CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

**CASE OF DOERGA v. THE NETHERLANDS**

*(Application no. 50210/99)*

JUDGMENT

STRASBOURG

27 April 2004

**FINAL**

*27/07/2004*

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 Doerga v. the Netherlands,**

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

Mr J.-P. COSTA, *President*,
Mr L. LOUCAIDES,
Mr C. BÎRSAN,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mrs W. THOMASSEN,
Mrs A. MULARONI, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 23 September 2003 and on 6 April 2004,

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

# PROCEDURE

1. The case originated in an application (no. 50210/99) 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 Netherlands national, Subhas Ranbier Doerga ("the applicant"), on 16 June 1999.

2. The applicant was represented by Mr P.C.M. van Schijndel, a lawyer practising in The Hague. The Netherlands Government ("the Government") were initially represented by their Agent, Mr R.A.A. Böcker, of the Ministry of Foreign Affairs, and in the final stages of the proceedings by their Agent, Mrs J. Schukking, of the same Ministry.

3. The applicant complained under Article 8 of the Convention of the tapping and recording of his telephone conversations and the retention of these recordings.

4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 23 September 2003, after having obtained the Government's observations on the admissibility and merits and the applicant's response thereto (Rule 54 § 2 (b)), the Court declared the application partly admissible.

6. The parties did not avail themselves of the possibility to file further observations on the merits (Rule 59 § 1).

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1953. At the time of the introduction of his application, the applicant was serving a prison sentence in the Netherlands.

8. On or around 26 January 1995 suspicions arose that the applicant, who at that time was serving a prison sentence in the Marwei penitentiary in Leeuwarden, had been involved in giving a false tip-off by telephone to the Leeuwarden police to the effect that three named detainees were planning to escape from prison by taking hostages. Thereafter, and in order to secure order, peace and safety in the penitentiary, the applicant's telephone conversations were tapped and recorded on tape. These taped conversations were kept so as to allow the authorities to establish – if such a situation were to arise again – whether the applicant had been involved in giving any further false telephone tip-offs.

9. On 3 October 1995, as a result of the detonation of an explosive device placed in her car, Ms X – the applicant's former partner – suffered slight injuries. Her son, Mr Y, suffered serious injuries necessitating the amputation of the lower part of his left leg.

10. At the time of the explosion, the applicant was still in prison. As it was suspected that he was involved in the bomb attack, the national public prosecutor (*landelijk officier van justitie*) ordered that the applicant's recorded telephone conversations be made available to the criminal investigation into the bomb attack.

11. On 16 May 1998 the applicant was summoned to appear before the Haarlem Regional Court (*arrondissementsrechtbank*) to stand trial on charges of, *inter alia*, (attempted) premeditated grievous bodily harm, causing an explosion endangering property and life, making a threat to kill and various counts of fraud.

12. On 22 August 1996 the Haarlem Regional Court convicted the applicant of making a threat to kill and one count of fraud, acquitted him on the remaining charges and sentenced him to two years' imprisonment. Both the applicant and the public prosecutor filed an appeal with the Amsterdam Court of Appeal (*gerechtshof*).

13. In its judgment of 4 November 1997, following hearings held on 20 May and 21 October 1997, the Amsterdam Court of Appeal quashed the judgment of 22 August 1996, convicted the applicant of complicity in (attempted) premeditated grievous bodily harm, causing an explosion endangering property and life, and making a threat to kill or, in any event, to inflict grievous bodily harm. He was also convicted of several counts of fraud. The applicant was sentenced to nine years' imprisonment. As regards the determination of the applicant's sentence, the Court of Appeal held,

*inter alia*, that the applicant, over a period of several months, had continuously threatened Ms X by telephone and had eventually carried out his threats by organising – from his place of detention – the placing of a bomb under her car. The detonation of this bomb had caused injuries to Ms X and Mr Y, necessitating the amputation of the lower part of the latter's leg. The court noted that it was only as a result of the administration of rapid and adequate first aid that Mr Y had not bled to death. In addition, the explosion had caused collateral damage to another car as well as to windows of nearby houses and there had been a real danger that the explosion could also have (fatally) injured bystanders. The court further noted that the applicant had already been convicted in the past of having deliberately shot Ms X in the leg.

14. The Court of Appeal based the applicant's conviction on, *inter alia*, statements given by the applicant, a co-detainee, Mr Y, Ms X and her neighbours, several telephone conversations between the applicant and Ms X that had been tape-recorded by the latter, and one of the applicant's telephone conversations that had been tapped and recorded prior to 3 October 1995 by the authorities of the penitentiary where the applicant was detained, namely a conversation between the applicant and his sister in which he warned his sister never to approach or get into Ms X's car.

15. The Court of Appeal rejected the defence's argument that the telephone conversations which had been tapped and recorded by the prison authorities before 3 October 1995 should be disregarded as unlawfully obtained evidence. Noting the reasons for which the prison authorities had decided to tap and record the applicant's telephone conversations, the court held that the impugned measures served a lawful purpose, namely the preservation of order, peace and security within the penitentiary. Furthermore, the measures also complied with the requirements of proportionality. It further held that, although the internal penitentiary regulations prescribed the immediate erasure of recorded telephone conversations, a reasonable interpretation of the applicable rules in relation to the aims pursued implied that the recorded conversations could be kept, since there were concrete indications of an ongoing escape plan. When fresh suspicion arose that the applicant was involved in another criminal offence, the information lawfully obtained on the basis of internal prison rules could be made available to the police for the purposes of the criminal investigation into that offence. The Court of Appeal referred in this connection to the general obligation contained in Article 160 of the Code of Criminal Procedure (*Wetboek van Strafvordering*) to report, *inter alia*, criminal offences involving a danger to life, and to the very serious nature of the offence at issue.

16. The applicant's subsequent appeal in cassation was rejected by the Supreme Court (*Hoge Raad*) on 2 March 1999.

17. As regards the applicant's complaint that his telephone conversations had been unlawfully tapped, recorded and kept by the penitentiary authorities, the Supreme Court held:

"3.2. The complaint has to be considered in the following framework of legal rules. Article 15 § 4 of the Constitution (*Grondwet*) ... Article 8 [of the Convention] ... Article 92a of the ... applicable [1953] Prison Rules (*Gevangenismaatregel*) ... Article 4 § 1 of the [1953] Prison Rules ... [the] circular no. 1183/379 of the Deputy Minister of Justice (*Staatssecretaris van Justitie*) of 1 April 1980 ... [and] an internal regulation issued by the Governor of the Marwei penitentiary under Article 23 of the [1951] Prison Act (*Beginselenwet Gevangeniswezen*) ...

3.3. Under the heading 'The lawfulness of the evidence obtained' ... the Court of Appeal found that the recording of the applicant's telephone conversations conducted in the Marwei penitentiary served a lawful purpose, namely maintaining order, peace and security in the penitentiary, and further complied with the requirements of proportionality. This finding does not reveal any incorrect interpretation of the law. In the first place, this finding recognises that the recording can be justified in view of the aims set out in Article 8 § 2 of [the Convention], in particular the prevention of disorder. In the second place, it recognises that the Court of Appeal has also examined whether in a democratic society the interference at issue with the right set out in Article 8 § 1 of [the Convention] was necessary for attaining the stated aim. In so far as that finding further established that the tape recording pursued this aim and that the interference was also necessary, these matters are factual and are readily understandable.

3.4. This recording is further provided for by law as required by Article 8 § 2 of [the Convention]. Indeed, the system of legal rules set out under 3.2 complies with the requirements of accessibility and foreseeability. The system comprises regulations of which the most important features have been published in generally accessible sources or have been deposited in places accessible to detainees. They provide a sufficiently clear indication to detainees about the fact that telephone conversations can be tapped and recorded and the reasons for this.

3.5. The above considerations lead to the conclusion that the finding of the Court of Appeal as to the lawfulness of the tape recording can be upheld. Questions still remain about the finding of the Court of Appeal as regards the keeping of the recordings and the failure to erase them immediately, the ... making available to the criminal investigation authorities of these tape recordings, ... their being listened to by the latter for the purposes of the investigation into ... [the car bomb attack] and the subsequent use in evidence of a document containing a transcript of one of the recorded telephone conversations (evidence item 23). It must first be noted that the cassation complaint apparently only seeks to challenge the finding of the Court of Appeal as to the use in evidence of the formal record (*proces-verbaal*) containing the transcript of a telephone conversation between the [applicant] and his sister (evidence item 23).

3.6. The internal regulation set out under 3.2 provides that tape recordings are not to be kept and will be immediately erased. Against the background of a reasonable interpretation, it is difficult to explain that provision otherwise than to mean that the tape recordings must no longer be kept and the tapes must be erased as soon as the danger giving rise to the recording has ceased to exist. Under the heading 'The lawfulness of the evidence obtained' ... the Court of Appeal found that the telephone conversation used in evidence had been recorded, *inter alia*, after suspicions had

arisen that the [applicant] was involved in giving a false telephone tip-off about an intended hostage-taking and that this tape recording had been kept in order to be able to establish – if such a situation were to arise – whether the [applicant] was again involved in giving false telephone tip-offs affecting the order, peace and security of the penitentiary. It follows from this that, according to the Court of Appeal – and quite apart from the existence of any concrete indication about an escape plan ... – the keeping of and failure to erase the recordings occurred against the background of the danger which gave rise to the decision to tap the conversations. The Court of Appeal thus found that there was no violation of the relevant internal regulation. Without stating further reasons, this finding can be readily understood.

3.7. Taking into account the above considerations, the handing over of the tapes to the national public prosecutor for the purpose of the criminal investigation was not unlawful. Suspicions against the [applicant] had arisen that from his place of detention he was involved in a bomb attack. When this official had become aware of the existence of those tapes, it was not unlawful to hand them over, bearing in mind the provisions of Article 162 § 2 of the Code of Criminal Procedure and the fact that, failing a voluntary surrender [of the tapes], the judicial authorities could have had recourse to seizure (*inbeslagname*).

3.8. The complaint has therefore no merit."

## II. RELEVANT DOMESTIC LAW AND PRACTICE

18. Article 15 § 4 of the Constitution (*Grondwet*) provides:

"A person who has been lawfully deprived of his liberty may be restricted in the exercise of fundamental rights in so far as the exercise of such rights is not compatible with the deprivation of liberty."

19. Article 92a of the [1953] Prison Rules (*Gevangenismaatregel*), in so far as relevant, provides:

"The Governor may permit detainees to speak by telephone to persons outside the penitentiary."

20. Article 4 § 1 of the [1953] Prison Rules reads:

"The Governor is responsible for the proper running of the penitentiary. In the exercise of his duties he is bound by the restrictions imposed on him by Our Minister, whether laid down in the Internal Regulations (*huishoudelijk reglement*) or otherwise."

21. Circular no. 1183/379 of the Deputy Minister of Justice (*Staatssecretaris van Justitie*) of 1 April 1980 provides:

"Every closed institution must have telephone rules, which must be tailored to the penitentiary's regime and to its staff capacity and facilities and must be submitted to me for approval. These rules should include the following: ...

- the way in which the content of the calls is monitored (it must be possible to listen to the calls by way of retrospective check); the rules must specify whether all calls are monitored on the Governor's instructions; ..."

22. An internal regulation issued by the governor of the Marwei penitentiary under Article 23 of the [1951] Prison Act (*Beginselenwet Gevangeniswezen*) provides:

> "It is possible that an instruction may be given by the Governor or on his behalf, by way of a spot check and/or if there are grounds for doing so, to record your telephone conversation. Partly to protect your privacy, only the head of security or his deputy will listen to such tape recordings. They are responsible for ensuring that the tapes are not retained and that they are erased immediately."

23. On 12 December 1994, on the basis of Article 22 of the 1951 Prison Act, the Minister of Justice issued Internal Regulations for Prisons (*Huishoudelijk Reglement voor de gevangenissen*). These regulations entered into force on 15 January 1995.

24. According to Article 116 of the Internal Regulations for Prisons, detainees have the right – for ten minutes and at least once per week, at times fixed by the governor – to speak by telephone to persons outside the penitentiary. In accordance with Article 127 § 4 of the Internal Regulations, the governor may restrict – where this is found necessary for the maintenance of order in the penitentiary, for the prevention or investigation of crimes, or for thwarting escape plans – a particular detainee's right to have visits, to correspond or to have telephone conversations. Pursuant to Article 91 §§ 5, 6 and 7 of the 1953 Prison Rules, a reasoned decision to this effect must be communicated within twenty-four hours to the detainee, who may challenge it before the penitentiary's Supervisory Board (*Commissie van Toezicht*). A further appeal lies to the Appeals Board of the Central Council for the Application of Criminal Law (*Beroepscommissie van de Centrale Raad voor Strafrechttoepassing*).

25. Although the Internal Regulations for Prisons contain specific provisions concerning the monitoring of detainees' visits and correspondence, they make no specific provision for monitoring detainees' telephone conversations with persons in the outside world.

26. On 1 January 1999 the 1953 Prison Rules (*Gevangenismaatregel*) were replaced by new Prison Rules (*Penitentiaire Maatregel*). The new Prison Rules make no specific provision for the right of detainees to have contacts with the outside world.

27. On the same day, the 1951 Prison Act (*Beginselenwet gevangeniswezen*) was replaced by a new Prison Act (*Penitentiaire Beginselenwet*). Article 39 of the new Prison Act, in so far as relevant, reads:

> "1. The detainee shall have the right, with the exception of the restrictions provided for in paragraphs two to four inclusive, to conduct – at least once per week, at a time and place determined in the internal regulations and by means of a designated telephone, and for ten minutes – one or more telephone conversations with persons outside the penitentiary. Unless the Governor provides otherwise, the costs thereof shall be borne by the detainee.

2. The Governor may order that telephone conversations of a detainee be monitored where this is necessary to determine the identity of the person with whom a detainee is having a conversation or in the light of an interest referred to in Article 36 § 4 [of the Prison Act]. This monitoring can comprise listening to or recording telephone conversations. The person concerned shall be informed beforehand of the nature of and the reason for monitoring."

28. Article 36 § 4 of the new Prison Act provides:

"The Governor may refuse to send or deliver certain letters or other items sent by mail if this is necessary in the light of one of the following interests:

a. the maintenance of order or security in the institution;

b. the prevention or investigation of criminal offences;

c. the protection of victims of crimes or persons otherwise involved in crimes."

29. Article 160 § 1 of the Code of Criminal Procedure, in so far as relevant, reads as follows:

"Any person who has knowledge of one of the offences defined in Articles 92-110 of the Criminal Code, in Book II, Title VII of the Criminal Code, in so far as this has caused a danger to life ... is obliged to report this matter immediately to an investigating officer."

30. Article 162 § 2 of the Code of Criminal Procedure, in so far as relevant, provides:

"They [public bodies and officials] shall upon request provide the public prosecutor ... with all information which has come to their attention in the course of their duties about criminal offences the investigation of which has not been entrusted to them."

# THE LAW

## I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

31. The applicant complained that his telephone conversations had been tapped and recorded, and that these recordings had been retained instead of being immediately erased, in violation of his rights under Article 8 of the Convention, which in so far as relevant provides:

"1. Everyone has the right to respect for his private ... life ... 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 ... public safety ... for the prevention of disorder or crime ... or for the protection of the rights and freedoms of others."

## A. Arguments before the Court

### *1. The respondent Government*

32. The Government conceded that there had been an interference with the applicant's rights under Article 8 § 1 of the Convention. However, they argued that that interference was justified under the second paragraph of this provision.

33. The interference at issue was based on accessible legal rules, including circular no. 1183/397 of the Deputy Minister of Justice and the internal regulations of the Marwei penitentiary. The Deputy Minister's circular, which was public knowledge and accessible to all, was understood by all as meaning that it was permissible not only to listen to telephone calls, but also to record them and to keep the tapes. Only in that manner was a retrospective check possible. In the case-law of the Appeals Board of the Central Council for the Application of Criminal Law, this practice was accepted as permissible in the interests of maintaining order and security in prisons.

34. Like other prisons, the Marwei penitentiary drew up its own internal regulations on the basis of the circular. Relying on the Court's findings in the case of *Malone v. the United Kingdom* (judgment of 2 August 1984, Series A no. 82, p. 33, § 69), the Government argued that the relevant statutory basis for intercepting communications could consist, *inter alia*, of a "settled administrative practice". As regards the accessibility of the relevant legal rules, the Government pointed out that the applicant had been informed by the Marwei authorities – by being notified of the Marwei internal regulations – of the possibility that detainees' telephone conversations could be tapped.

35. As to the compatibility with the rule of law of the domestic legal rules on covert surveillance of detainees' telephone calls, the Government submitted that detainees had the possibility to complain to the Supervisory Board of any allegedly arbitrary application of a penitentiary's internal regulations. Furthermore, only the Governor could order the tapping of telephone calls of a particular detainee against whom there existed concrete suspicions of involvement in a criminal offence. The calls tapped were recorded as a safeguard, since a retrospective check could only be effective if the conversation had been recorded.

36. The Government further submitted that the interference complained of had been justified in order to safeguard order and security within the penitentiary, which included preventing criminal offences and thwarting escape attempts. The interference thus pursued the legitimate aims of protecting public safety, the prevention of disorder or crime and the protection of the rights and freedoms of others, as set out in Article 8 § 2 of the Convention.

37. As to the question whether the interference was "necessary in a democratic society", the Government argued with reference to the Court's findings in the case of *Golder v. the United Kingdom* (judgment of 21 February 1975, Series A no. 18, p. 21, § 45) that the authorities must have some room for manoeuvre in order to prevent convicted detainees in a penitentiary from either becoming involved in the plotting of escapes or from continuing to make systematic threats against individuals or from plotting serious life-threatening criminal offences. The exercise of control over a prisoner's contacts with the outside world was essential in this regard and was an intrinsic feature of detention following conviction. Moreover, a prisoner could reasonably be expected to know on the basis of a penitentiary's internal regulations that his telephone calls might be tapped, whether in the course of a spot-check or for a particular reason. A prisoner should accordingly have a different expectation of privacy.

38. When the applicant's telephone conversations were tapped and recorded, there had been concrete suspicions that he had knowledge of a violent escape plan involving hostage-taking. As to the duration of the retention of these recordings, the Government were of the opinion that any reasonable reading of the internal regulations, bearing in mind the imperatives of order, peace and security within the penitentiary, would suggest that recordings could be kept until the security risk had been averted. In the instant case, it was strongly suspected that an escape plan involving the use of violence was being prepared and that this danger had not yet been averted. The Government concluded that the interference at issue could not be regarded as disproportionate, given that the applicant could assume that the tapes would be erased as soon as they had lost their immediate relevance.

*2. The applicant*

39. The applicant submitted that the possibility to tap the telephone conversations of detainees and to retain the tapes of the recorded conversations had only a very narrow legal basis. It was not based on a specific power derived from a statutory provision, but on a general restriction laid down in Article 15 § 4 of the Constitution, a circular issued by the Deputy Minister of Justice and the internal regulations of the Marwei penitentiary.

40. According to the applicant, the arrangements contained in the circular and in the internal regulations conferred on the prison authorities wide powers, and were formulated too broadly and too vaguely without any clearly defined limits. In his opinion, the resulting possibility to retain recorded telephone conversations for an unlimited period of time could not be regarded as compatible with the requirements of Article 8 of the Convention.

41. The applicant further submitted that where the tapping and the recording of the telephone conversations of detainees were justified by the aim of maintaining order and security in a penitentiary – however vague the relevant regulations were on this point – such measures could not serve any other purpose. Furthermore, when the need to ensure order and security in the penitentiary was no longer at issue, the retention of the recordings of tapped conversations could not thereafter be justified on any grounds. In the applicant's opinion, it was unlawful to tap and record conversations of detainees and to retain such recordings when the tapping and recording were not based on the safeguarding of order and security within the prison. No such grounds existed in his case. On that account, the retention of the recordings of his telephone conversations was unlawful.

42. The applicant contested the Government's argument that the retention of the recorded conversations was necessary because the prison authorities had strongly suspected that an escape plan involving violence was being prepared and that the attendant danger had not yet been averted. He submitted that the argument was without foundation since the information about the alleged plan was false. Although the applicant could accept that, for reasons linked to the giving of a false tip-off, his telephone conversations had been recorded and that these recordings had been kept for the sake of order and security in the penitentiary, he did not accept that the recordings could be kept indefinitely. If, after 26 January 1995, there had been no further indication that he was involved in giving false tip-offs, the retention of his recorded conversations could not be regarded as lawful.

## B. The Court's assessment

### *1. Existence of an interference*

43. It is not in dispute that the tapping and recording of the applicant's telephone conversations and the retention of these recordings by the prison authorities constituted an interference with the applicant's rights under Article 8 § 1 of the Convention.

### *2. Justification for the interference*

44. The Court will accordingly examine whether the interference in the present case was justified under Article 8 § 2, notably whether it was "in accordance with the law".

45. The expression "in accordance with the law" requires, firstly, that the impugned measure should have some basis in domestic law; secondly, it refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and that it is compatible with the rule of law (see

*Kopp v. Switzerland*, judgment of 25 March 1998, *Reports of Judgments and Decisions* 1998-II, p. 540, § 55, and *Amann v. Switzerland* [GC], no. 27798/95, § 50, ECHR 2000-II). In the context of interception of communications by public authorities, because of the lack of public scrutiny and the risk of misuse of power, the domestic law must provide some protection to the individual against arbitrary interference with the rights protected by Article 8 of the Convention (see *Halford v. the United Kingdom*, judgment of 25 June 1997, *Reports* 1997-III, p. 1017, § 49).

46. The Court notes that the possibility for the penitentiary authorities to monitor and record prisoners' telephone conversations was provided for in circular no. 1183/379 of 1 April 1980. This circular stipulated that further rules on the manner in which the content of such conversations was to be monitored were to be laid down in a set of internal regulations to be determined in respect of each penitentiary institution.

47. The internal regulations for the penitentiary where the applicant was detained at the material time conferred on the governor the power to order the interception and recording on tape of prisoners' telephone conversations. Those regulations expressly stated that such tape-recorded conversations were to be erased as soon as the penitentiary's head of security or his deputy had listened to them.

48. In the present case the Supreme Court held that the erasure obligation set out in the above-mentioned internal regulations was to be interpreted as meaning that tape-recorded conversations were to be erased as soon as the danger giving rise to the recording of conversations had ceased to exist. As it is primarily for the national authorities, in particular the courts, to interpret and apply national law, the Court accepts that the interception of the applicant's telephone conversations, their recording on tape and the retention of these tapes had a basis in domestic law.

49. However, the phrase "in accordance with the law" implies conditions which go beyond the existence of a legal basis in domestic law and requires that the legal basis be "accessible" and "foreseeable".

50. A rule is "foreseeable" if it is formulated with sufficient precision to enable the person concerned – if need be with appropriate advice – to regulate his conduct. In the cases of *Kruslin v. France* and *Huvig v. France* (judgments of 24 April 1990, Series A no. 176-A and B, pp. 22-23, § 30, and pp. 54-55, § 29) the Court underlined the importance of that concept in the following terms:

> "[It implies] that there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by paragraph 1 [of Article 8]. Especially where a power of the executive is exercised in secret, the risks of arbitrariness are evident. Undoubtedly, the requirements of the Convention, notably in regard to foreseeability, cannot be exactly the same in the special context of interception of communications for the purposes of police investigations or judicial investigations, as they are where the object of the relevant law is to place restrictions on the conduct of individuals. In particular, the requirement of foreseeability cannot

> mean that an individual should be enabled to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly. Nevertheless, the law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence. In its judgment of 25 March 1983 in the case of Silver and Others, the Court held that 'a law which confers a discretion must indicate the scope of that discretion', although the detailed procedures and conditions to be observed do not necessarily have to be incorporated in rules of substantive law (Series A no. 61, pp. 33-34, §§ 88-89). The degree of precision required of the 'law' in this connection will depend upon the particular subject-matter. Since the implementation in practice of measures of secret surveillance of communications 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 or to a judge 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 to give the individual adequate protection against arbitrary interference."

Furthermore, tapping and other forms of interception of telephone conversations constitute a serious interference with private life and correspondence and must accordingly be based on a 'law' that is particularly precise. It is essential to have clear, detailed rules on the subject (see *Kruslin v. France* and *Huvig v. France*, cited above, p. 23, § 33, and p. 55, § 32, and *Amann v. Switzerland*, cited above, § 56).

51. The Court must therefore examine the "quality" of the legal provisions relied on in the instant case.

52. The Court finds that the rules at issue in the present case are lacking both in clarity and detail in that neither circular no. 1183/379 nor the internal regulations of the Marwei penitentiary give any precise indication as to the circumstances in which prisoners' telephone conversations may be monitored, recorded and retained by penitentiary authorities or the procedures to be observed. This is illustrated by the fact that the domestic courts interpreted the applicable internal rule that "the tapes are not retained and [must be] erased immediately" (see paragraph 22 above) as meaning that recordings of intercepted telephone conversations can be retained for as long as the danger giving rise to the recording exists (see paragraph 17 above), which in the instant case amounted to a period of more than eight months (see paragraphs 8-10 and 14 above).

53. Although the Court accepts, having regard to the ordinary and reasonable requirements of imprisonment, that it may be necessary to monitor detainees' contacts with the outside world, including contacts by telephone, it does not find that the rules at issue can be regarded as being sufficiently clear and detailed to afford appropriate protection against arbitrary interference by the authorities with the applicant's right to respect for his private life and correspondence.

54. The interference complained of was not therefore "in accordance with the law" as required by the second paragraph of Article 8 and there has been a violation of this provision. In these circumstances, an examination of the necessity of the interference is not required.

## II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

55. 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

56. The applicant declined to make any claims in respect of pecuniary or non-pecuniary damage, stating that he intended instead to pursue such claims before the domestic courts.

### B. Costs and expenses

57. The applicant claimed a total of 4,500 euros (EUR) in respect of costs and expenses, which amount corresponded to 36 hours of work at a rate of EUR 125 per hour.

58. The Government, noting that no breakdown of the costs and expenses claimed had been submitted by the applicant, were not satisfied that they had been actually and necessarily incurred and were reasonable as to quantum. They proposed an award based on the legal aid rates applicable in the Netherlands and asked the Court to take into account the fact that part of the application had been declared inadmissible.

59. The Court reiterates that it does not regard itself bound by domestic scales and practices, although it may derive some assistance from them. It must also be shown that the costs and expenses claimed were actually and necessarily incurred and that they are reasonable as to quantum (see *Venema v. the Netherlands*, no. 35731/97, § 116-117, ECHR 2002-X).

60. The Court notes that the applicant has only partly succeeded in making out his complaints under the Convention. Making an equitable assessment based on the information made available to it, and having regard to the above-mentioned criteria, the Court awards the applicant the sum of EUR 2,500 exclusive of any tax that may be chargeable.

### C. Default interest

61. 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 UNANIMOUSLY

1. *Holds* that there has been a violation of Article 8 of the Convention;

2. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 2,500 (two thousand five hundred euros) in respect of costs and expenses, plus any tax that may be chargeable;
   (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;

3. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 27 April 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

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| S. DOLLÉ | J.-P. COSTA |
| Registrar | President |