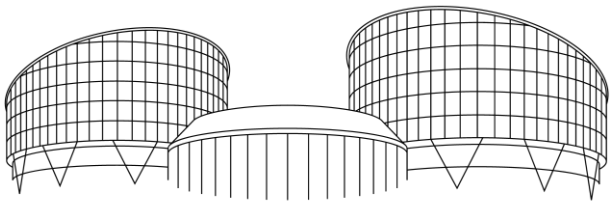

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF TELEGRAAF MEDIA NEDERLAND LANDELIJKE MEDIA B.V. AND OTHERS v. THE NETHERLANDS

(Application no. 39315/06)

JUDGMENT

STRASBOURG

22 November 2012

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Josep Casadevall, *President,*
Egbert Myjer,
Corneliu Bîrsan,
Alvina Gyulumyan,
Ineta Ziemele,
Luis López Guerra,
Kristina Pardalos, *judges,*
and Marialena Tsirli, *Deputy Section Registrar,*

Having deliberated in private on 19 June and 23 October 2012,

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

PROCEDURE

1. The case originated in an application (no. 39315/06) against the Kingdom of the Netherlands lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a limited liability company (*besloten vennootschap met beperkte aansprakelijkheid*) incorporated under Netherlands law, Uitgeversmaatschappij De Telegraaf B.V.; two Netherlands nationals, Mr Joost de Haas and Mr Bart Mos; and also by two associations with legal personality under Netherlands law, *Nederlandse Vereniging van Journalisten* (Netherlands Association of Journalists) and *Nederlands Genootschap van Hoofdredacteuren* (Netherlands Society of Editors-in-Chief), on 29 September 2006.

2. The applicants were represented by Mr R.S. Le Poole and Mr M.A. de Kemp, lawyers practising in Amsterdam. The Netherlands Government ("the Government") were represented by their Agent, Mr R.A.A. Böcker of the Ministry for Foreign Affairs.

3. The applicants alleged a violation of Article 10 of the Convention in that measures including the use of special powers had been taken against them in order to identify their journalistic sources. The second and third applicants alleged in addition that they had been victims of violation of Article 8 of the Convention resulting from the use of special powers of surveillance.

4. By a partial decision of 18 May 2010, the Court decided to adjourn the examination of the above complaints in respect of Uitgeversmaatschappij De Telegraaf B.V., Mr De Haas and Mr Mos

(hereafter "the applicants") and declared the application inadmissible in respect of *Nederlandse Vereniging van Journalisten* and *Nederlands Genootschap van Hoofdredacteuren*. It was also decided to rule on the admissibility and merits of the application at the same time (former Article 29 § 3).

5. The applicants and the Government each filed written observations (Rule 59 § 1).

6. A hearing took place in public in the Human Rights Building, Strasbourg, on 19 June 2012 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Mr R. BÖCKER, Ministry of Foreign Affairs, *Agent*,
Dr M. KUIJER, Ministry of Security and Justice,
Mr P. VAN SASSE VAN YSSELT, Ministry of the Interior and Kingdom Relations,
Mr R. DIELEMANS, Ministry of the Interior and Kingdom Relations,
Ms J. JARIGSMA, Public Prosecution Service, *Advisers*;

(b) *for the applicants*
Mr R.S. LE POOLE, *Advocaat*,
Mr M. DE KEMP, *Advocaat*, *Counsel*,
Mr J. DE HAAS,
Mr B. MOS, *Applicants*,
Ms H.M.A. VAN MEURS-BERGSMA, Head of Legal Department, Telegraaf Media Nederland Landelijke Media B.V., *Adviser.*

The Court heard addresses by Mr Böcker, Mr De Kemp and Mr Le Poole, and also their answers to its questions.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The first applicant is a limited liability company incorporated under Netherlands law. Its business includes publishing the mass-circulation daily newspaper *De Telegraaf*. Originally called Uitgeversmaatschappij De Telegraaf B.V., it changed its name to Telegraaf Media Nederland Landelijke Media B.V. on 5 January 2011.

8. The second applicant, Mr Joost de Haas, is a Netherlands national born in 1967 and resident in Bovenkarspel. He is a journalist.

9. The third applicant, Mr Bart Mos, is a Netherlands national born in 1963 and resident in Ridderkerk. He too is a journalist.

A. The newspaper articles

10. On Saturday 21 January 2006, the newspaper *De Telegraaf* published on its front page an article couched in the following terms:

> "AIVD secrets in possession of drugs mafia
>
> Top criminals made use of information
>
> By Joost De Haas and Bart Mos
>
> Amsterdam, Saturday
>
> State secrets (*staatsgeheime informatie*), obtained from investigations of the Netherlands secret service AIVD [*Algemene Inlichtingen- en Veiligheidsdienst*, General Intelligence and Security Service] circulate in the criminal circuit of Amsterdam.
>
> Complete investigations into the drugs and weapons dealer Mink K., who is labelled 'a danger to the State' (*staatsgevaarlijk*), are thus known to individuals concerned in the criminal world (*onderwereld*). This appears from documents and statements with which this newspaper has been acquainted.
>
> It appears from the documents that the secret service has over a period of years carried out investigations and directed infiltrations relating to Amsterdam drugs criminals. The intervention of the service was prompted by, among other things, strong presumptions of the existence of corruption within the Amsterdam police force and the Public Prosecution Service (*openbaar ministerie*). For that reason the secret service decided, in the late nineties, to recruit an informant in close proximity to Mink K. According to this informant, corruption was so rampant that liquidations were actually carried out using weapons seized by the police.
>
> Threat
>
> It appears from the documents that the AIVD considered top criminal Mink K. to be a threat to the legal order, as he reserved millions each year to bribe police and prosecution service officials. In addition, K. was thought to have enormous stocks of weapons at his disposal, including large quantities of semtex and 'hundreds of anti-tank missiles'. The links which K. was thought to maintain with terror groups such as Hezbollah and ETA were disquieting. The documents have been returned to the AIVD by *De Telegraaf*.
>
> Incidentally, [the Ministry of] Defence yesterday reported the loss of a memory stick containing confidential information of the Military Intelligence and Security Service (*Militaire Inlichtingen- en Veiligheidsdienst*, MIVD)."

11. On an inside page, the same issue carried an article by the same two authors giving details including the informant's code name and that of a second informant operating in the periphery of the criminal organisation.

12. The following day, Sunday 22 January 2006, *De Telegraaf* published an article, again naming Mr De Haas and Mr Mos as authors, in which it was suggested that highly secret information concerning the AIVD's investigations had been made available to criminals including Mink K.

13. In the evening of Sunday 22 January 2006 the public service television broadcaster NOS broadcast an interview with the then Minister of Justice (*Minister van Justitie*), Mr J.P.H. Donner, on the eight o'clock news. Minister Donner stated the following:

> "So this is about people who may be involved in the AIVD who publish documents to the outside world in this way. That is what must absolutely be prevented. Of course it is afterwards to be deplored that State secrets find their way into the newspapers. Once again, I also find that *De Telegraaf* has cited [them] in very general terms and not directly. So as far as that goes, they have been circumspect in their use. But that is quite another matter. My point is that this kind of thing ought not to be made public."

14. On Monday 23 January 2006 *De Telegraaf* announced that the AIVD had lodged a criminal complaint concerning the unlawful disclosure of State secrets. The AIVD had reportedly stated that they had no proof that Mink K. had been able to bribe police and Public Prosecution Service officials, and that the documents in question had been leaked by an AIVD member.

15. In the days that followed, *De Telegraaf* published further material including allegations that Mink K. had had meetings with Government ministers (as well as the latter's denials).

B. Parliamentary documents

16. On 24 January 2006 the Minister of the Interior and Kingdom Relations (*Minister van Binnenlandse Zaken en Koninkrijksrelaties)* sent a white paper to the Speaker of the Lower House of Parliament (parliamentary year 2005-06, 29876, no. 11). It was stated that the predecessor of the AIVD, the BVD (*Binnenlandse Veiligheidsdienst*, National Security Service), had undertaken an investigation between 1997 and 2000 into allegations of corruption of public officials by Mink K. but that no such cases of corruption had come to light. It was not yet known how and when classified documents pertaining to this investigation had become known outside the BVD/AIVD, although there was thought to be no leak from within the police or Public Prosecution Service. *De Telegraaf* had reported that the documents, which had been circulating in criminal circles for some time already, had been obtained from criminal contacts and suggested that they had been leaked by serving or former agents of the BVD or AIVD. The documents which *De Telegraaf* had returned comprised an incomplete collection of raw data from which no conclusions could be drawn.

17. Also on 24 January 2006 the Committee on the Intelligence and Security Services of the Lower House of Parliament was informed by confidential letter about the secret operational particulars of the investigation instituted by the AIVD.

18. The matter gave rise to discussion in the Lower House on several occasions in the course of 2006. At the close of these, the Minister wrote to the Lower House on 20 December 2006. His letter concluded as follows:

> "There has been what can properly be called a serious incident (*Er is sprake van een ernstig incident geweest*): a considerable collection of copied documents from a closed working file of the BVD has been taken out of the building in defiance of the rules. Operational AIVD research and research by the National Police Internal Investigations Department (*rijksrecherche*) indicate that this was probably done by a former BVD staff member, who would have had the opportunity to do so until August 2000. Possibly via third parties, the documents subsequently came into the possession of *De Telegraaf*, which published information about this in January of this year. I would point out that final conclusions about the way in which these compromising facts took place can formally be drawn only when the proceedings against the suspected former staff member have been brought to a close.
>
> The compromised documents provide an insight into the BVD's operational knowledge levels at that time within the task area of public-sector integrity and in the BVD's working methods relating to that task area. Damage to investigations in process and the consequences of the working methods then in use (*modus operandi*) becoming known is relatively limited. Risks to agents and/or informants cannot however be excluded. Where necessary, operational measures have been taken to limit these risks.
>
> A reassessment in the light of the security rules in force then and now shows that there is little to be gained from more regulation. Compliance and supervision of compliance with rules and regulations will however need to be strengthened. The updated security plan and internal communication on that subject will so ensure. Technical measures, such as the introduction of new security technology in authorised systems, and measures within the area of personnel management, such as the continuation of sound security investigations and reviews of new and existing staff, will also contribute to a further reduction of security risks. Extreme alertness to signals which might indicate security risks and better (social) control of non-security-conscious behaviour are indispensible in this connection.
>
> I also conclude from the investigations that security which will completely prevent deliberate compromising [of secret information] is not achievable. It will never be possible to exclude that staff members who are authorised to take cognisance of State secrets and who deliberately seek to inflict harm will be able deliberately and unauthorised to carry State secrets outside the AIVD buildings by some means or other.
>
> There has to be a balance between maximum security and an effective working process. Based on regulation and direction in compliance with regulation, among other things, risks of confidential information being compromised can be reduced to a minimum. Even so, a residual risk as regards the human factor will always exist."

C. The surrender order addressed to the first applicant

19. On 26 January 2006 a detective chief superintendent of the National Police Internal Investigations Department (*hoofdinspecteur van politie-rijksrecherche*) issued an order addressed to [a subsidiary of] the first applicant for the surrender of "document(s) and/or copy(ies), with State secrets concerning operational activities of the [BVD] and/or the [AIVD]."

20. On 30 January 2006 the first applicant's legal counsel entered into an agreement with the public prosecutor aimed at protecting the identity of the source of the information set out above for as long as was necessary for the Regional Court to assess whether the surrender order was barred for reasons of source protection. Since the originals of the documents in question (copies had already been returned) might bear fingerprints or other traces capable of identifying this person, they were placed in a container by a notary and sealed, after which the container with the documents was handed over to the investigating judge to be kept in a safe unopened pending the outcome of objection proceedings intended to be brought.

21. The first applicant in fact lodged an objection with the Regional Court of The Hague by post on 23 February 2006 (received at that court's registry on 28 February). Relying on Article 10 of the Convention, it invoked what it considered to be the journalistic privilege against the disclosure of sources. It argued in this connection, *inter alia*, that Mr De Haas and Mr Mos had exercised due care in that they had disclosed neither the identity of AIVD members or informants nor that service's specific *modus operandi* or the current state of its information.

22. A hearing in chambers (*raadkamer*) took place on 17 March 2006. The first applicant, in the person of its counsel Mr Le Poole, was informed by the presiding judge of its status of suspect in a criminal case and reminded of its right to refuse to answer questions; the applicants Mr De Haas and Mr Mos attended as interested parties. The first applicant offered to destroy the documents in question. The official record of the hearing contains the following, *inter alia*:

> "The public prosecutor again addressed the court and stated, in brief, as follows:
>
> - Examining the documents to discover their source is not the first priority, but if the opportunity arises it will certainly be used.
>
> - Moreover, it is up to the AIVD to decide whether the documents which are currently held in the office of the investigating judge are indeed all the documents which the applicant may have had in its possession.
>
> ...
>
> Counsel for the [first applicant] also stated, in brief, as follows:
>
> - In view of the protection of the source the [first applicant] cannot afford to risk an examination of the documents.

- [The first applicant] has been restrained (*terughoudend*) in publishing information from these sources [i.e. the documents], it is known in any case that Mink K. has known their content for some time already, so that publication has not led to any serious danger.

- In my view the public prosecutor's comparison with a firearm is inapposite. After all, [the first applicant] offers to destroy the documents immediately and is not interested in possessing them.

- [The first applicant] has never had an interest in the content of these documents. The fact that such sensitive AIVD information is circulating in criminal circles is a news item that should be made known. In this sense also [the first applicant] has fulfilled its role as public watchdog in a very circumspect fashion (*op zeer omzichtige wijze*).

The public prosecutor addressed the court once more and stated, in brief, as follows:

- The source who supplied the documents to [the first applicant] need not necessarily have been the leak within the AIVD's organisation. Secret classified documents belonging to the AIVD vanished on a number of occasions over a given period, and the present documents could play a role in this investigation.

- It might indeed be possible to determine the identity of the source from an examination of the documents. However, in the context of the investigation into the leak within the AIVD, examination of the documents is not necessary in order to establish the identity of the leak since this can be done simply on the basis of the content of the documents concerned.

- The present documents should be returned to the State for the simple reason that they contain secret classified information which should not be circulated in the public domain. Until such time as it is established that the [first] applicant has indeed returned all the documents in its possession to the AIVD, destruction of the documents, as proposed by the applicant, should not be considered.

- Moreover, the [first] applicant has not observed complete restraint in relation to the publication of the documents. After all, there is no need to quote from them in order to indicate that they are in criminal hands."

The applicants Mr De Haas and Mr Mos expressed themselves in support of the first applicant.

23. The Regional Court gave a decision dismissing the objection on 31 March 2006. Its reasoning included the following:

"The fact that the seized documents may contain fingerprints which may lead the AIVD or the Public Prosecution Service to the [first applicant's] source or sources does not lead the court to find otherwise. As the [first applicant] has correctly argued, Article 10 of the Convention also comprises the protection of journalistic sources in order to safeguard the right freely to gather news (*recht van vrije nieuwsgaring*). However, the Regional Court does not consider that that right has been violated in the instant case. The Regional Court stresses that the journalists concerned have not been required to give their active co-operation to the investigation into the identity of the source, but that in the instant case all that has been sought is the handover of material that exists independently from the will of the journalists and which, in addition, is the object of a criminal act. The Regional Court therefore considers that any sanctioning of the Public Prosecution Service's actions in the present case will not hinder any

future exchange of information – albeit perhaps in a different form – between the [first applicant] and its sources."

24. The first applicant lodged an appeal on points of law (*cassatie*) with the Supreme Court (*Hoge Raad*), which on 25 March 2008 dismissed it in a decision containing the following reasoning:

"4.5 In considering that the documents seized originate from the AIVD and contain State secret information and are the object of the criminal act proscribed by Article 98c of the Criminal Code, the Regional Court has expressed the fact that the surrender order protects the interest for which that provision was enacted, namely the protection of State secrets.

Its subsequent consideration that in the present case the right to protect sources, covered by Article 10 of the Convention, has not been violated, encapsulates the finding that it is a weighty social interest that State secret information should not circulate in public and also that the interference with the right to source protection – which the Regional Court has clearly found to exist, as is not contested in this appeal – is to be considered justified in light of the circumstances of the case.

These considerations do not ... disclose an incorrect view of the applicable law, and are not incomprehensible in light of the proceedings in chambers. In so finding, the Supreme Court notes

(a) that the case file does not admit of any other conclusion than that the documents seized contain State secret information about operational investigations of the AIVD into possible interaction between the criminal substratum and law-abiding society (*verwevenheid van onderwereld en bovenwereld*) for the purpose of preventing serious crime, this information being important in connection with the protection of the democratic legal order and liable to endanger national security and the safety of others if made public, and

(b) that the objection adduced by the [first applicant] against surrender of the documents has been limited, as regards the measure of probability of disclosure of the source, to its fear that examination of the documents might lead to identification of the source because fingerprints might be found on these papers, in which connection the Public Prosecutor has stated that an examination of the documents, although possible, is not necessary to determine the identity of the leak within the AIVD, that already being possible using the contents of these documents, which are already known to the AIVD."

D. Civil proceedings

25. On 2 June 2006 the applicant's counsel Mr Le Poole wrote to the Minister of the Interior and Kingdom Relations, with a copy to the head of the AIVD, demanding an end to all investigations and to the use of special powers against the second and third applicants, an undertaking to destroy all information so obtained and a further undertaking that any such information should not be used in criminal proceedings against the second and third applicants.

26. On 6 June 2006 the Permanent Secretary (*secretaris-generaal*) of the Ministry of the Interior and Kingdom Relations, replying on behalf of the

Minister, wrote to Mr Le Poole refusing to give such an undertaking. To confirm or deny the use of special powers would entail the disclosure of information on specific AIVD operations, such information having to remain secret in the interests of national security. It was noted in the Permanent Secretary's letter that questions about the case asked in Parliament had been responded to similarly.

27. On 7 June 2006 the three applicants, joined by *Nederlandse Vereniging van Journalisten* and *Nederlands Genootschap van Hoofdredacteuren* (see paragraphs 1 and 4 above), summoned the respondent State to appear before the Provisional Measures Judge (*voorzieningenrechter*) of the Regional Court (*rechtbank*) of The Hague in summary injunction proceedings (*kort geding*). They claimed to be aware that the applicants De Haas and Mos had been subject to telephone tapping and observation, presumably by AIVD agents, from late January 2006 onwards. Such measures, in the contention of the applicants, lacked a legal basis, since the AIVD was using powers granted it by section 6 (2)(a) of the 2002 Intelligence and Security Services Act (*Wet op de inlichtingen- en veiligheidsdiensten* – see paragraph 51 below) to carry out duties set out in section 6(2)(c) of that Act. In the alternative, since clearly the target of the measures was the second and third applicants' journalistic source and not the applicants themselves, basic requirements of subsidiarity and proportionality had been disregarded, the more so since the said two applicants were journalists and therefore entitled pursuant to Article 10 of the Convention to protect their journalistic sources. The applicants also claimed the protection of the second and third applicants' private and family life, home and correspondence under Article 8 of the Convention. They sought, in essence, a provisional measure in the form of an order for the cessation of all investigations and the use of special powers against the second and third applicants, in so far as these related to the press publications referred to above; the destruction of all data obtained by their use; and an order preventing the AIVD from handing over the data to the Public Prosecution Service for use in criminal proceedings against the second and third applicants.

28. The Provisional Measures Judge gave judgment on 21 June 2006. On a preliminary point, he ruled that the applicants' claims for provisional measures were admissible in the civil courts since no alternative procedure offering a speedy resolution of the matter or any judicial remedy other than civil proceedings was available in law. Proceeding on the assumption that the AIVD had in fact made use of its surveillance powers – which the respondent had not confirmed or denied – he then went on to hold that such use was contrary to Article 10 of the Convention. He ordered provisional measures largely in the terms requested by the applicants.

29. The State appealed to the Court of Appeal of The Hague. Again refusing to confirm or deny the use of surveillance powers against any of

the applicants, they argued that the protection of journalists' sources was not absolute and any conflict between the protection of journalistic sources and the protection of State secrets should be decided in favour of the latter. They also stated that the first, second and third applicants had gone beyond the needs of informing the public, especially by unlawfully retaining original copies of secret documents the possession of which was in itself a crime and in exposing the AIVD's use of informants. Moreover, adequate safeguards existed in the form of the Supervisory Board for Intelligence and Security Services (*Commissie van toezicht voor de inlichtingen- en veiligheidsdiensten*, hereafter "Supervisory Board"), two of whose members including the chairman were members of the judiciary; the Supervisory Board exercised supervision on a regular basis but also entertained complaints, and in so doing had access to information denied the civil courts. It was stated that the Supervisory Board had begun investigations into the case at the request of the Minister of the Interior and Kingdom Relations.

30. For their part, the applicants appealed on the ground that the Provisional Measures Judge had failed to find the AIVD at fault for misusing powers intended only for use against persons identified as "targets", that is, who were themselves considered dangerous for national security.

31. The Court of Appeal gave judgment on 31 August 2006. It held that the use of powers of surveillance against the applicants was not *per se* impermissible, even though the applicants might not be targets themselves. It accepted, in the face of the State's refusal to declare itself on this factual point, that the first, second and third applicants had made out a credible case that powers of surveillance had been used against them. This interfered with their rights under Articles 8 (private life) and 10, and was unlawful in so far as the use of the powers concerned continued after the identification of a target other than the applicants, to whom moreover the need for source protection apparently did not apply. For the remainder it allowed the State's appeal; the State was ordered not to hand any materials or copies thereof, obtained with the use of special powers, to the Public Prosecution Service as long as the Supervisory Board had not found those materials to have been lawfully obtained.

32. Both the applicants and the State lodged appeals on points of law with the Supreme Court.

33. The Supreme Court gave judgment on 11 July 2008. Its reasoning included the following:

> "3.5.3. ... The Court of Appeal was entitled to hold, without violating section 6 of the 2002 Intelligence and Security Services Act, that in view of the danger threatening the effectiveness and integrity of the AIVD as a result of a 'leak' within the security service itself, weighty State interests were at stake, and draw the conclusion that the AIVD's investigations against the journalists were, at least initially, covered by sub-paragraph a. ..."

and

"3.7.3. ... The Court of Appeal has not overlooked the fact that the interests of the Government invoking one of the exceptions set out in Article 8 § 2 and Article 10 § 2, if they are to justify such an exception, must tip the balance (*zwaarder zullen moeten wegen*) against the interests in maintaining the rights and freedoms guaranteed by those provisions. ... [The Court of Appeal's finding] that 'in view of the importance of the protection of journalistic sources to the freedom of the press in a democratic society and the possible chilling effect (*afschrikwekkende werking*) which results from the knowledge that the AIVD is using the said special powers against the journalists, ... such use is only justified by an undeniable need in the public interest (*onloochenbare behoefte in het algemeen belang*)' unambiguously implies that the Court of Appeal, in applying its test, has had regard to the condition, formulated by the European Court of Human Rights, of an 'overriding requirement in the public interest'"

and

"3.7.4.2. Part 2.4.1. [of the applicants' statement of grounds of appeal] complains that the Court of Appeal misapplied the law in that it did not find, on the sole ground of the extreme reticence in the use of special powers and their duration given the weighty interest of protecting journalistic sources ..., that the interference with Article 10 of the Convention was from the outset not justified by an 'overriding requirement of public interest', instead of [finding such to be the case] from the moment the AIVD caught sight of one or more other persons. The protection of journalistic sources thus becomes entirely illusory, since the AIVD, by starting its investigation with the journalist, will always be able to trace (a person leading closer to) the source, so it is argued.

This part fails, because it essentially purports to assume that the protection of journalistic sources is absolute. It is not. The protection of journalistic sources reaches its limits in, among other things, the protection of national security and the need to prevent the dissemination of confidential information, as set out in Article 10 § 2 of the Convention. The Court of Appeal, in stressing the importance of 'extreme reticence in the use of special powers', was right not to exclude [such measures]."

and

"3.7.4.3. ... the Court of Appeal sufficiently specified the interest and the danger [involved] by stating, as the aim of the use of the special powers: the prevention of dissemination of the State secrets at issue by tracing the leak and the investigation, possibly also in order to protect the lives of others, of the consequences of publication of these State secrets."

and

"3.7.4.5. ... The counter-argument made by *De Telegraaf* and the other appellants that other means were available, namely that the AIVD might have asked the journalists to name their source, was rejected by the Court of Appeal on the ground, essentially, that the journalists would not have named their source in that case either precisely because they are doing their very best to keep their sources secret. The other defence submitted by *De Telegraaf* and the other appellants, that the AIVD could have awaited the outcome of the criminal investigation was rejected by the Court of Appeal by pointing out that the criminal investigation and the investigation by the AIVD are entirely unrelated to each other, by which the Court of Appeal meant to express that the two investigations pursue different aims and serve different interests,

so that in order to answer the question whether the use of the special powers meets the requirement of subsidiarity the outcome of the criminal investigation is, in principle, irrelevant. ...”

and

“3.8.5. ... The Court of Appeal has dismissed the primary claim under 2 (B) [i.e. the claim for an order preventing the AIVD from handing over the data to the Public Prosecution Service for use in criminal proceedings against the second and third applicants] because it could not determine which information had and which had not been lawfully obtained – meaning, plainly, on the basis of investigations what ... can be considered still lawful, or no longer lawful, vis-à-vis the journalists – and because it could not be ruled out beforehand that all the information collected had been obtained unlawfully, so that the Court of Appeal could not in reason determine what information ought to be discarded. This ground of the decision is not called into question in the statement of points of appeal, and rightly so, because the Court of Appeal had the latitude in summary injunction proceedings to find and decide thus.

It follows that the Court of Appeal has not made its decision dependent on the opinion of the Supervisory Board. ... Moreover, the Court of Appeal’s considerations do not exclude the possibility that *De Telegraaf* and the other appellants may, after the Supervisory Board has given its opinion, ... yet seek an order or a prohibition as here at issue from the civil courts, if by that time they still have such an interest and if in the opinion of the Supervisory Board (in so far as that opinion is public or made public afterwards in the civil proceedings) provides sufficient factual grounds for a reasoned ruling on such a claim.

For that reason the question whether the complaints procedure provided by the 2002 Intelligence and Security Services Act is an ‘effective remedy’ in the sense of Article 13 of the Convention need not be discussed.”

The Supreme Court dismissed both the applicants’ and the State’s appeals.

E. Questioning of the second and third applicants as witnesses in criminal proceedings

34. On 15 November 2006 the second and third applicants appeared before the investigating judge (*rechter-commissaris*) of the Regional Court of The Hague to be questioned as witnesses in criminal proceedings against three individuals suspected of involvement in divulging to the outside world the State secrets here in issue. Both refused to answer certain questions, including at least those questions which would be capable of leading to the disclosure of the identity of the person from whom they had received secret AIVD documents.

35. On 27 November 2006 the second and third applicants were again questioned by the investigating judge and persisted in their refusal. The three defence counsel, present at the time, asked the investigating judge to order the two applicants detained for failure to comply with a judicial order (*gijzeling*). The investigating judge so ordered.

36. On 30 November 2006 the Regional Court of The Hague, sitting in chambers, ordered the applicants released. It recognised the importance of the protection of journalistic sources, as stated in the case-law of the Supreme Court (see below), and found that no issue of State security could arise since the fact of the documents having become available outside the AIVD had been made common knowledge in the media.

F. The judgment in the criminal case against H.

37. The three defendants were put on trial before the Regional Court of The Hague on charges under Articles 98 and 98c of the Criminal Code (*Wetboek van Strafrecht*) (see below). The applicants have submitted a judgment of the Regional Court of The Hague convicting one of these persons (one H.) at first instance of the crime defined in Article 98 of the Criminal Code, in which it is mentioned that the documents seized from the first applicant were examined by the Netherlands Forensic Institute (*Nederlands Forensisch Instituut*) but that no traces were found.

G. Proceedings of the Supervisory Board and the decision of the Minister

1. The lawfulness investigation

38. On 21 June 2006 the Minister of the Interior and Kingdom Relations informed the Lower House of Parliament that he had requested the Supervisory Board to investigate as a matter of urgency the lawfulness of the AIVD's investigation into the leak. Its task was to cover the entire AIVD investigation into the leaking of secret classified information, including the alleged exercise of special powers in relation to the second and third applicants.

39. On 15 November 2006 the Supervisory Board presented to the Minister a report containing its findings and its advice. This was classified State secret (*Stg. Geheim*, the second highest classification level for State secrets). The Government quote from it in the following terms:

> "[Section 9(1) of the 2002 Intelligence and Security Services Act] provides that public servants of the AIVD do not have the power to conduct a criminal investigation. The AIVD is therefore not entitled to employ any special powers with the aim of a criminal investigation. The intelligence service may only use these powers within the context of its own tasks. The areas of attention of the police and the [Public Prosecution Service] on the one hand and of the AIVD on the other hand, are sometimes in line with one another. The investigative services and the AIVD however each have their own approach towards their investigations, they operate from different perspectives. A criminal investigation is aimed at obtaining evidence on behalf of criminal proceedings. An investigation of the AIVD is on the other hand aimed at timely informing the authorities that are competent to act on any threats against the democratic legal system or threats to the security or other vital interests of the state

with the purpose of preventing the harming of these interests. In the case of the leaked state secrets, a story covered by *De Telegraaf*, it is the investigative services' task to collect information about the question who stole the state secrets at the BVD and which unauthorised third parties keep or kept possession of the leaked material. The investigation by the AIVD has a different focus, owing to the fact that the AIVD investigates to what extent the integrity and effective functioning of the AIVD have been, and possibly still are being, harmed. In case of a leak of this extent it is, moreover, necessary to find out if possibly more documents have been leaked and where these are, in order to identify the damage for current operational investigations and the danger to human sources and staff of the AIVD. Although the AIVD investigation is not aimed at collecting evidence for criminal proceedings, in performing its task the AIVD may come across information that may also be important for the criminal investigation and prosecution of criminal offences. In that case the AIVD based on [section 38 of the 2002 Intelligence and Security Services Act] has the possibility to make available the information to the [Public Prosecution Service] via an official message to the National Public Prosecutor for Counter-terrorism. In the investigation in hand several official messages were issued to the [Public Prosecution Service]."

40. The Government summarise the Supervisory Board's findings as follows: The exercise of special powers by the AIVD in its investigation into the leaking of secret classified information had been lawful (i.e. necessary and in accordance with the law and with the criteria of proportionality and subsidiarity), save for a few exceptions. The tapping of the telephone of one non-target was not in keeping with the requirement of subsidiarity, and transcriptions had been made of various intercepted telephone conversations that were unrelated to the case and were also of no relevance to the performance by the AIVD of its duties. The Supervisory Board also found some transcriptions of intercepted telephone conversations in cases where the Minister had not yet given consent for electronic surveillance. In addition, it discovered that two telephone numbers that had wrongly been attributed to a target of the AIVD had been tapped. The Supervisory Board concluded that despite these lapses the data that had been provided in the official reports had been lawfully obtained.

41. On 6 December 2006 the Minister transmitted a version of the report cleansed of secret information to the Lower House of Parliament. The forwarding letter (parliamentary year 2006-07, 29 876, no. 19) contains the following:

"The AIVD investigation was intended in the first place to make an assessment of the leaked file and any other leaked documents. Within that framework it was considered necessary, among other things, to use special powers against the journalists of *De Telegraaf* who were in possession of the leaked file. The use of special powers was not intended directly to identify the journalists' sources but did indirectly interfere with the journalistic right of source protection. The Supervisory Board has tested the lawfulness of the decisions concerned in the light of the applicable laws and delegated legislation and the above-mentioned requirements of necessity, proportionality and subsidiarity. In so doing the Board has taken into consideration all relevant aspects of the case, including in particular those mentioned

above. The Board thus concluded that the decisions to use special powers against the journalists were lawful."

and

"In my reaction to the supervisory report I have transmitted to your House information which the Supervisory Board has set out in the secret part of its report in accordance with section 8, third paragraph, of the 2002 Intelligence and Security Services Act. This includes the fact, among others, that journalists have lawfully had their telephones tapped. I did not wish to supply this information earlier in the summary injunction and appeal proceedings which have taken place with regard to the present AIVD investigation. My reasons for giving you this information now are connected with the failings found by the Board in the exercise of this special power. Given the interest existing in society for the matter in question and in order to prevent incorrect speculation I consider it necessary that the said facts should be known to the public. I can only provide further operational information concerning the journalists and operational information relating to other persons to the Committee for Intelligence and Security Services (*Commissie voor de Inlichtingen- en Veiligheidsdiensten*) of the Lower House of Parliament."

2. The complaint advisory proceedings

42. On 3 July 2006, that is while the first and second (criminal and civil) sets of proceedings were still pending, the applicants' counsel Mr De Kemp wrote to the Minister of the Interior and Kingdom Relations giving notice of a complaint concerning the AIVD's actions relating to the second and third applicants. In accordance with section 83 of the 2002 Intelligence and Security Services Act (see below), the Minister forwarded the complaint to the Supervisory Board.

43. On 6 December 2006 the Minister wrote to Mr De Kemp summarising the Board's findings and advice and expressing his views on the matter (the report itself was not disclosed to the applicants). His letter included the following:

"[Section 6, paragraph 2, sub-paragraph a versus sub-paragraph c]

The leaking of classified AIVD information damages the integrity and functioning of that service and can in so doing endanger the national security for which the AIVD labours. The AIVD has therefore, in the opinion of the Board, rightly initiated an operational investigation within the meaning of section 6, paragraph 2, sub-paragraph a of the 2002 Intelligence and Security Services Act.

The special powers used

The Board considers that the decision to make use of special powers against the journalists of *De Telegraaf* met the requirements of necessity, subsidiarity and proportionality. In other respects too, the decision to use special powers did not, in the Board's opinion, give rise to impropriety vis-à-vis *De Telegraaf* and the other complainants.

The Board is of the opinion that the complaint is unfounded on these two main points.

The way in which the special powers were used

The Board finds that there have been a few lapses (*onzorgvuldigheden*) in the way in which telephone tapping was resorted to against the journalists. The Board is of the opinion that the way in which this was done should be considered an (implied) part of the complaint of *De Telegraaf* and the other complainants. After all, the complaint relates to the application of special powers. Such application includes, in the Board's opinion, the transcription and recording of intercepted conversations. The Board finds that several of the journalists' conversations have been transcribed and recorded which did not relate to the investigation into the leak within the AIVD and which have no further relevance to the AIVD's discharge of its duties. Even on initial consideration this ought to have been clear in respect of a (major) portion of these too far-reaching transcriptions. The Board also finds that this information has not been destroyed after having been recorded and considered more closely.

The Board advises [the Minister] to declare the complaint well-founded in respect of this [implied] part of the complaint.

Adulteration (*vermenging*) with the investigation headed by the Public Prosecution Service

The Board is of the opinion that the use of special powers in the present case fell within the task of the AIVD as set out in section 2, paragraph 2, sub-paragraph a of the 2002 Intelligence and Security Services Act. The special powers have thus not been used for the purpose of the criminal investigation. The Board therefore takes the view that there has been no adulteration of the AIVD investigation with the criminal investigation headed by the Public Prosecution Service. The issuing of official reports (*ambtsberichten*) in this case cannot lead to the finding that there has been adulteration of tasks and powers between the AIVD and the Public Prosecution Service. After all, this concerns the regular provision of information – which the AIVD has obtained based on its own tasks – to the Public Prosecution Service in accordance with the law in force.

The Board advises [the Minister] to declare the complaint ill-founded on this main point.

Official reports

The Board is of the opinion that the shortcomings found as regards the transcription and recording of the intercepted telephone conversations have no bearing on the lawfulness of the obtention of the information – in so far as these concern (also) the journalists – which have been made available to persons foreign to the service (*extern zijn verstrekt*) by means of official reports.

My view of the matter

In view of the findings of the Board and in accordance with the advice of the Board I declare the complaint unfounded on the main points, namely as regards the AIVD's task under section 6, sub-paragraph 2, sub-paragraph a; as regards the decision to use special powers against the journalists of *De Telegraaf*, and as regards the adulteration of the investigations of the AIVD and the Public Prosecution Service. An implied part of the complaint, namely the transcription and recording of intercepted telephone conversations, I declare well-founded in part.

The recording and transcribing of the conversations was begun one hour too early and the conversations have been partly recorded and transcribed to too great an extent. This has harmed the interests of the journalists because too much information about them has been recorded and this information has been kept by the AIVD for too long.

I have not found any circumstances requiring me to deviate from the advice of the Board on any of the parts of the complaint.

The information unlawfully recorded (*ten onrechte vastgelegde gegevens*) have in the meantime been removed and destroyed. In accordance with the Board's advice, greater reticence will be exercised in future in transcribing and recording telecommunication with journalists should the situation arise.

Now that I have stated my view of your complaint, you can, if you so wish, lodge your complaint with the National Ombudsman (*Nationale ombudsman*) in accordance with section 83 of the 2002 Intelligence and Security Services Act."

H. Complaint to the National Ombudsman

44. On 8 February 2007 the applicants and *Nederlandse Vereniging van Journalisten* and *Nederlands Genootschap van Hoofdredacteuren*, through their counsel Mr De Kemp, lodged a complaint with the National Ombudsman asking for an investigation into the AIVD's conduct. They relied on the views expressed by the Minister of the Interior and Kingdom Relations in his letter to them of 6 December 2006, which in their submission constituted an admission that special powers had actually been used against the second and third applicants.

45. The National Ombudsman replied on 5 March 2007. He pointed out that the applicants', and indeed the State's, appeals on points of law were still pending before the Supreme Court and that he was not empowered to investigate conduct that was the subject of proceedings pending in the civil courts. Moreover, once the Supreme Court delivered its judgment the National Ombudsman was bound to take note of the grounds on which it was based.

46. The applicants have not pursued their complaint before the National Ombudsman.

I. Official reports submitted by the applicants

47. The applicants have submitted copies of official reports (*ambtsberichten*) addressed by the head of the AIVD to the National Public Prosecutor for Counter-terrorism (*Landelijke Officier van Justitie Terrorismebestrijding*). The copies submitted to the Court bear no dates and identifying information – other than pertaining to the applicants – has been blanked out.

48. The first of these reports names a former member of the BVD, the AIVD's predecessor, as having been in possession of State secret documents after having left the service and mentions indications that this person has received a considerable sum of money from "criminal circles". The second names four members and former members of the BVD and the AIVD who might have had access to copies or originals of the documents

handed back by the first applicant. The third report states that the second and third applicants have been in contact with persons connected with the international trade in illegal drugs. The fourth states that, according to information from a "reliable source", the second and third journalists have tried to establish contact with one H. (understood by the Court to be a person suspected of involvement in the disclosure of AIVD information) with a view to publishing an article about him with his photograph.

II. RELEVANT DOMESTIC LAW

A. The Criminal Code

49. Provisions of the Criminal Code relevant to the case before the Court are the following:

"Article 98

1. He who deliberately delivers or makes available knowledge (*inlichting*) which needs to be kept secret in the interest of the State or its allies, an object from which such information can be derived, or such information (*gegevens*) to a person or body not authorised to take cognisance of it, shall, if he knows or ought reasonably to be aware that it concerns such knowledge, such an object or such information, be sentenced to a term of imprisonment not exceeding six years or a fifth-category fine [i.e. up to 74,000 euros (EUR)]. ...

Article 98c

1. The following shall be sentenced to a term of imprisonment not exceeding six years or a fifth-category fine:

i. he who deliberately takes or keeps knowledge, an object or information as referred to in Article 98 without being duly authorised;

ii. he who undertakes any action with intent to obtain knowledge, an object or information as referred to in Article 98 without being duly authorised; ..."

B. The Code of Criminal Procedure

50. Provisions of the Code of Criminal Procedure (*Wetboek van Strafvordering*) relevant to the case before the Court are the following:

"Article 94

1. All objects are liable to seizure which may serve to establish the truth ...

2. In addition, all objects are liable to seizure which may be declared forfeit or ordered withdrawn from circulation. ...

Article 96a

1. In case of suspicion of a criminal offence as described in Article 67 § 1 [i.e. an offence attracting a prison sentence of four years or more – including the offences

defined in Articles 98 and 98c of the Criminal Code – or of a number of other specified criminal acts not relevant to the present case] every civil servant invested with investigative powers (*opsporingsambtenaar*) may order any person who is reasonably believed to hold an item eligible for seizure to surrender it for that purpose.

2. Such an order shall not be given to the suspect.

3. Based on their privilege of non-disclosure (*bevoegdheid tot verschoning*), the following shall not be obliged to comply with such an order:

...

b. the persons referred to in Article 218, in so far as surrender would be incompatible with their duty of secrecy; ...

Article 218

Persons who, by virtue of their position, their profession or their office, are bound to secrecy may ... decline to give evidence or to answer particular questions, but only in relation to matters the knowledge of which is entrusted to them in that capacity.

Article 552a

1. Interested parties may lodge an objection in writing against the seizure of an object, the use made of seized objects, the failure to order the return of a seized object, ...

7. If the court finds the complaint or request well-founded, it shall give the appropriate order."

C. The Intelligence and Security Services Act

51. Provisions of the 2002 Intelligence and Security Services Act (*Wet op de inlichtingen- en veiligheidsdiensten*) relevant to the case before the Court are the following:

"Section 6

1. There shall be a General Intelligence and Security Service [i.e. the AIVD].

2. The [AIVD]'s tasks, in the interest of national security, are the following:

a. to carry out investigations relative to organisations and persons who, by the aims which they pursue or their activities, give rise to serious suspicion (*het ernstige vermoeden*) that they constitute a danger to the continued existence of the democratic legal order or to the security or other weighty interests of the State;

b. ...

c. to promote measures (*het bevorderen van maatregelen*) for the protection of the interests mentioned in sub-paragraph a, including measures aimed at securing information which needs to be kept secret in the interest of national security and of those parts of Government service and private enterprise (*bedrijfsleven*) which in the judgment of the Ministers invested with responsibility in the matter are of vital importance for the maintenance of social life (*de instandhouding van het maatschappelijk leven*);

d. to carry out investigations concerning other countries relative to subject-matter indicated by the Prime Minister, Minister of General Affairs (*Minister-President, Minister van Algemene Zaken* [the Prime Minister being both at the same time]), in agreement with other Ministers involved; ...

Section 8

...

3. Information providing an insight into the following, at least, shall be omitted from the published annual report [sc. of the activities of the AIVD and the MIVD respectively]:

a. the means applied by the service in specific cases;

b. the secret sources used by the service;

c. the service's current state of knowledge (*actueel kennisniveau*).

4. The Minister concerned may communicate the information referred to in the third paragraph to one or both Houses of Parliament in confidence. ...

Section 9

1. Officials of the [intelligence and security] services are not invested with powers of criminal investigation (*bezitten geen bevoegdheid tot het opsporen van strafbare feiten*). ...

Section 12

1. The [intelligence and security] services are empowered (*bevoegd*) to process data taking into account the constraints (*eisen*) posed thereon by the present Act ...

2. Data shall be processed only for a particular purpose and only in so far as is necessary for the proper implementation of this Act ...

3. Data shall be processed in accordance with the law and properly and with due care.

Section 15

The heads of the [intelligence and security] services shall see to:

a. the maintenance of the secrecy of data so designated (*daarvoor in aanmerking komende gegevens*);

b. the maintenance of the secrecy of sources so designated from which data are obtained;

c. the safety of the persons with whose co-operation data are collected.

Section 16

The heads of the [intelligence and security] services shall also see to:

a. the making of the arrangements necessary to ensure the correctness and completeness of the data to be processed;

b. the making of the arrangements of a technical and organisational nature necessary to secure the safety of the processing of data against loss or damage and against unauthorised processing;

c. the appointment of persons who shall be authorised, to the exclusion of others, to carry out the tasks appointed in the framework of data processing.

Section 18

A power (*bevoegdheid*) referred to in this chapter [i.e. the special powers referred to in sections 20 and 25, quoted below, among others] may only be exercised in so far as necessary for the proper fulfilment of the tasks referred to in section 6, second paragraph, sub-paragraphs a and d ...

Section 19

1. The exercise of a power referred to in this chapter [i.e. including the special powers referred to in sections 20 and 25] shall be permitted only if, in so far as this paragraph does not provide otherwise, the Minister concerned or, in his name, the head of the service concerned has given his permission therefor.

2. The head of a service may indicate by a written decision officials subordinate to him to give the permission referred to in the first paragraph. A copy of the decision shall be sent to the Minister concerned.

3. Except as otherwise provided by or pursuant to statute, permission shall be given for a period no longer than three months, which may, upon request, be prolonged for a further period of that length.

Section 20

1. The [intelligence and security] services are empowered to:

a. observe, and in that framework record information concerning behaviour of natural persons or information concerning objects (*zaken*), with or without the use of observational and recording devices;

b. follow, and in that framework record information concerning behaviour of natural persons or information concerning objects (*zaken*), with or without the use tracking devices, locator apparatus and recording devices. ...

Section 25

1. The [intelligence and security] services are empowered to use technical appliances for the targeted tapping, receiving, recording and monitoring (*afluisteren*) of every form of conversation, telecommunication or transfer of information by means of an automated system (*geautomatiseerd werk*), regardless of where this takes place. The power set out in the first sentence shall include the power to undo the encryption of conversations, telecommunication or transfer of information.

2. The powers referred to in the first paragraph may be used only if permission to do so has been given on a request for that purpose by the Minister concerned to the head of the [intelligence and security] service.

...

4. The request for permission referred to in [the second paragraph] shall be submitted by the head of the service and shall contain, at least, the following information:

a. an indication of the power which the service wishes to use and, in so far as applicable, the number [i.e. telephone number etc.];

b. information concerning the identity of the person or organisation in respect of whom or which, as the case may be, the use of the power concerned is sought;

c. the reason why the use of the power concerned is sought. ...

Section 31

1. The use of a power as referred to in this chapter is permissible only if the information thereby sought cannot be collected, or cannot be collected in time, by consulting sources of information accessible to anyone or sources of information in respect of which a right to take cognisance of the information therein contained has been granted to the service.

2. If the decision has been taken to collect information by the use of one or more of the [said] powers ..., only that power shall be resorted to which considering the circumstances, including the seriousness of the threat to one of the interests to be protected by [an intelligence or security service], and also in comparison with other powers available, causes the least disadvantage to the person concerned.

3. No use shall be made of a power if its use would cause disproportionate harm to the person concerned compared to the aim thereby pursued.

4. The use of a power shall be proportionate to the aim pursued.

Section 32

The use of a power as referred to in this chapter shall be terminated immediately if the aim for which the power is used, is achieved, or the use of a less intrusive power (*minder ingrijpende bevoegdheid*) can suffice.

Section 34

1. The Minister concerned shall examine within five years after the end of the use of special powers as referred to in ... section 25, first paragraph ..., and thereafter every year, whether the person in respect of whom one of the special powers is used can receive a report thereof. If this is possible, it shall be done without delay.

2. If it is not possible for the person in respect of whom one of the special powers referred to in the first paragraph [of this section] is used to receive a report thereof, the Supervisory Board shall be informed accordingly. ...

Section 35

The provision of data processed by or for [an intelligence or security service] to an official within the service ... shall take place only in so far as that is necessary for the proper execution of the duty with which that official is charged.

Section 36

1. The [intelligence and security] services have competence, within the framework of the proper execution of their duties, to provide information about data processed by or for the service in question to:

a. the Ministers concerned;

b. other Government bodies concerned;

c. other persons or bodies concerned;

d. designated (*daarvoor in aanmerking komende*) intelligence and security services of other countries and other designated international security, liaison, intelligence and intelligence organs.

...

3. Without prejudice to the provision of information as referred to in the first paragraph, information of data processed by the [intelligence and security] services in other cases can be given only in the cases provided for by this Act.

Section 38

1. If it appears, in the course of the processing of data by or for [an intelligence and security service] that data may also be of importance for the detection or prosecution of criminal acts, the Minister concerned, or the head of the service concerned on his behalf .... can inform the appointed member of the Public Prosecution Service accordingly in writing. ...

Section 43

1. Data which, in view of the purpose for which they are processed, have lost their meaning shall be removed.

2. If it appears that data are incorrect or are wrongly processed, they shall be corrected or removed respectively. The Minister concerned shall inform those to whom he has forwarded the data concerned accordingly as soon as possible.

3. The data which have been removed shall be destroyed, unless legal rules on preservation prevent this. ...

Section 64

1. There shall be a Supervisory Board for the intelligence and security services.

2. The Supervisory Board shall be charged with:

a. supervision of the legality of the execution of the provisions of this Act ...

c. advising the Ministers concerned in relation to the investigation and consideration of complaints; ...

Section 65

1. The Supervisory Board shall consist of three members, including the chairman.

2. The members shall be appointed for six years by royal decree (*Koninklijk Besluit*) following collective nomination by the Ministers concerned and can be reappointed only once. For the appointment of the members the Lower House of Parliament shall nominate three persons for each vacancy, one of whom shall be chosen by the Ministers concerned. In making its nomination the Lower House shall take into account, as it thinks fit, a list of recommended persons naming at least three persons for each vacancy prepared by the Vice-President of the Council of State (*Raad van State*), the President of the Supreme Court and the National Ombudsman.

3. The Ministers concerned may request the Lower House to submit a new nomination. ...

Section 66

The members of the Supervisory Board shall be dismissed by royal decree following collective nomination by the Ministers concerned:

...

g. if in the judgment (*oordeel*) of the Ministers concerned collectively, having taken note of the opinion of the Lower House, the person concerned by his acts or omissions seriously damages the trust to be placed in him.

Section 72

The meetings of the Supervisory Board shall not be public.

Section 78

1. Within the framework of its supervisory task, referred to in Section 64, second paragraph, sub-paragraph a, the Supervisory Board is empowered to investigate the way in which that which is provided in or pursuant to this Act ... has been carried out.

2. The Supervisory Board may also carry out an investigation as referred to in the first paragraph in response to a request to that effect from either of the Houses of Parliament.

3. The Minister concerned and one or both Houses of Parliament shall be informed of intended investigations, in confidence if need be.

Section 79

1. The Supervisory Board shall draw up a supervision report following its investigations. The supervision report shall be public, save as regards information as referred to in section 8, third paragraph, of this Act.

2. Before finalising the supervision report, the Supervisory Board shall offer the Minister concerned the opportunity to react to the findings contained in the supervisory report within a reasonable time set by the board.

3. Having received the reaction of the Minister concerned, the Supervisory Board shall finalise the supervision report. It may, on the basis of its findings, make recommendations to the Minister concerned regarding any measures to be taken.

4. The supervisory report, once it is finalised, shall be transmitted to the Minister concerned by the Supervisory Board.

5. The Minister concerned shall forward the supervisory report and his reaction thereto to both Houses of Parliament within six weeks. Information as referred to in section 8, third paragraph, of this Act shall in all cases be omitted. That information may be communicated to one or both Houses of Parliament for their confidential information.

Section 81

1. Data which the Ministers concerned, the heads of the [intelligence and security] services, ... and other officials involved in the execution of this Act ... have submitted to the Supervisory Board for it to carry out its tasks and which are kept by it shall not be public. ...

Section 82

Sections 15 and 16 shall apply by analogy to the Supervisory Board.

Section 83

1. Any person may lodge a complaint with the National Ombudsman about the actions or presumed actions of the Ministers concerned, the heads of the services, ... and the persons working for the services in the execution of this Act ... against (*jegens*) natural or legal persons.

2. Before lodging a complaint with the National Ombudsman, the complainant shall give notice to the Minister concerned of the complaint and offer him the opportunity to express his views on the matter.

3. The Minister shall, before offering his views as referred to in the second paragraph, obtain the advice of the Supervisory Board. ... [The Minister] shall not be able to give instructions to the Supervisory Board.

4. In complaints proceedings in which the Minister concerned, persons working under his responsibility or the Supervisory Board are obliged pursuant to section 9:31 of the General Administrative Law Act (*Algemene wet bestuursrecht*) to give information or surrender documents to the National Ombudsman, section 9:31, fifth and sixth paragraphs [which empower the National Ombudsman to decide whether any refusal to surrender or grant access to such information or documents is justified, see below] shall not apply.

5. If the Minister concerned, persons working under his responsibility or the Supervisory Board are obliged to surrender documents, it shall be sufficient to make the documents concerned available for inspection. The documents concerned shall not be copied in any way.

Section 84

1. The National Ombudsman shall inform the complainant of his opinion of the complaint in writing, giving reasons to the extent that the security or other weighty interests of the State admit of it.

2. The National Ombudsman shall inform the Minister concerned of his opinion of the complaint in writing. The National Ombudsman may, in his communication, make such reasoned recommendations as he sees fit. The National Ombudsman may, if in his view the purport of the recommendations so justifies, also communicate them to the complainant.

3. The Minister concerned shall inform the National Ombudsman within six weeks and in writing of the consequences which he attaches to the latter's opinion and recommendations.

4. The Minister concerned shall forward the National Ombudsman's opinion, his advice, and the consequences to be attached thereto by the Minister concerned to one or both Houses of Parliament. The information referred to in section 8, third paragraph, shall be omitted in all cases. This information may be communicated to one or both of the Houses of Parliament for their confidential information."

D. The General Administrative Law Act

52. The General Administrative Law Act contains provisions specific to proceedings before an Ombudsman (Chapter 9, Title 2). As relevant to the case, these provide as follows:

"Section 9:17

The expression 'Ombudsman' shall mean:

a. the National Ombudsman, ...

Section 9:18

1. Any person shall have the right to lodge a written request with the Ombudsman to investigate the way in which an administrative organ (*bestuursorgaan*) has conducted itself in a specific matter vis-à-vis them or someone else.

...

3. The Ombudsman shall be obliged to comply with a request as referred to in the first paragraph, unless section 9:22 ... applies.

Section 9:20

1. Before lodging the request with an Ombudsman, the petitioner (*verzoeker*) shall lodge a complaint with the administrative organ concerned, unless this cannot reasonably be expected of them. ...

Section 9:22

The Ombudsman is not competent (*bevoegd*) to investigate or continue an investigation if the request concerns:

a. a matter which belongs to general Government policy, including general policy for the maintenance of the legal order (*rechtsorde*), or the general policy of the administrative organ in question;

...

d. conduct in relation to which a decision (*uitspraak*) has been given by an administrative tribunal;

e. conduct in relation to which proceedings are pending before a different jurisdictional body, or an appeal lies against a decision which has been given in such proceedings as the case may be;

f. conduct that is subject to supervision by the judiciary.

Section 9:27

1. The Ombudsman shall consider whether or not the administrative organ has conducted itself with propriety (*behoorlijk*) in the matter which he has investigated.

2. If a jurisdictional body has given a decision in relation to the conduct to which the Ombudsman's investigation relates, the Ombudsman shall have regard to the legal grounds on which that decision is wholly or partially based.

3. The Ombudsman may make recommendations to the administrative organ following (*naar aanleiding van*) his investigations.

Section 9:31

1. The administrative organ, persons working under its responsibility – even after ceasing their activities – , witnesses and the petitioner shall give the Ombudsman the necessary information and shall appear before him when invited to do so. The same obligation is incumbent on every collegiate body (*college*), it being understood that the collegiate body shall determine which of its members shall comply with the obligations, unless the Ombudsman indicates one or more particular members. The Ombudsman may order persons concerned who have been summoned to appear in person.

2. The Ombudsman can only obtain information relating to policy conducted under the responsibility of a minister or another administrative organ from the persons and collegiate bodies concerned through the intervention of the Minister or that administrative organ as the case may be. The organ through whose intervention the information is to be obtained may be represented by civil servants at hearings.

3. Within a time-limit to be set by the Ombudsman, documents held by the administrative organ, the person to whose conduct the investigation relates and others shall be handed over to [the Ombudsman] for the purpose of the investigation after he has so requested in writing.

4. The persons summoned in accordance with the first paragraph, or the persons who are under an obligation to surrender documents in accordance with the third paragraph, may, if there are weighty reasons to do so, refuse to give information or surrender documents as the case may be or inform the Ombudsman that he and he only shall be allowed to take cognisance of the information or the documents.

5. The Ombudsman shall decide whether the refusal or restriction on taking cognisance referred to in the fourth paragraph is justified.

6. If the Ombudsman has decided that the refusal is justified, the obligation shall be cancelled."

E. The National Ombudsman Act

53. The National Ombudsman Act (*Wet Nationale ombudsman*) is applicable to the conduct of administrative organs including Government Ministers (section 1a(1)(a)). Conduct of a civil servant in the exercise of his or her functions is imputed to the administrative organ responsible (section 1a(4)).

54. The National Ombudsman is appointed by the Lower House of Parliament, which may take such notice as it sees fit of a recommendation of three persons submitted jointly by the President of the Supreme Court, the Vice-President of the Council of State and the President of the Court of Audit (*Algemene Rekenkamer*). The appointment is for six years at a time; the incumbent may be reappointed (section 2 (2)-(4)).

55. The Lower House of Parliament has the power to dismiss the National Ombudsman on specific grounds. These include unfitness as a

result of invalidity or disease; taking up an official position or occupation incompatible with the position of National Ombudsman; loss of Netherlands nationality; conviction of an indictable offence (*misdrijf*) or any measure entailing deprivation of liberty, by a final and binding judgment; and bankruptcy, receivership (*curatele*), debt adjustment proceedings (*schuldsanering*) and detention (*gijzeling*) in connection with a debt pursuant to a final and binding judgment (section 3(2)). If proceedings of such nature are pending against the National Ombudsman but have not yet been brought to a conclusion, the Lower House of Parliament has the power to suspend him and withhold his salary (section 4).

F. The Government Accounts Act 2001

56. Section 6 of the Government Account Act 2001 (*Comptabiliteitswet 2001*) provides that a Government budget can comprise non-policy items (*niet-beleidsartikelen*) including items described as "secret" for liabilities, expenses and income that in the interests of the State should not be made public by attribution to a policy item. Section 87(3) provides that the Court of Audit's supervisory tasks with respect to secret items, including the examination of information held by Government bodies (section 87(1)) and the obtaining of information from Government Ministers – which the latter are bound to hand over – shall be carried out by the President of the Court of Audit in person.

G. Relevant domestic case-law

57. Until 11 November 1977, the Netherlands Supreme Court did not recognise any journalistic privilege of non-disclosure. On that date, it handed down a judgment in which it found that a journalist, when asked as a witness to disclose his source, was obliged to do so unless it could be regarded as justified in the particular circumstances of the case that the interest of non-disclosure of a source outweighed the interest served by such disclosure.

58. This principle was reversed by the Supreme Court in a landmark judgment of 10 May 1996 on the basis of the principles set out in the Court's judgment of 27 March 1996 in the case of *Goodwin v. the United Kingdom* (*Reports of Judgments and Decisions* 1996-II). In this ruling, the Supreme Court accepted that, pursuant to Article 10 of the Convention, a journalist was in principle entitled to non-disclosure of an information source unless, on the basis of arguments to be presented by the party seeking disclosure of a source, the court was satisfied that such disclosure was necessary in a democratic society for one or more of the legitimate aims set out in Article 10 § 2 of the Convention (*Nederlandse Jurisprudentie* – Netherlands Law Reports – 1996, no. 578).

59. In a judgment given on 2 September 2005 concerning the search of premises of a publishing company on 3 May 1996 (*Nederlandse Jurisprudentie* 2006, no. 291), the Supreme Court held *inter alia*:

> "The right of freedom of expression, as set out in Article 10 of the Convention, encompasses also the right freely to gather news (see, amongst others, *Goodwin v. the United Kingdom*, judgment of 27 March 1996, NJ 1996, no. 577; and *Roemen and Schmit v. Luxembourg*, judgment of 25 February 2003 [ECHR 2003-IV]). An interference with the right freely to gather news – including the interest of protection of a journalistic source – can be justified under Article 10 § 2 in so far as the conditions set out in that provision have been complied with. That means in the first place that the interference must have a basis in national law and that those national legal rules must have a certain precision. Secondly, the interference must serve one of the aims mentioned in Article 10 § 2. Thirdly, the interference must be necessary in a democratic society for attaining such an aim. In this, the principles of subsidiarity and proportionality play a role. In that framework it must be weighed whether the interference is necessary to serve the interest involved and therefore whether no other, less far-reaching ways (*minder bezwarende wegen*) can be followed along which this interest can be served to a sufficient degree. Where it concerns a criminal investigation, it must be considered whether the interference with the right freely to gather news is proportionate to the interest served in arriving at the truth. In that last consideration, the gravity of the offences under investigation will play a role."

III. RELEVANT INTERNATIONAL MATERIALS

60. Several international instruments concern the protection of journalistic sources; among others, the *Resolution on Journalistic Freedoms and Human Rights*, adopted at the 4th European Ministerial Conference on Mass Media Policy (Prague, 7-8 December 1994) and the Resolution on the Confidentiality of Journalists' Sources by the European Parliament (18 January 1994, *Official Journal of the European Communities* No. C 44/34).

61. Moreover, Recommendation No. R(2000) 7 on the right of journalists not to disclose their sources of information was adopted by the Committee of Ministers of the Council of Europe on 8 March 2000 and states, in so far as relevant:

> "[The Committee of Ministers] Recommends to the governments of member States:
>
> 1. to implement in their domestic law and practice the principles appended to this recommendation,
>
> 2. to disseminate widely this recommendation and its appended principles, where appropriate accompanied by a translation, and
>
> 3. to bring them in particular to the attention of public authorities, police authorities and the judiciary as well as to make them available to journalists, the media and their professional organisations.
>
> Appendix to Recommendation No. R (2000) 7
>
> *Principles concerning the right of journalists not to disclose their sources of information*

Definitions

For the purposes of this Recommendation:

a. the term 'journalist' means any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication;

b. the term 'information' means any statement of fact, opinion or idea in the form of text, sound and/or picture;

c. the term 'source' means any person who provides information to a journalist;

d. the term 'information identifying a source' means, as far as this is likely to lead to the identification of a source:

i. the name and personal data as well as voice and image of a source,

ii. the factual circumstances of acquiring information from a source by a journalist,

iii. the unpublished content of the information provided by a source to a journalist, and

iv. personal data of journalists and their employers related to their professional work.

Principle 1 (Right of non-disclosure of journalists)

Domestic law and practice in member States should provide for explicit and clear protection of the right of journalists not to disclose information identifying a source in accordance with Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the Convention) and the principles established herein, which are to be considered as minimum standards for the respect of this right.

Principle 2 (Right of non-disclosure of other persons)

Other persons who, by their professional relations with journalists, acquire knowledge of information identifying a source through the collection, editorial processing or dissemination of this information, should equally be protected under the principles established herein.

Principle 3 (Limits to the right of non-disclosure)

a. The right of journalists not to disclose information identifying a source must not be subject to other restrictions than those mentioned in Article 10, paragraph 2 of the Convention. In determining whether a legitimate interest in a disclosure falling within the scope of Article 10, paragraph 2 of the Convention outweighs the public interest in not disclosing information identifying a source, competent authorities of member States shall pay particular regard to the importance of the right of non-disclosure and the pre-eminence given to it in the case-law of the European Court of Human Rights, and may only order a disclosure if, subject to paragraph b, there exists an overriding requirement in the public interest and if circumstances are of a sufficiently vital and serious nature.

b. The disclosure of information identifying a source should not be deemed necessary unless it can be convincingly established that:

i. reasonable alternative measures to the disclosure do not exist or have been exhausted by the persons or public authorities that seek the disclosure, and

ii. the legitimate interest in the disclosure clearly outweighs the public interest in the non-disclosure, bearing in mind that:

- an overriding requirement of the need for disclosure is proved,

- the circumstances are of a sufficiently vital and serious nature,

- the necessity of the disclosure is identified as responding to a pressing social need, and

- member States enjoy a certain margin of appreciation in assessing this need, but this margin goes hand in hand with the supervision by the European Court of Human Rights.

c. The above requirements should be applied at all stages of any proceedings where the right of non-disclosure might be invoked.

Principle 4 (Alternative evidence to journalists' sources)

In legal proceedings against a journalist on grounds of an alleged infringement of the honour or reputation of a person, authorities should consider, for the purpose of establishing the truth or otherwise of the allegation, all evidence which is available to them under national procedural law and may not require for that purpose the disclosure of information identifying a source by the journalist.

Principle 5 (Conditions concerning disclosures)

a. The motion or request for initiating any action by competent authorities aimed at the disclosure of information identifying a source should only be introduced by persons or public authorities that have a direct legitimate interest in the disclosure.

b. Journalists should be informed by the competent authorities of their right not to disclose information identifying a source as well as of the limits of this right before a disclosure is requested.

c. Sanctions against journalists for not disclosing information identifying a source should only be imposed by judicial authorities during court proceedings which allow for a hearing of the journalists concerned in accordance with Article 6 of the Convention.

d. Journalists should have the right to have the imposition of a sanction for not disclosing their information identifying a source reviewed by another judicial authority.

e. Where journalists respond to a request or order to disclose information identifying a source, the competent authorities should consider applying measures to limit the extent of a disclosure, for example by excluding the public from the disclosure with due respect to Article 6 of the Convention, where relevant, and by themselves respecting the confidentiality of such a disclosure.

Principle 6 (Interception of communication, surveillance and judicial search and seizure)

a. The following measures should not be applied if their purpose is to circumvent the right of journalists, under the terms of these principles, not to disclose information identifying a source:

i. interception orders or actions concerning communication or correspondence of journalists or their employers,

ii. surveillance orders or actions concerning journalists, their contacts or their employers, or

iii. search or seizure orders or actions concerning the private or business premises, belongings or correspondence of journalists or their employers or personal data related to their professional work.

b. Where information identifying a source has been properly obtained by police or judicial authorities by any of the above actions, although this might not have been the purpose of these actions, measures should be taken to prevent the subsequent use of this information as evidence before courts, unless the disclosure would be justified under Principle 3.

Principle 7 (Protection against self-incrimination)

The principles established herein shall not in any way limit national laws on the protection against self-incrimination in criminal proceedings, and journalists should, as far as such laws apply, enjoy such protection with regard to the disclosure of information identifying a source."

62. For the precise application of the Recommendation, the explanatory notes specified the meaning of certain terms. As regards the term "sources" the following was set out:

"c. Source

17. Any person who provides information to a journalist shall be considered as his or her 'source'. The protection of the relationship between a journalist and a source is the goal of this Recommendation, because of the 'potentially chilling effect' an order of source disclosure has on the exercise of freedom of the media (see, Eur. Court H.R., Goodwin v. the United Kingdom, 27 March 1996, para. 39). Journalists may receive their information from all kinds of sources. Therefore, a wide interpretation of this term is necessary. The actual provision of information to journalists can constitute an action on the side of the source, for example when a source calls or writes to a journalist or sends to him or her recorded information or pictures. Information shall also be regarded as being 'provided' when a source remains passive and consents to the journalist taking the information, such as the filming or recording of information with the consent of the source."

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLES 8 AND 10 OF THE CONVENTION

63. Articles 8 and 10 provide as follows:

Article 8

"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."

Article 10

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. **The use of "special powers" against the second and third** applicants

64. The applicants argued that the use of special powers against the second and third applicants had not been "in accordance with the law", as required by Article 8 § 2 of the Convention, or "prescribed by law", as required by Article 10 § 2 of the Convention.

65. The Government denied that there had been a violation of either Article.

1. Admissibility

66. The Court considers that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3(a) of the Convention. Nor is it inadmissible on any other grounds. It must therefore be declared admissible.

2. Argument before the Court

(a) Government

67. The Government recognised that the second and third applicants had been under investigation and that special powers had been used against them, including the power to intercept and record telecommunications. This had undoubtedly entailed interference with their right to respect for their private and family life, protected by Article 8; it could also be construed as an interference with their freedom to receive and impart information and ideas, protected by Article 10.

68. The statutory basis for the interference had been constituted by section 6(2)(a) of the 2002 Intelligence and Security Services Act, which – along with its drafting history – was at all times accessible to the public.

69. Referring to the Court's case-law, in particular *Weber and Saravia v. Germany* (dec.), no. 54934/00, ECHR 2006-XI, the Government stated that the situations which might attract the use of the AIVD's special powers were set out in section 6 of the 2002 Intelligence and Security Services Act. Moreover, the AIVD published annual reports in which it identified the areas on which it had focused in the past year and the areas on which it would focus in the year ahead. The duty to publish an annual report had been expressly included in the legislation precisely to enhance the transparency of the AIVD's use of its powers. The nature of the "offences" which might give rise to the interference in question was thus as foreseeable as it could be. The Government asked the Court to bear in mind that the expression "offence", in the context of cases such as the present, had a connotation different from its primary meaning derived from criminal law.

70. Even so, situations were bound to occur which were not foreseeable, but in which action by the AIVD was clearly necessary in view of its task and the interests which it served. The present case was one such.

71. Safeguards were in place. As the Supervisory Board had established, the use of special powers had not continued any longer than was permissible in the light of the applicable provisions. The processing – examination, use and storage – of data was subject to the statutory requirements set out in section 12 of the 2002 Intelligence and Security Services Act. Shortcomings identified by the Supervisory Board had been addressed and the data wrongly recorded had been removed and destroyed (see paragraph 43 above).

72. Statutory requirements set out in section 38 of the 2002 Intelligence and Security Services Act governed the transmission of information to the Public Prosecution Service. As was reflected in the Minister's letter of 6 December 2006 to the applicants' counsel (see paragraph 43 above), these had been complied with.

73. A monitoring and control system was in place, consisting of the following bodies:

a) the Upper and Lower Houses of Parliament, and insofar as the covert operations of the intelligence and security services are concerned, the Committee on the Intelligence and Security Services of the Lower House;

b) the Court of Audit and – in the case of the secret budget items of the intelligence and security services – the president of the Court of Audit personally;

c) the National Ombudsman;

d) the administrative courts in the case of decisions subject to judicial review, such as requests for access to data;

e) the civil courts where an intelligence or security service has committed an unlawful act in respect of a person or organisation;

f) the criminal courts where an official was called to account as a defendant or was summoned as a witness;

g) the Supervisory Board.

These various supervisory and monitoring bodies did not exclude one another. However, the supervision and monitoring by each of the bodies was subject to limitations depending on the type of authority and the stage of the investigation. These limitations followed from the intrinsically secret nature of the activities of intelligence and security services.

74. The use of special powers required the prior authorisation of the Minister of the Interior and Kingdom Relations. The request for authorisation had to mention the particular status, if any, of the person under investigation – for example, the status of journalist.

75. The interference complained of had had a "legitimate aim" in that it served the interests of national security, which had been directly compromised by the leaking of secret classified information.

76. As to "necessity in a democratic society", the Government pointed out that protecting national security was one of the main functions of the State. If it was found that secret classified information had been leaked from the AIVD, its ability to operate reliably was at stake and hence national security as well. In this case, moreover, the nature and content of the leaked information had been such that an investigation into the leak had been necessary, taking into account the statutory duty of care in respect of the security of persons with whose help data were collected and the secrecy of the relevant data and sources. For example, the operational names of two sources had been published in *De Telegraaf* together with contextual information capable of enabling dangerous criminals to discover the true identity of the persons concerned. There had therefore been a statutory duty to take action.

77. An alternative to the use of special powers had not been available, given that those responsible for the leak had a vested interest in concealing the facts and circumstances.

78. The AIVD's purpose had not been to identify the applicants' journalistic sources; source protection was therefore not in issue.

79. Domestic law itself – to wit, sections 31 and 32 of the 2002 Intelligence and Security Services Act – laid down the requirements of subsidiarity and proportionality, subject to monitoring by the Supervisory Board and with the possibility of lodging a complaint with the National Ombudsman.

(b) Applicants

80. The applicants agreed with the Government that the use of special powers against the second and third applicants constituted an "interference"

with their rights under Articles 8 and 10. They suggested, however, that the Government's admission that they had been "targets" within the meaning of section 6(2)(a) of the 2002 Intelligence and Security Services Act was inconsistent with the position taken by the domestic courts, in particular the Court of Appeal (see paragraph 31 above).

81. If the second and third applicants had *not* themselves been "targets" within the meaning of section 6(2)(a), then the use of special powers against them had lacked a statutory basis. If, on the contrary view, the second and third applicants *had* been targets – a position which the applicants described as "preposterous", since it would imply that they constituted a menace to the continued existence of the democratic legal order –, then a statutory basis had to be admitted.

82. However, safeguards against abuse were insufficient given that there was no prior judicial review of the use of special powers. Authorisation given by the Minister of the Interior and Kingdom Relations was not sufficient, since the Minister was hardly independent and impartial.

83. A necessity in a democratic society for the interference had not been shown. The AIVD documents received by the applicants related to the period 1997-2000; the newspaper articles concerned had all been published in 2006, approximately six years later. In the applicants' submission, there was no appearance of any danger to informants, whose identity the newspaper publications did not reveal; nor had the AIVD's operating procedures been divulged. At all events, the information itself contained in the documents had all been in the hands of criminals for a long time already.

3. The Court's assessment

(a) Interference

84. The applicant and respondent parties agree that there has been an "interference" with the rights of the second and third applicants under Articles 8 and 10 of the Convention, but disagree on its precise nature.

85. The Government dispute the applicants' position that the protection of journalistic sources is in issue. They argue that the AIVD resorted to the use of special powers not to establish the identity of the applicants' journalistic sources of information, but solely to identify the AIVD staff member who had leaked the documents.

86. The Court is prepared to accept that the AIVD's purpose in seeking to identify the person or persons who had supplied the secret documents to the applicants was subordinate to its main aim, which was to discover and then close the leak of secret information from within its own ranks. However, that is not decisive (see *Sanoma Uitgevers B.V. v. the Netherlands* [GC], no. 38224/03, § 66, 14 September 2010). The Court's understanding of the concept of journalistic "source" is "any person who provides information to a journalist"; it understands "information identifying a

source" to include, as far as they are likely to lead to the identification of a source, both "the factual circumstances of acquiring information from a source by a journalist" and "the unpublished content of the information provided by a source to a journalist" (see Recommendation No. R(2000) 7 on the right of journalists not to disclose their sources of information (quoted in paragraph 61 above); compare also *Sanoma*, §§ 65-66, and *Weber and Saravia*, §§ 144-45).

87. As in *Roemen and Schmit v. Luxembourg*, no. 51772/99, § 52, ECHR 2003-IV; *Ernst and Others v. Belgium*, no. 33400/96, § 100, 15 July 2003; *Tillack v. Belgium*, no. 20477/05, § 64, 27 November 2007; and *Sanoma*, *loc. cit.*, the Court must therefore find that the AIVD sought, by the use of its special powers, to circumvent the protection of a journalistic source (compare and contrast *Weber and Saravia*, cited above, § 151).

88. Although questions raised by surveillance measures are usually considered under Article 8 alone, in the present case they are so intertwined with the Article 10 issue that the Court finds it appropriate to consider the matter under Articles 8 and 10 concurrently.

(b) **"In accordance with the law/prescribed by law"**

89. The Court must now decide whether the interference was "in accordance with the law" (Article 8) or "prescribed by law" (Article 10) – expressions which, although they differ in the English text of the Convention (both correspond to *prévue(s) par la loi* in the French version), are identical in meaning (see The Sunday Times *v. the United Kingdom (no. 1)*, 26 April 1979, § 48, Series A no. 30, and *Silver and Others v. the United Kingdom*, 25 March 1983, § 85, Series A no. 61).

90. The Court reiterates its case-law according to which the expression "in accordance with the law" not only requires the impugned measure to have some basis in domestic law, but also refers to the quality of the law in question, requiring that it should be accessible to the person concerned and foreseeable as to its effects. The law must be compatible with the rule of law, which means that it must provide a measure of legal protection against arbitrary interference by public authorities with the rights safeguarded by Article 8 § 1 and Article 10 § 1. Especially where, as here, a power of the executive is exercised in secret, the risks of arbitrariness are evident. 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 (see *Weber and Saravia*, cited above, §§ 93-95 and 145; *Segerstedt-Wiberg and Others*

v. Sweden, no. 62332/00, § 76, ECHR 2006-VII; *Liberty and Others v. the United Kingdom*, no. 58243/00, §§ 62-63; 1 July 2008; *Kennedy v. the United Kingdom*, no. 26839/05, § 152, 18 May 2010).

91. There is no suggestion that the law was not accessible.

92. The letters which the Minister of the Interior and Kingdom Relations sent on 6 December 2006 to the Lower House of Parliament (paragraph 41 above) and to the applicants' counsel (paragraph 43) show that the use of special powers against the second and third applicants was considered lawful for the purposes of section 6(2)(a) of the 2002 Intelligence and Security Services Act. The Supreme Court's judgment (§ 3.5.3, see paragraph 33 above) is based on the same view, at least for an initial period. The Court therefore finds that the statutory basis for the interference in question was section 6(2)(a) of the 2002 Intelligence and Security Services Act.

93. The possibility that the applicants might be placed under surveillance was not predictable in the sense that their situation corresponded to a precise statutory prescription. Nevertheless, even though the second and third applicants may resent the suggestion that their actions constituted a threat to the Netherlands democratic legal order, they could not reasonably be unaware that the information which had fallen into their hands was authentic classified information that had unlawfully been removed from the keeping of the AIVD and that publishing it was likely to provoke action aimed at discovering its provenance. On its own reading of section 6(2)(a) and (c) of the 2002 Intelligence and Security Services Act, the Court is prepared to accept that the interference complained of was, in that sense, foreseeable.

94. As to the available safeguards, the applicants do not allege that the array of supervisory and monitoring procedures described by the Government (see paragraph 73 above) is in itself insufficient.

95. Rather, it is the applicants' contention that their status as journalists required special safeguards to ensure adequate protection of their journalistic sources. The Court will now turn to this issue.

96. In *Weber and Saravia*, the interference with the applicants' rights under Articles 8 and 10 consisted of the interception of telecommunications in order to identify and avert dangers in advance, or "strategic monitoring" as it is also called. The first applicant in that case being a journalist, the Court found that her right to protect her journalistic sources was in issue (*loc. cit.*, §§ 144-45). However, the aim of strategic monitoring was not to identify journalists' sources. Generally the authorities would know only when examining the intercepted telecommunications, if at all, that a journalist's conversation had been monitored. Surveillance measures were, in particular, not directed at uncovering journalistic sources. The interference with freedom of expression by means of strategic monitoring could not, therefore, be characterised as particularly serious (*loc. cit.*,

§ 151). Although admittedly there was no special provision for the protection of freedom of the press and, in particular, the non-disclosure of sources once the authorities had become aware that they had intercepted a journalist's conversation, the safeguards in place, which had been found to satisfy the requirements of Article 8, were considered adequate and effective for keeping the disclosure of journalistic sources to an unavoidable minimum (*loc. cit.*, § 151).

97. The present case is characterised precisely by the targeted surveillance of journalists in order to determine from whence they have obtained their information. It is therefore not possible to apply the same reasoning as in *Weber and Saravia*.

98. The Court has indicated, when reviewing legislation governing secret surveillance in the light of Article 8, that in a field where abuse is potentially so easy in individual cases and could have such harmful consequences for democratic society as a whole, it is in principle desirable to entrust supervisory control to a judge (see *Klass and Others v. Germany*, 6 September 1978, § 56, Series A no. 28, and *Kennedy*, cited above, § 167). However, in both cases the Court was prepared to accept as adequate the independent supervision available. In *Klass and Others*, this included a practice of seeking prior consent to surveillance measures of the G 10 Commission, an independent body chaired by a president who was qualified to hold judicial office and which moreover had the power to order the immediate termination of the measures in question (*mutatis mutandis*, *Klass and Others*, §§ 21 and 51; see also *Weber and Saravia*, §§ 25 and 117). In *Kennedy* (*loc. cit.*) the Court was impressed by the interplay between the Investigatory Powers Tribunal ("IPT"), an independent body composed of persons who held or had held high judicial office and experienced lawyers which had the power, among other things, to quash interception orders, and the Interception of Communications Commissioner, likewise a functionary who held or had held high judicial office (*Kennedy*, § 57) and who had access to all interception warrants and applications for interception warrants (*Kennedy*, § 56).

99. In contrast, in *Sanoma*, an order involving the disclosure of journalistic sources was given by a public prosecutor. The Court dismissed as inadequate in terms of Article 10 the involvement of an investigating judge, since his intervention, conceded voluntarily by the public prosecutor, lacked a basis in law and his advice was not binding. Judicial review *post factum* could not cure these failings, since it could not prevent the disclosure of the identity of the journalistic sources from the moment when this information came into the hands of the public prosecutor and the police (*loc. cit.*, §§ 96-99).

100. In the instant case, as the Agent of the Government admitted at the hearing in reply to a question from the Court, the use of special powers would appear to have been authorised by the Minister of the Interior and

Kingdom Relations, if not by the head of the AIVD or even a subordinate AIVD official, but in any case without prior review by an independent body with the power to prevent or terminate it (section 19 of the 2002 Intelligence and Security Services Act, see paragraph 51 above).

101. Moreover, review *post factum*, whether by the Supervisory Board, the Committee on the Intelligence and Security Services of the Lower House of Parliament or the National Ombudsman, cannot restore the confidentiality of journalistic sources once it is destroyed.

102. The Court thus finds that the law did not provide safeguards appropriate to the use of powers of surveillance against journalists with a view to discovering their journalistic sources. There has therefore been a violation of Articles 8 and 10 of the Convention.

B. The order to surrender the documents

103. The applicants argued that the order to surrender the original documents, ostensibly for the purpose of restoring the documents to the AIVD, had in fact been intended to make possible the positive identification of the journalistic source. The applicants alleged a violation of their freedom, as purveyors of news, to impart information as guaranteed by Article 10 of the Convention.

104. The Government denied that there had been any such violation.

1. Admissibility

105. The Court considers that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3(a) of the Convention. Nor is it inadmissible on any other grounds. It must therefore be declared admissible.

2. Argument before the Court

(a) Government

106. Under the head of "duties and responsibilities", the Government raised two points.

107. Firstly, the Government considered the present case different in essential respects from *Voskuil v. the Netherlands*, no. 64752/01, 22 November 2007. The primary purpose of the surrender order had not been to identify the applicants' journalistic sources, nor even the leak from within the AIVD – who was identifiable simply by studying the content of the information unlawfully leaked – but to withdraw the documents from public circulation. It was moreover found that the applicants had not returned all of the documents immediately; had they done so at the outset, there would have been no need for the surrender order.

108. Secondly, the Government submitted that although the fact itself that secret classified documents had fallen into the hands of the criminal classes was a matter of public interest and therefore newsworthy, the applicants had gone beyond what was necessary in publishing information which they contained. Details published had included the code names of two informants and contextual information capable of identifying them, which had compromised both their safety (and that of their families and others in their immediate circle of acquaintance) and national security.

109. The surrender order undoubtedly constituted an "interference".

110. The interference had been "prescribed by law". The crucial difference between the present case and *Sanoma* was that the lawfulness of the surrender order was assessed by a court by virtue of its statutory power before the documents were handed over for inspection.

111. The "legitimate aims" pursued by the interference had been "national security" and "the prevention of crime".

112. Finally, the interference had been "necessary in a democratic society" for the furtherance of these aims. As stated above, it was necessary to ensure that all the documents should be returned to the AIVD. It was also important to investigate whether it was possible to determine if there had been access to the documents and if so, by whom (other than the second and third applicants and H., by then already a suspect). Again as already mentioned, the safety of two informants and members of their families and their immediate circle was in jeopardy as well.

113. A surrender order had been the least intrusive measure available, and therefore to be preferred to a search of the applicants' premises such as those carried out by the authorities in the cases of *Roemen and Schmit* and *Ernst and Others*, cited above.

114. Finally, and again as already noted, there had been an independent review by a court before the documents were passed on to the National Police Investigations Department.

(b) Applicants

115. The applicants complained that although ostensibly the primary purpose of the surrender order had been to withdraw the documents from public circulation, in fact the intention had been to subject them to technical examination and identify the applicants' source. They pointed to the public prosecutor's admission (see paragraph 22 above) and that of the Government that the identity of the AIVD official who leaked the documents had already been known simply from studying the content of the documents and identifying the AIVD officials who had had access to them, and also to the judgment convicting H. of the leaks (see paragraph 37 above), which reflected the fact that the documents had actually been examined.

116. The documents obtained by the second and third applicants contained relatively old information, which moreover had already become known in criminal circles. The Government's interest in keeping the information secret had therefore not been prejudiced by the publications in *De Telegraaf*, but by the leak from within the AIVD; it followed that the action taken against the applicants could have had no other purpose than to trace the path followed by the documents back to the leak.

117. Referring to the above-mentioned *Sanoma* judgment, they argued that orders to disclose sources might have a detrimental impact, not only on the source, but also on the newspaper itself, which would no longer be trusted by potential sources, and on the public, who had an interest in receiving information imparted through anonymous sources. In addition, they argued, referring to the same judgment, that there was no procedure attended by adequate legal safeguards for them to enable an independent assessment as to whether the interest of the criminal investigation overode the public interest in the protection of journalistic sources.

3. The Court's assessment

(a) Interference

118. All agree that there has been an "interference" with the first applicant's freedom to receive and impart information. The Court so finds (see *Sanoma*, cited above, § 72).

(b) Prescribed by law

119. It is not in dispute that the surrender order had a statutory basis, namely Article 96a of the Code of Criminal Procedure (see paragraph 50 above). The Court so finds (see *Sanoma*, cited above, § 86).

120. As regards the procedural safeguards available, the Court finds that the present case differs in essential respects from *Sanoma*. The documents were placed in a container by a notary and sealed, after which the container with the documents was handed over to the investigating judge to be kept in a safe unopened pending the outcome of objection proceedings in the Regional Court (see paragraph 20 above). The applicants agreed to this procedure with the public prosecutor. Moreover, as the Government correctly point out, it had a statutory basis, namely Article 552a of the Code of Criminal Procedure, which moreover empowers the Regional Court to give any orders needed (see paragraph 50 above; compare and contrast *Sanoma*, §§ 96-97).

121. The interference complained of was therefore "prescribed by law".

(c) Legitimate aim

122. It is not in dispute that the aims pursued by the interference were, at the very least, "national security" and "the prevention of crime" as the Government state. The Court so finds.

(d) Necessary in a democratic society

123. The test of "necessity in a democratic society" requires the Court to determine whether the "interference" complained of corresponded to a "pressing social need", whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it are relevant and sufficient (see, among many other authorities, The Sunday Times, cited above, § 62). In assessing whether such a "need" exists and what measures should be adopted to deal with it, the national authorities are left a certain margin of appreciation. This power of appreciation is not, however, unlimited but goes hand in hand with European supervision by the Court, whose task it is to give a final ruling on whether a restriction is reconcilable with freedom of expression as protected by Article 10 (see, among many other authorities, *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 88, ECHR 2004-XI; *Voskuil*, cited above, § 63; and *TV Vest AS and Rogaland Pensjonistparti v. Norway*, no. 21132/05, § 58, ECHR 2008 (extracts)).

124. The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" and whether it was "proportionate to the legitimate aim pursued". In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts (see, among many other authorities, *Hertel v. Switzerland*, 25 August 1998, § 46, *Reports* 1998-VI; *Cumpănă and Mazăre*, cited above, § 90; *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, §§ 68-71, ECHR 2004-XI; *Steel and Morris v. the United Kingdom*, no. 68416/01, § 87, ECHR 2005-II; *Mamère v. France*, no. 12697/03, § 19, ECHR 2006-XIII; *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 45, ECHR 2007-IV; *Voskuil*, cited above, § 63; and *Guja v. Moldova* [GC], no. 14277/04, § 69, ECHR 2008).

125. Since 1985 the Court has frequently made mention of the task of the press as purveyor of information and "public watchdog" (see, among

many other authorities, *Barthold v. Germany*, 25 March 1985, § 58, Series A no. 90; *Lingens v. Austria*, 8 July 1986, § 44, Series A no. 103; *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, § 63, Series A no. 239; *Cumpănă and Mazăre*, cited above, § 93; *Voskuil*, cited above, § 64; and *Financial Times Ltd. and Others v. the United Kingdom*, no. 821/03, § 59, 15 December 2009).

126. Under the terms of Article 10 § 2, the exercise of freedom of expression carries with it duties and responsibilities which also apply to the press. Article 10 protects a journalist's right – and duty – to impart information on matters of public interest provided that he is acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism (*Fressoz and Roire v. France* [GC], no. 29183/95, § 54, ECHR 1999-I; Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, § 65, ECHR 1999-III; and *Financial Times Ltd. and Others*, cited above, § 62).

127. Protection of journalistic sources is one of the basic conditions for press freedom, as is recognised and reflected in various international instruments including the Committee of Ministers Recommendation quoted in paragraph 61 above. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest (see *Goodwin*, cited above, § 39; *Voskuil*, cited above, § 65; *Financial Times Ltd. and Others*, cited above, § 59; and *Sanoma*, cited above, § 51).

128. While it may be true that the public perception of the principle of non-disclosure of sources would suffer no real damage where it was overridden in circumstances where a source was clearly acting in bad faith with a harmful purpose (for example, by intentionally fabricating false information), courts should be slow to assume, in the absence of compelling evidence, that these factors are present in any particular case. In any event, given the multiple interests in play, the Court emphasises that the conduct of the source can never be decisive in determining whether a disclosure order ought to be made but will merely operate as one, albeit important, factor to be taken into consideration in carrying out the balancing exercise required under Article 10 § 2 (*Financial Times Ltd. and Others*, cited above, § 63).

129. Turning to the facts of the case, the Court notes that before the Regional Court the public prosecutor stated that the primary purpose of the surrender order was to return them to the AIVD, although if the opportunity

arose to examine them for usable traces it would be taken. However, as the public prosecutor admitted, even without detailed technical examination of the documents the culprits could be found simply by studying the contents of the documents and identifying the officials who had had access to them (see paragraph 22 above). That being so, the need to identify the AIVD official concerned cannot alone justify the surrender order.

130. Although the full contents of the documents had not come to the knowledge of the general public, it is highly likely that that information had long been circulating outside the AIVD and had come to the knowledge of persons described by the parties as criminals. Withdrawing the documents from circulation could therefore no longer prevent the information which they contained – including the code names and other information identifying AIVD informants – from falling into the wrong hands (see The Sunday Times *v. the United Kingdom (no. 2)*, 26 November 1991, § 54, Series A no. 217; Observer *and* Guardian *v. the United Kingdom*, 26 November 1991, § 68, Series A no. 216; and *Vereniging Weekblad* Bluf! *v. the Netherlands*, 9 February 1995, § 45, Series A no. 306-A).

131. There remains the need for the AIVD to check whether all the documents removed from its keeping had been withdrawn from circulation. The Court accepts that this is a legitimate concern. However, that is not sufficient to find that it constituted "an overriding requirement in the public interest" justifying the disclosure of the applicant's journalistic source. The Court takes the view that the actual handover of the documents taken was not necessary: since – as appears from the Minister's letter of 20 December 2006 to the Lower House (see paragraph 18 above) – these were copies not originals, visual inspection to verify that they were complete, followed by their destruction (as was in fact proposed by the first applicant, see paragraph 22 above), would have sufficed.

132. In sum, "relevant and sufficient" reasons for the interference complained of have not been given. There has therefore been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

133. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

134. The applicants made no claims in respect of pecuniary or non-pecuniary damage.

B. Costs and expenses

135. In respect of costs and expenses, the applicants claimed a total sum of EUR 168.888,47 including value-added tax. They submitted detailed invoices and time-sheets.

136. The Government acknowledged the unusual volume and complexity of the case but considered the hourly rates charged excessive.

137. According to the Court's consistent case-law, applicants are entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum; furthermore, legal costs are recoverable only in so far as they relate to the violation found (see, as a recent authority, *S.T.S. v. the Netherlands*, no. 277/05, § 73, ECHR 2011, with further references).

138. In the present case, regard being had to the documents in its possession, the Court considers it reasonable to award the sum of EUR 60,000 not including value-added tax, plus any tax that may be chargeable to the applicants on that amount.

C. Default interest

139. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the remainder of the application admissible;

2. *Holds* unanimously that there has been a violation of Articles 8 and 10 of the Convention as regards the use by the AIVD of special powers against the second and third applicants;

3. *Holds* by five votes to two that there has been a violation of Article 10 of the Convention as regards the order for the surrender of documents addressed to the first applicant;

4. *Holds* unanimously
   (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 60,000 (sixty

thousand euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* unanimously the remainder of the applicants' claim for just satisfaction.

Done in English, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 22 November 2012.

Marialena Tsirli	Josep Casadevall
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges Myjer and López Guerra is annexed to this judgment.

J.C.M.
M.T.

JOINT PARTLY DISSENTING OPINION OF JUDGES MYJER AND LÓPEZ GUERRA

1. We voted with the majority finding that there was a violation in relation to the use of "special powers" against the second and third applicants.

2. As far as the order to surrender the documents is concerned, we are however of the opinion that there has been no violation. We consider that there are important distinctions to be made between the present case and other cases in which the Court has had to consider the importance of protecting journalistic sources.

3. We agree that civil servants may in certain circumstances have the right, and even the duty, to disclose information to the outside world in the public interest (see, for example, *Guja v. Moldova* [GC], no. 14277/04, §§ 72-97, ECHR 2008, and *Heinisch v. Germany*, no. 28274/08, §§ 62-93, ECHR 2011 (extracts)). However, neither the applicants nor the respondent Government have suggested that such circumstances obtained in the present case. It must therefore in our view be accepted that the respondent Government were in principle entitled to determine the identity of the person who had unlawfully taken the documents concerned and placed them in the hands of a person or persons not authorised to receive them.

4. The documents themselves, moreover, were criminally obtained or photocopied in the perpetration of a criminal act. As such, they could properly be seized as "objects ... which [might] serve to establish the truth" (Article 94 of the Code of Criminal Procedure, see paragraph 50 of the judgment). That being the case, it is unconscionable that whoever has obtained the documents should be allowed to set conditions for their return to the person or institution that has title to them. In our view, this holds true even if the documents happen to be in the possession of the press.

5. Turning to the facts of this case, we consider that it was properly for the institution which held title to the documents – the AIVD, as it happens – itself to determine the reasons for which to demand the return of the documents. If documents criminally obtained or photocopied in the perpetration of a criminal act can, for the sole reason that they have come into the possession of the press, no longer be seized except on conditions posed by the press itself, the press is granted a privilege for which we see no justification. It is in our view wrong to weigh against the rights of the owner of the documents the possibility that the documents may be examined for traces capable of identifying the person who committed the original crime. In this the present case differs from other cases concerning the protection of journalistic sources.

6. It should be pointed out at this juncture that the right to protect the confidentiality of journalists' sources is not absolute. As mentioned in paragraph 96 of the judgment, the Court has accepted that the disclosure of

information identifying journalistic sources may occur unavoidably in the process of "strategic monitoring" despite reasonable measures taken by the authorities. Closer to the facts of the present case, the Court has consistently accepted, in a phrase repeated many times since its first use in *Goodwin v. the United Kingdom*, 27 March 1996, § 39, *Reports of Judgments and Decisions* 1996 II, that an order leading to the disclosure of a journalistic source may be compatible with Article 10 if – but only if – it is justified by an "overriding requirement in the public interest" (*see Roemen and Schmit v. Luxembourg*, no. 51772/99, § 46, ECHR 2003 IV; *Ernst and Others v. Belgium*, no. 33400/96, § 91, 15 July 2003; *Tillack v. Belgium*, no. 20477/05, § 53, 27 November 2007; *Voskuil v. the Netherlands*, no. 64752/01, § 65, 22 November 2007; *Financial Times Ltd and Others v. the United Kingdom*, no. 821/03, § 59, 15 December 2009; and *Sanoma Uitgevers B.V. v. the Netherlands* [GC], no. 38224/03, § 51, 14 September 2010. This is also reflected in principle 3 of Recommendation No. R(2000) 7 on the right of journalists not to disclose their sources of information (see paragraph 61 of the judgment).

7. In view of the very nature of their position, civil servants often have access to information which the government, for various legitimate reasons, may have an interest in keeping confidential or secret. Therefore, the duty of discretion owed by civil servants will also generally be a strong one (*Guja*, cited above, § 71). In our opinion, this duty weighs even more heavily in the case of an official belonging to a service like the AIVD, which by its very nature has to guard the secrecy of its information (see, *mutatis mutandis*, *Hadjianastassiou v. Greece*, 16 December 1992, § 46, Series A no. 252; *Vereniging Weekblad* Bluf! *v. the Netherlands*, 9 February 1995, § 35, Series A no. 306 A; and *Pasko v. Russia*, no. 69519/01, § 86, 22 October 2009).

8. The present case is distinguishable from earlier cases like The Sunday Times *v. the United Kingdom* (no. 2), 26 November 1991, Series A no. 217; Observer and Guardian *v. the United Kingdom*, 26 November 1991, Series A no. 216; and *Vereniging Weekblad* Bluf!, cited above. In those cases the Court was able to find violations of Article 10 on the ground that the secrecy of the information which the measures complained of purported to protect was already compromised. In contrast, in the present case the issue is not so much the need to protect the secrecy of the information itself, but the very fact that, secret or not, information was allowed to fall into the hands of persons not authorised to receive it by the misconduct of an AIVD official.

9. Likewise, we cannot find it unreasonable that the Netherlands authorities refused to accept the first applicant's offer to destroy the documents. The Court has held that Article 10 cannot be interpreted as prohibiting the forfeiture in the public interest of items whose use has lawfully been adjudged illicit (see, *mutatis mutandis*, *Handyside*

v. the United Kingdom, 7 December 1976, § 63, Series A no. 24, and *Otto-Preminger-Institut v. Austria*, 20 September 1994, § 57, Series A no. 295-A). We cannot see that similar reasoning should not apply in the present case. We therefore consider that the Netherlands State was entitled to have the possession of the actual documents restored to it.