 1987 (Wet op de inlichtingen- en veiligheidsdiensten), which came into effect on 1 February 1988 (see para. 27 below).

B. The relevant domestic law and practice

22. Until 1987, the Dutch intelligence and security services, both civil and military, were governed by the Royal Decree of 5 August 1972 regulating the duties, organisation, working methods and co-operation of the intelligence and security services (Koninklijk Besluit van 5 augustus 1972, Stb. 437, houdende regeling van de taak, de organisatie, de werkwijze en de samenwerking van de inlichtingen- en veiligheidsdiensten). The Dutch intelligence and security services

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consist of three branches: the Internal Security Service (BVD), the Military Intelligence Services (MID) and the Foreign Intelligence Service.

23. He falls under the authority of the MID. The latter comes under the Minister of Defence, whereas the Minister for Home Affairs is responsible for the BVD. In this respect, both Ministers are responsible to the Parliament.

The tasks of the military intelligence services are set out in Art. IV, 2 of the Royal Decree. It states:

(Dutch)

"De militaire inlichtingendiensten hebben, ieder voorzover het hun krijgsmachtdeel betreft, tot taak:
a. het inwinnen van gegevens omtrent het potentieel en de strijdkrachten van andere mogendheden, welke nodig zijn voor een juiste opbouw en een doeltreffend gebruik van de krijgsmacht;

b. het inwinnen van gegevens welke nodig zijn voor het treffen van maatregelen:
1. ter voorkoming van activiteiten die ten doel hebben de veiligheid of paraatheid van de krijgsmacht te schaden;
2. ter beveiliging van gegevens binnen de krijgsmacht waarvan de geheimhouding geboden is;
3. ter bevordering van een juist verloop van mobilisatie en concentratie der strijdkrachten."

(Translation)

"The military intelligence services' tasks, insofar as their branch of service is concerned, are:
a. to collect information on the potential and the armed forces of other powers, which is necessary for a correct structure and an effective use of the armed forces;
b. to collect the information which is necessary for taking measures:
1. to prevent activities aimed at prejudicing the security or the readiness of the armed forces;
2. to secure confidential information concerning the armed forces;
3. to promote a correct course of mobilisation and concentration of the armed forces."

24. The co-operation and in particular the exchange of information between the services, i.e. the CID and the BVD, is provided for in Article I, 3, which reads:

(Dutch)

"De inlichtingen- en veiligheidsdiensten verlenen elkaar - in het bijzonder ook door het uitwisselen van gegevens - zoveel mogelijk medewerking."

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(Translation)

> "The intelligence and security services will cooperate as much as possible, in particular by the exchange of information."

25. The Publicity of Public Administration Act (Wet Openbaarheid van Bestuur), invoked by the applicants in the proceedings concerned, gives to every Dutch citizen the right to request a public body to disclose information concerning its administration and its policy. The public body can refuse the disclosure of information on the basis of Article 4 which reads, insofar as relevant:

(Dutch)

> "Het verstrekken van de informatie blijft achterwege indien dit ...
> b. de veiligheid van de staat zou kunnen schaden ..."

(Translation)

> "No information ... will be issued insofar as...
> b. it might harm the national security ..."

26. The activities of the intelligence and security services can be controlled by way of two procedures. The Standing Committee on Intelligence and Security Services of the Lower House (Vaste Kamercommissie voor de inlichtingen - en veiligheidsdiensten uit de Tweede Kamer), which consists of the parliamentary leaders of the governing parties and of the main opposition parties, can, when requested by a citizen, investigate whether one of the services concerned has acted in an unlawful manner towards him. Complaints by citizens can also be submitted to the National Ombudsman, who is independent of the Government and the Parliament.

27. On 3 December 1987, the Royal Decree of 5 August 1972 was replaced by a parliamentary Act, the Intelligence and Security Services Act 1987 (Wet op de inlichtingen- en veiligheidsdiensten). This Act came into force on 1 February 1988. It gives the Ministers responsible more power in certain matters and provides for an even closer co-operation between the services than was provided for in the Royal Decree.

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III. OPINION OF THE COMMISSION

A. Complaint declared admissible

28. The Commission has declared admissible the applicants' complaint that the surveillance of the applicants' activities by the intelligence and security services and the compilation and retention of personal information concerning them as well as the refusal of access to this information constituted a violation of their right to respect for private life contrary to Article 8 of the Convention.

B. Point at issue

29. Accordingly, the issue to be determined is whether there has been a violation of Article 8 of the Convention.

C. Article 8 of the Convention

30. Article 8 of the Convention provides as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

31. The applicants complain that they were the subject of secret surveillance by the intelligence and security services and that information concerning their activities was compiled and retained by the intelligence and security services. They further complain that they were denied access to this information. They contend that the above actions of the intelligence and security services and the refusal of access to the information gathered on them constitute an unjustified interference with their right to respect for private life as guaranteed by Article 8 of the Convention.

32. In line with their policy of not disclosing information about the operation of these services, the Government do not answer question whether the facts complained of amounted to a violation of Article 8. However, they specifically deny that the "Peace Movement" as such has been the object of investigations by the intelligence and security services.

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33. The Commission recalls that the storing of information concerning a person's private life in a secret police register amounts to an interference with the right to respect for private life as guaranteed by Article 8 para. 1 of the Convention (see Eur. Court H.R., Leander judgment of 26 March 1987, Series A no. 116, p. 22 para. 48). Secret surveillance activities for the purpose of gathering and storing on file information concerning a person's private life also constitute an interference with this right (see, mutatis mutandis, Eur. Court H.R., Klass judgment of 6 September 1978, Series A no. 28; Malone judgment of 2 August 1984, Series A no. 82).

34. The Commission has considered whether the evidence before it as to the compilation and retention of personal information concerning the applicants permits the conclusion that there has been an interference with their right under Article 8.

35. The Commission recalls that in the Klass case (loc. cit.) and in subsequent applications the Convention organs have considered the particular difficulties which are encountered by applicants complaining of secret surveillance, as regards proof of the measures complained of.

In the case of N. (N. v. the United Kingdom, Comm. Report 9.5.89) the Commission found a reasonable likelihood, established on the basis of the facts before it, that the British Security Service had compiled and retained a file concerning the applicant's private life.

In another application against the United Kingdom (Patricia Hope Hewitt and Harriet Harman v. the United Kingdom, Comm. Report 9.5.89) the applicants could produce documents relating in detail the measures of secret surveillance they were subjected to.

36. In the present case the Commission accepts the applicants' description of the facts (see paras. 15 ff. above), which is not contested by the Government in the essential point (para. 17 above). The applicants have also submitted a copy of the so called "CID files" from which it appears that they were denoted as dangerous to the State and in particular to a military mobilisation.

37. The Commission is therefore satisfied that the applicants were the subjects of secret surveillance by the intelligence and security services and that the information gathered on them comprises personal information about them and is kept in records by the intelligence and security services.

38. It follows that there has been an interference with the applicants' right to respect for their private life guaranteed under Article 8 para. 1 of the Convention.

39. The Commission must therefore examine whether this interference was justified under Article 8 para. 2 of the Convention. It must first determine whether the interference was "in accordance with the law".

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40. The Commission recalls that the phrase "in accordance with the law" includes requirements over and above compliance with the domestic law. The "law" in question must be adequately accessible in the sense that the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. In addition, "a norm cannot be regarded as law unless it is formulated with sufficient precision to enable the citizen to regulate his conduct. He must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail" (see Eur. Court H.R., Sunday Times judgment of 26 April 1979, Series A no. 30, p. 31 para. 49).

41. The Court in the Malone case has further elucidated the concept of foreseeability and highlighted its importance as a safeguard against the arbitrary application of measures of secret surveillance. The Court stated as follows (loc. cit., p. 32 paras. 67 and 68):

> "The Court would reiterate its opinion that the phrase 'in accordance with the law' does not merely refer back to domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law, which is expressly mentioned in the preamble to the Convention (see, mutatis mutandis, the [above-mentioned] Silver and Others judgment, p. 34 para. 90, and the Golder judgment of 21 February 1975, Series A no. 18, p. 17 para. 34). The phrase thus implies - and this follows from the object and purpose of Article 8 - that there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by paragraph 1 (see the report of the Commission, para. 121). Especially where a power of the executive is exercised in secret, the risks of arbitrariness are evident (see the above-mentioned Klass and Others judgment, Series A no. 28, pp. 21 and 23, paras. 42 and 49) ... Since the implementation in practice of measures of secret surveillance ... is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference."

42. The above considerations were confirmed in the Kruslin case (Eur. Court H.R., Kruslin judgment of 24 April 1990, Series A No. 176, pp. 22 ff).

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43. The Commission notes in the present case that the activities of the intelligence and security services were at that time governed by the Royal Decree of 5 August 1972 (see para. 22 ff above). The Royal Decrees have the force of law and are promulgated in the Official Gazette (Staatsblad). The Royal Decree of 5 August 1972 concerned the operation of the intelligence and security services, but did not in sufficiently clear terms indicate the circumstances in which and the conditions on which the authorities were empowered to carry out measures of secret surveillance.

44. The Commission notes in particular that Article IV, 2 of the Royal Decree defined the tasks of the MID in terms which circumscribe the object of the activities and measures of the MID without stating what limits the service had to respect. No definition was given of the categories of people liable to be subject to measures of secret surveillance nor was there any indication as to the circumstances in which these measures could be applied and the means to be employed to that end. Similarly unspecified were the tasks of the CID and the scope of the powers conferred on it within the framework of the MID's activities.

45. Moreover, the safeguard mechanisms (see para. 26 above) listed in the Government's observations were not contained in the Royal Decree. As the Court as well as the Commission have held in several cases, for systems of secret surveillance to be compatible with Article 8 of the Convention, they must contain safeguards laid down by law and effective for the control of the activities of the respective services (Eur. Court H.R., Klass and others judgment of 6 September 1978, Series A no. 28, para. 55; Eur. Court H.R., Leander judgment of 26 March 1987, Series A no. 116, para. 60; Nos. 10439/83, 10440/83, 10441/83, 10452/83, 10512/83 and 10513/83, Dec. 10.5.85, D.R. 43 pp. 34, 116).

46. The Commission finds that in these circumstances the interference with the applicants' right to respect for private life was not "in accordance with the law" as required by Article 8 para. 2 of the Convention.

47. In view of the above finding, the Commission considers it unnecessary to examine whether the interference in the present case was necessary in a democratic society within the meaning of Article 8 para. 2 of the Convention.

48. The applicants' request for access to the files containing the information gathered on them raises no separate issue under Article 8.

Conclusion

49. The Commission unanimously concludes that there has been a violation of Article 8 of the Convention.

Secretary to the Commission

(H.C. KRÜGER)

President of the Commission

(C.A. NØRGAARD)

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APPENDIX I

History of the proceedings before the Commission

Date	Item
25 July 1988	Introduction of applications Nos. 14084/88, 14085/88, 14086/88 and 14087/88
28 July 1988	Introduction of application No. 14088/88
1 August 1988	Registration of applications Nos. 14084/88, 14085/88, 14086/88, 14087/88 and 14088/88
3 August 1988	Introduction of application No. 14109/88
11 August 1988	Registration of application No. 14109/88
23 August 1988	Introduction of application No. 14173/88
26 August 1988	Introduction of applications Nos. 14195/88, 14196/88 and 14197/88
31 August 1988	Registration of application No. 14173/88
7 September 1988	Registration of applications Nos. 14195/88, 14196/88 and 14197/88
Examination of admissibility	
9 November 1989	Commission's decision to join the applications and to invite the Government to submit observations in writing
7 February 1990	Government's observations
25 April 1990	Applicants' observations in reply
4 March 1991	Commission's decision to declare the applications admissible

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Examination of the merits

15 March 1991	Decision on admissibility transmitted to the parties
16 April 1991	Government's further observations
20 June 1991	Applicants' further observations in reply
6 July 1991	Consideration of the state of proceedings
3 December 1991	Commission's deliberations on the merits and final votes
3 December 1991	Commission's adoption of the Report

APPENDIX II

**DECISION OF THE COMMISSION
ON THE ADMISSIBILITY OF**

Applications Nos. 14084/88, 14085/88, 14086/88
14087/88, 14088/88, 14109/88, 14173/88, 14195/88,
14196/88 and 14197/88
by R. V., J. L., C. van S., F. van M., J. O.,
C. K., K. K., S. E., R. P. and B. Van V.
against the Netherlands

The European Commission of Human Rights sitting in private on 4 March 1991, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
S. TRECHSEL
F. ERMACORA
G. SPERDUTI
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
Mrs. G. H. THUNE
Sir Basil HALL
MM. F. MARTINEZ RUIZ
C.L. ROZAKIS
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
A.V. ALMEIDA RIBEIRO
M.P. PELLONPÄÄ

Mr. J. RAYMOND, Deputy Secretary to the Commission

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

Having regard to the applications:

- No. 14084/88 introduced on 25 July 1988 by R.J.E. V. and registered on 1 August 1988;

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- No. 14085/88 introduced on 25 July 1988 by J. L. and registered on 1 August 1988;

- No. 14086/88 introduced on 25 July 1988 by C. van S. and registered on 1 August 1988;

- No. 14087/88 introduced on 25 July 1988 by F.R. van M. and registered on 1 August 1988;

- No. 14088/88 introduced on 28 July 1988 by J.A. O. and registered on 1 August 1988;

- No. 14109/88 introduced on 3 August 1988 by C. K. and registered on 11 August 1988;

- No. 14173/88 introduced on 23 August 1988 by K.F. K. and registered on 31 August 1988;

- No. 14195/88 introduced on 26 August 1988 by S.Th.A. E. and registered on 7 September 1988;

- No. 14196/88 introduced on 26 August 1988 by R.M. P. and registered on 7 September 1988;

- No. 14197/88 introduced on 26 August 1988 by B.G.S.M. van V. and registered on 7 September 1988;

all these applications being introduced against the Netherlands;

Having regard to its decision of 9 November 1989 to join these applications;

Having regard to the Government's observations dated 7 February 1990 and the applicants' replies dated 25 April 1990;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated,

Decides as follows:

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THE FACTS

I. THE APPLICANTS

1. Application No. 14084/88. The applicant is a Dutch national, born in 1956 and at present a resident of Utrecht, the Netherlands.

2. Application No. 14085/88. The applicant is a Dutch national at present a resident of Utrecht, the Netherlands.

3. Application No. 14086/88. The applicant is a Dutch national, and at present a resident of Vleuten, the Netherlands. He is a clergyman by profession.

4. Application No. 14087/88. The applicant is a Dutch national, born in 1959 and at present a resident of Utrecht, the Netherlands.

5. Application No. 14088/88. The applicant is a Dutch national, born in 1956 and at present a resident of Amsterdam, the Netherlands.

6. Application No. 14109/88. The applicant is a Dutch national, born in 1948 and at present a resident of Utrecht, the Netherlands.

7. Application No. 14173/88. The applicant is a Dutch national, born in 1951 and at present a resident of Utrecht, the Netherlands.

The above seven applicants are represented by M. E. Th. Hummels, a lawyer practising in Utrecht.

8. Application No. 14195/88. The applicant is a Dutch national, born in 1962 and at present a resident of Amsterdam, the Netherlands.

9. Application No. 14196/88. The applicant is a Dutch national, born in 1958 and at present a resident of Utrecht, the Netherlands.

10. Application No. 14197/88. The applicant is a Dutch national, born in 1957 and at present a resident of Utrecht, the Netherlands.

The above three applicants are represented by Mr. Th. A. de Roos, a lawyer practising in Amsterdam.

II. **FACTS common to the applications**

A. Particular circumstances of the case

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

In the night of 18 to 19 November 1984, an anti-militarist activist group, known as "Onkruit", raided the offices of the Utrecht team of the 450 Counter-Intelligence Detachment (450 Contra-

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Inlichtingen Detachement; 450-CID) of the Army Intelligence Service (Landmacht Inlichtingendienst). Previously, the CID was part of the Army Intelligence Service, now it belongs to the Military Intelligence Service. "Onkruit" found, inter alia, the names of 178

civilians and 64 organisations which were "noted" (gesignaleerd) on the planning board of the so-called Infiltration-Influencing Outline (Infiltratie Beinvloedings Schema; IBS) as dangerous to the State. Fifteen of these civilians were denoted by a red tag as hazardous to a military mobilisation.

It appeared from other documents that files containing reports and photographs concerning the civilians and organisations noted in the IBS were held in a central 450-CID storehouse.

"Onkruit" published all the information that they found and portions of this information were published in national daily newspapers, including names of civilians and organisations noted in the IBS. Also, it appeared from the "Onkruit" material that there was collaboration between the military 450-CID and the civilian Internal Security Service (Binnenlandse Veiligheidsdienst; BVD) and Police Intelligence Service (Politie Inlichtingen Dienst; PID), and possibly also with the Central Detective Intelligence Service (Centrale Recherche Inlichtingen dienst; CRI). In the course of subsequent debates in Parliament in March 1985, it became apparent that the 450-CID may have over-stepped its authority by investigating persons and organisations active in the so-called "Peace Movement". Subsequently, on 1 January 1987, a reorganisation of the military intelligence and security services took place which resulted in an increased influence of the Ministry of Defence on them.

The applicants' names were among those found on the planning board of the IBS.

In May 1986, the applicants requested the Minister of Defence (Minister van Defensie) and the Minister for Home Affairs (Minister van Binnenlandse Zaken) to grant them access to the information contained in files concerning them held by, respectively, the 450-CID and the BVD. They based their request on the information gathered by "Onkruit" and on their right to information held by public organisations as guaranteed by the Publicity of Public Administration Act (Wet Openbaarheid van Bestuur; WOB). They claimed a legitimate interest to know what was contained in these files because it could have harmful effects on their future, i.e. when seeking a job. Furthermore, it was apparent that this information was insufficiently secure from outside interference, as the raid by "Onkruit" had demonstrated. They alleged that any form of observation or registration by intelligence or security services was an unjustified interference with their private life.

Both Ministers refused to acknowledge that any files concerning the applicants were held by intelligence or security services. The Minister of Defence reiterated that the 450-CID did not investigate the "Peace Movement". The Minister for Home Affairs pointed out that,

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in the interest of national security, no information about the existence of files held by the BVD could be divulged. He cited the exception contained in Article 4 (b) of the Publicity of Public Administration Act (WOB) (see below Relevant domestic law and practice).

The applicants requested a review of these decisions. This was unsuccessful.

Thereupon the applicants appealed to the Judicial Division of the Council of State (Afdeling Rechtspraak van de Raad van State). They invoked, inter alia, Article 8 of the Convention.

On 28 February 1988, in two separate decisions, the Council of State rejected the appeals. It stated that the Ministers had justifiably based their decisions on the national security exception contained in Article 4 (b) of the WOB. Furthermore, there had been no violation of Article 8 of the Convention because the decisions under appeal only constituted refusals to acknowledge the existence of information, which, of themselves, could not constitute an interference with the applicants' private life.

In the meantime, on 31 December 1987, the Royal Decree of 5 August 1972 was replaced by a parliamentary Act, the Intelligence and Security Services Act 1987 (Wet op de inlichtingen- en veiligheidsdiensten), which came into effect on 1 February 1988.

B. Relevant domestic law and practice

1. Until 1987, the Dutch intelligence and security services, both civil and military, were governed by the Royal Decree of 5 August 1972 regulating the duties, organisation, working methods and co-operation of the intelligence and security services (Koninklijk Besluit van 5 augustus 1972, Stb. 437, houdende regeling van de taak, de organisatie, de werkwijze en de samenwerking van de inlichtingen- en veiligheidsdiensten). The Dutch intelligence and security services consist of three branches: the Internal Security Services (BVD), the Military Intelligence Services (MID) and the Foreign Intelligence Service.

The CID falls under the authority of the MID. The latter comes under the Minister of Defence, whereas the Minister for Home Affairs is responsible for the BVD. In this respect, both Ministers are responsible to the Parliament.

The tasks of the military intelligence services are set out in Art. IV, 2 of the Royal Decree. It states:

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(Dutch)

"De militaire inlichtingendiensten hebben, ieder voorzover het hun krijgsmachtdeel betreft, tot taak:
a. het inwinnen van gegevens omtrent het potentieel en de strijdkrachten van andere mogendheden, welke nodig zijn voor een juiste opbouw en een doeltreffend gebruik van de krijgsmacht;
b. het inwinnen van gegevens welke nodig zijn voor het treffen van maatregelen:
1. ter voorkoming van activiteiten die ten doel hebben de veiligheid of paraatheid van de krijgsmacht te schaden;
2. ter beveiliging van gegevens binnen de krijgsmacht waarvan de geheimhouding geboden is;
3. ter bevordering van een juist verloop van mobilisatie en concentratie der strijdkrachten."

(Translation)

"The military intelligence services' tasks, insofar as their branch of service is concerned, are:
a. to collect information on the potential and the armed forces of other powers, which is necessary for a correct structure and an effective use of the armed forces;
b. to collect the information which is necessary for taking measures:
1. to prevent activities aimed at prejudicing the security or the readiness of the armed forces;
2. to secure confidential information concerning the armed forces;
3. to promote a correct course of mobilisation and concentration of the armed forces."

The co-operation and in particular the exchange of information between the services, i.e. the CID and the BVD, is provided for in Article I, 3, which reads:

(Dutch)

"De inlichtingen- en veiligheidsdiensten verlenen elkaar in het bijzonder ook door het uitwisselen van gegevens zoveel magelijk medewerking".

(Translation)

"The intelligence and security services will cooperate as much as possible, in particular by the exchange of information."

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2. The Publicity of Public Administration Act (Wet Openbaarheid van Bestuur), invoked by the applicants in the proceedings concerned, gives to every Dutch citizen the right to request a public body to disclose information concerning its administration and its policy. The public body can refuse the disclosure of information on the basis of Article 4 which reads, insofar as relevant:

(Dutch)

"Het verstrekken van de informatie blijft achterwege indien dit ...
b. de veiligheid van de staat zou kunnen schaden ..."

(Translation)

"No information ... will be issued insofar as...
b. it might harm the national security ..."

3. On 3 December 1987, the Royal Decree of 5 August 1972 was replaced by a parliamentary Act, the Intelligence and Security Services Act 1987 (Wet op de inlichtingen- en veiligheidsdiensten). This Act came into force on 1 February 1988. It gives the Ministers responsible more power in certain matters and provides for an even closer co-operation between the services than was provided for in the Royal Decree.

The legal basis upon which the MID, and thus the CID, act resides in Article 9 of the Intelligence and Security Services Act, which reads:

(Dutch)

"1. Er is een Militaire Inlichtingendienst.
2. Deze heeft tot taak:
a. het verzamelen van gegevens omtrent het potentieel en de strijdkrachten van andere mogendheden welke nodig zijn voor een juiste opbouw en een doeltreffend gebruik van de krijgsmacht;
b. het verrichten van veiligheidsonderzoeken ter zake van de vervulling van vertrouwensfuncties, dan wel van functies in het bedrijfsleven, welke naar het oordeel van Onze terzake verantwoordelijke Ministers de mogelijkheid bieden de veiligheid of andere gewichtige belangen van de Staat te schaden;
c. het verzamelen van gegevens welke nodig zijn voor het treffen van maatregelen:
1. ter voorkoming van activiteiten die ten doel hebben de veiligheid of paraatheid van de krijgsmacht te schaden;
2. ter beveiliging van gegevens betreffende de krijgsmacht waarvan de geheimhouding is geboden;
3. ter bevordering van een juist verloop van mobilisatie en concentratie der strijdkrachten."

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(Translation)

"1. There shall be a Military Intelligence Service.
2. Its task is:
a. to collect information on the potential and the armed forces of other powers, which is necessary to a correct structure and an effective use of the armed forces;
b. to carry out security investigations on the fulfilling of confidential functions in trade and industry which, according to our Ministers responsible, might prejudice the security or other important interests of the State;
c. to collect information which is necessary to take measures:
1. to prevent activities aimed at prejudicing the security or the readiness of the armed forces;
2. to secure confidential information concerning the armed forces;
3. to promote a correct course of mobilisation and concentration of the armed forces."

COMPLAINTS

The applicants allege that it is apparent from the information published by "Onkruit" that they are or have been the subject of investigation by the 450-CID. They also refer to Article I,3 of the Royal Decree of 5 August 1972 regulating the duties, organisation, working methods and co-operation of the intelligence and security services, which provides that security services shall assist each other as much as possible. They conclude that the BVD must also have files on them.

The applicants complain under Article 8 of the Convention that the investigation of their activities by security services and the refusal of access to the information gathered by the security services interferes with their right to respect for their private life. They argue that the national security exception contained in paragraph 2 of Article 8 does not apply as the 450-CID is not authorised by law to investigate civilians nor is it necessary in a democratic society in the interest of national security to deny them access to the information contained in their files.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 25 July 1988 and registered on 1 August 1988.

On 9 November 1989, the Commission decided to join the applications and to communicate them to the respondent Government and invite them to submit written observations on the admissibility and the merits of the applications.

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The Government's observations were received by letter dated 7 February 1990 and the applicants' observations were dated 25 April 1990.

THE LAW

1. The applicants complain that the investigation and registration of their activities by security services and the refusal of access to the information held on them by the security services constitute a breach of Article 8 of the Convention, which states:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

2. The Government contend that, since the applicants have failed to bring an action for tort before the civil courts, their application must be declared inadmissible for non-exhaustion of domestic remedies.

The applicants contend that they have exhausted domestic remedies. They did not bring an action for tort under Article 1401 of the Dutch Civil Code (Burgerlijk Wetboek) before the civil courts, as sufficient factual evidence must be brought to support the claim. But since the Government refuse to state whether information is being stored on the applicants, an action for tort was not an effective remedy in these circumstances.

Under Article 26 of the Convention the Commission may only deal with a matter after all remedies have been exhausted according to the generally recognised rules of international law.

The Commission notes that the Government have referred to the possibility of filing an action for tort before the civil courts. However, they do not explain how such an action could have been effective with regard to the applicants' complaints, in particular, whether they could have obtained access to their files and prevented further storing of the information complained of.

In particular, the Commission observes that a general practice of security related activities has been established on the basis of the Royal Decree. The Commission recalls in this respect that where the alleged violation is lawful in the respondent State, e.g. where it is authorised by statute or is accepted as the law of the land, the

requirements as to the exhaustion of domestic remedies within the meaning of Article 26 of the Convention clearly do not apply (Ireland v. the United Kingdom, Comm. Rep. 25.01.76, para. 25, Yearbook 19 pp. 760-761). In the present case, an action for tort is of necessity rendered inadequate by the general practice of security related activities. Therefore, in the Commission's opinion, the applicants have complied with Article 26 of the Convention.

In these circumstances the Commission considers that the Government have not shown that the action at issue was an effective remedy within the meaning of Article 26 of the Convention, in that it could have served to remedy the applicants' complaints. As a result, the application cannot be declared inadmissible for non-exhaustion of domestic remedies according to Article 27 para. 3 of the Convention.

3. With regard to the well-foundeness of their complaints, the applicants claim under Article 8 of the Convention that they are entitled to have access to the files concerning them. They contend that observation and registration of their activities by the intelligence and security services is an unjustified interference with their right to respect for their private life. The information recorded may give an incorrect impression of the applicants and their activities, and thus might jeopardise their future, for instance when seeking employment.

The applicants furthermore contend that, since the CID is not authorised by law to investigate the activities of civilians, this interference with their right to respect for their private life is not "in accordance with the law". The legal basis at the time of the gathering of information (1984 or earlier) was the Royal Decree and not the Intelligence and Security Services Act which was only enacted in 1987. The applicants submit that Article 8 of the Convention requires a Parliamentary Act as legal basis.

The applicants also submit that the interferences complained of are not "necessary in a democratic society" in the interests of national security within the meaning of Article 8 para. 2 of the Convention.

The respondent Government submit that the applicants have based their claims entirely on supposition. They emphasise the need for the secret services to be able to work in total secrecy. Therefore the Government can never reveal whether any information is held on a particular person, let alone disclose that information, if any. The disclosure of information would reveal the pattern of the services' activities and would endanger employed agents and informers. Besides, if the Government would grant the applicants' requests, the principle of equal treatment would compel them to disclose information at any request, which would deprive the security services of their "raison d'être".

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The Government argue that the "law" in Article 8 para. 2 need not be an Act of Parliament, though the Dutch secret services are governed by such an Act, the Intelligence and Security Services Act 1987, and prior to that by the Royal Decree of 5 August 1972. The Government consider that the existence of secret services is "necessary in a democratic society" to protect the country's security and to prevent crime. These services are strictly bound by their mandate, which is embodied in the aforementioned Act and Decree respectively. Thus, even if the services' activities would constitute an interference with the applicants' right to respect for their private life, this interference is "in accordance with the law", and thus justified within the meaning of Article 8 para. 2 of the Convention.

The Government also allege that there are enough safeguards for citizens against the activities of the intelligence and security services. The Standing Committee on Intelligence and Security Services of the Lower House, which consists of the parliamentary leaders of the governing parties and of the main opposition parties, can, when requested by a citizen, investigate whether one of the services concerned has acted in an unlawful manner towards him. Complaints by citizens can also be submitted to the National Ombudsman, who is independent of the Government and the Parliament.

The Commission, having regard to the parties' submissions under Article 8 of the Convention concerning the applicants' right to respect for their private life, considers that these complaints raise complex issues of fact and law which can only be resolved by an examination of the merits. This application cannot, therefore, be declared manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention. No other grounds for inadmissibility have been established.

For these reasons, the Commission unanimously

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

Deputy Secretary to the Commission — President of the Commission

(J. RAYMOND) — (C.A. NØRGAARD)