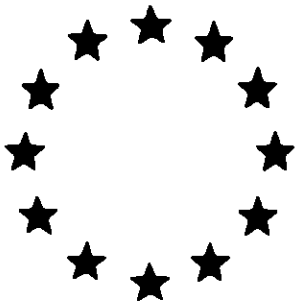
COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

EUROPEAN COMMISSION
OF HUMAN RIGHTS

APPLICATION No. 5029/71

Gerhard KLASS and others
against
FEDERAL REPUBLIC OF GERMANY

Report of the Commission

(Adopted on 9 March 1977)

STRASBOURG

TABLE OF CONTENTS

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I. INTRODUCTION

1. Outline of the case

a) The legal situation

1) The five applicants, one judge (Mr. Jürgen NUSSBRUCH), one public prosecutor (Mr. Gerhard KLASS) and three barristers (MM. Peter LUBBERGER, Hans-Jürgen POHL, Dieter SELB), are German citizens living in Mannheim and Heidelberg respectively.

The applicants lodged a constitutional appeal with the Federal Constitutional Court (Bundesverfassungsgericht) complaining of certain restrictions concerning the secrecy of mail and telecommunications.

2) Art. 10 of the Basic Law (Grundgesetz = GG) of the Federal Republic originally guaranteed the inviolability of the secrecy of mail, post and telecommunications with the exception that restrictions could be ordered pursuant to a law (Gesetz)(1). In 1968 Art. 10 GG was amended and now reads as follows:

> "Article 10
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> (1) Secrecy of the mail, post and telecommunications shall be inviolable.
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> (2) Restrictions may be ordered only pursuant to a law. Where such restrictions are ordered for the purpose of protecting the free democratic constitutional order, or the existence or security of the Federation or of a Land, the law may provide that the person concerned shall not be notified of the restriction and that legal remedy through the courts shall be replaced by a system of scrutiny by organs and auxiliary bodies appointed by the people's elected representatives."

3) The Act of 13 August 1968 (G10) published in BGBl I, p. 949(2), restricting the secrecy of the mail, post and telecommunications (supplementing Art. 10 of the Basic Law) specifies the cases in which restrictions as provided for in Art. 10(2) GG may be imposed and the procedure to be followed in such cases.

Art. 1, Sec. 1(1) of the G10 authorises the authorities, for the protection of the constitutional order of the Federation and of the Länder, to open and inspect communications which are subject to the secrecy of the mail, post and telecommunications, to monitor telegraphic messages and to monitor and record telephone conversations in a number of specified cases, inter alia, if this appears necessary for the protection of the free democratic constitutional order, the existence or the security of the Federation or of a Land.

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(1) Old version of Art. 10: "Secrecy of the mail, post and telecommunications shall be inviolable. Restrictions may be ordered only pursuant to a law."

(2) Bundesgesetzblatt.

Pursuant to Art. 1, Sec. 2 of G 10, restrictions may be ordered under Sec. 1 if "there is factual evidence for suspecting that a person ... plans to commit, is committing or has committed" certain criminal acts such as treason and acts endangering peace, the internal or external security of the State or its democratic constitutional order.

Art. 1, Sec. 2 (2), (phrase 2) of G10 provides:

"It (the order) may only be directed against the suspect or such other persons who may, on the basis of specific evidence, be presumed to receive or forward communications intended for the suspect or emanating from him or whose telephone the suspect may be presumed to use."

According to Art. 1, Sec. 4 of G10, restrictions under Sec. 1 may be ordered only on application. Applications may be made by the heads of certain authorities, which are enumerated. Orders under Sec. 1 are given by the competent supreme Land authority or a Federal Minister respectively. The validity of the orders is limited to a period of not more than three months, extensions may be granted on application.

4) Art. 1, Sec. 5(5) of G10 provides:

"The person concerned shall not be notified of restrictive measures."

Art. 1, Sec. 9 reads:

"(1) The Federal Minister referred to under Sec. 5(1) as being responsible for ordering restrictive measures shall report on the application of this law at intervals of not more than six months to a Board (1) consisting of five members of Parliament appointed by the Parliament (Bundestag).

(2) The competent Federal Minister shall report each month to a Commission (2) on the restrictive measures ordered by him. The Commission shall decide ex officio or on receipt of complaints as to the admissibility and necessity of such restrictive measures. Any measures which are declared by the Commission to be inadmissible or unnecessary shall be rescinded immediately by the competent Federal Minister.

(3) The Commission shall be composed of a Chairman, who shall have the qualification to be appointed as a judge, and two assessors. The members of the Commission shall perform their duties independently and shall not be required to comply with instructions. They shall be appointed by the Board referred to under para. (1) after consultation with the Federal Government."

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(1) In this Report mentioned as G10 Board

(2) In this Report mentioned as G10 Commission

Art. 1, Sec. 9 (5) reads:

"(5) There shall be no legal remedy through the courts in respect of the imposition and execution of restrictive measures."

Art. 2 of G 10 contains provisions amending the Code of Criminal Procedure (StPO), as to the admissibility of monitoring and sound-recording of telecommunications in connection with criminal proceedings. Such monitoring may now be ordered by a judge or a public prosecutor in urgent cases if there is factual evidence for the suspicion that a person has alone, or in company with others, committed or, in cases where the attempt is itself an offence, is attempting to commit, or has, by means of a punishable act, made preparations to commit certain specified political offences or certain other dangerous or grievous crimes (e.g. murder) and if it would be impossible, or substantially more difficult, to ascertain the facts or the suspected subject's whereabouts by other means.

Sec. 101 (1) StPO, as amended by Art. 2, No. 3, of G 10, reads as follows:

"The persons concerned shall be notified of the measures imposed ... as soon as this is possible without prejudice to the outcome of the investigations."

Supplementary acts have been passed in the Federal Länder by virtue of Art. 1, Sec. 9 (4) of G 10.

The applicants complained in their constitutional appeal to the Federal Constitutional Court of the provision contained in Art. 10, para. (2) (2) of the Basic Law and in Art. 1, Sec. 5, para. 5, and Sec. 9, para. (5) of the above-cited G 10. They alleged that these provisions violated basic principles of the constitution.

5) By judgment of 15 December 1970 the Federal Constitutional Court (1) decided that Art. 1, Sec. 5 (5) of G 10 was incompatible with the Basic Law insofar as it provides that the person concerned is not informed of the measures taken against him even if this would be possible without prejudice to the result of the investigation. The remainder of the applicants' appeal was rejected as being unfounded.

The Court found that otherwise the provisions complained of were justified in the interest of the protection of the Federal Republic and its free, democratic constitutional order and that they did not violate any basic constitutional principles.

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(1) Reports of the Federal Constitutional Court - BVerfGE - Vol. 30, page 1, et seq.

In a dissenting vote, three judges of the Federal Constitutional Court stated that they considered the provisions in question to be unconstitutional.

b) Complaints

6) The applicants allege that those provisions of Art. 10 (2) of the Basic Law and of G10 which, under certain conditions, authorise the authorities to control their correspondence and telephone communications without obliging the authorities to inform them subsequently of the measures taken against them, and which exclude the possibility of lodging an appeal against such measures to the ordinary courts, violate Arts. 6, 8 and 13 of the Convention.

2. Proceedings before the Commission

7) The present application was introduced on 11 June 1971 and registered on 14 June 1971.

The Commission decided on 9 February 1972 to give notice of the application to the respondent Government. The Government were consequently invited to submit their observations in writing on the admissibility of the application before 6 April 1972. The observations were received on 4 April 1972. The applicants were invited to reply before 28 April 1972. This time-limit was extended until 31 May 1972 and the applicants' reply dated 31 May 1972 was received on 2 June 1972.

In view of the fact that the respondent Government stated in their observations that an Amendment Bill was being prepared with regard to the Act in question (G10), the Commission decided repeatedly to adjourn the examination of the case.

8) As regards the preparation of the Amendment Bill the respondent Government submitted the following information:

- on 15 January 1973 that a Bill amending G10 had been drafted but could not, in view of the premature general elections for a new Parliament, be forwarded to Parliament before the 6th legislative period;

- on 8 June 1973 that the Bill was being revised and would contain a provision making an exception for barristers;

- on 14 December 1973 that the Bill had been submitted to the three allied powers (France, United Kingdom and United States of America) for consultation;

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- on 1 April 1974 that the Bill had been accepted by the Federal Cabinet. Copies of the Bill were submitted to the Commission. The Bill provided, inter alia, that barristers who are appointed as defence counsels concerning offences mentioned in Art. 1, Sec. 2, para. 1 of G 10, may only be supervised if they are also suspects. Furthermore, it provided that the person affected by clandestine measures of supervision has to be informed of these measures unless the purpose of these measures requires otherwise;

- on 5 July 1974 that the Bundesrat (Federal Council) had examined the Bill on 5 April 1974 and had submitted its observations. The Government added that the Bill would now be forwarded to Parliament shortly.

9) The Commission decided on 17 July 1974 no longer to adjourn the examination of the case. As it considered that an examination of the file did not give the information required for determining the question of admissibility it decided on 8 October 1974 in accordance with Rule 46 (2) of the Rules of Procedure (1), to invite the parties to submit their observations on admissibility at an oral hearing, which was held in Strasbourg on 17 December 1974.

On 18 December 1974, after having considered the written and oral observations of the parties, the Commission found that the applicants' complaints under Arts. 6 (1), 8 (1) and 13 of the Convention raised complex issues, being also of a general interest for the application of the Convention, the determination of which should depend upon an examination of their merits. The Commission consequently decided to declare the application admissible(2).

10) The applicants' observations on the merits were filed on 7 July 1975, after several requests for extensions of the time-limit had been granted. The respondent Government's observations in reply arrived on 31 October 1975.

On 6 March 1976 the Commission considered the parties' observations on the merits and decided not to hold an oral hearing because the facts of the case were undisputed and the legal arguments of the parties had been put forward exhaustively at the admissibility stage and in the parties' subsequent submissions. The parties were informed accordingly.

The applicants put their case themselves to the Commission.

The respondent Government were represented by Mr. E. Bülow, as Agent.

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(1) Now Rule 42 (2)(b) of the revised Rules of Procedure.

(2) See Decision on Admissibility, Appendix II.

3. The present Report.

11) The present Report has been drawn up by the Commission in pursuance of Art. 31 of the Convention and after deliberations and votes in plenary session, the following members being present:

MM. J.E.S. FAWCETT, President
G. SPERDUTI, Vice-President
C.A. NØRGAARD, Second Vice-President
F. ERMACORA
E. BUSUTTIL
L. KELLBERG
B. DAVER
J. CUSTERS
J.A. FROWEIN
G. JÖRUNDSSON
R.J. DUPUY
S. TRECHSEL
K. MANGAN
N. KLECKER

The text of the Report was adopted by the Commission on 9 March 1977 and is now transmitted to the Committee of Ministers in accordance with Art. 31 (2) of the Convention.

A schedule setting out the history of the proceedings before the Commission and the Commission's decision on the admissibility are attached hereto as Appendices I and II.

A friendly settlement of the case has not been reached (1) and the purpose of the Commission in the present Report, as provided in para. (1) of Art. 31, is accordingly to state an opinion as to whether the facts found disclose a breach by the respondent Government of its obligations under the Convention.

The full text of the oral and written pleadings of the parties together with further documents handed in as exhibits are held in the archives of the Commission and are available to the Committee of Ministers if required.

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(1) An account of the Commission's unsuccessful attempt to reach a friendly settlement has been produced as a separate document - See Appendix III.

II. ESTABLISHMENT OF THE FACTS

12) The facts relating to the present case are generally not in dispute between the parties. It is sufficient therefore to refer to the legal situation set out above under I, 1. In addition the following is of relevance:

1) Historical background and development until the Federal Constitutional Court's decision of 15 December 1970

13) Upon the unconditional surrender in 1945 the surveillance of German mail, post and telecommunications fell to the four occupying powers. This did not at first change when German sovereignty was restored step by step, when the Basic Law entered into force and when the Federal Republic was founded. The rights of surveillance exercised under occupation law by the Three Powers present in the Federal Republic of Germany (France, Great Britain and the U.S.A.) outlasted even the formal termination of the occupation regime in the Federal Republic of Germany, for under Art. 5, para. 2 of the Convention on the Relations between the Three Powers and the Federal Republic of Germany of 26 May 1952 (1) "the rights of the Three Powers, heretofore held or exercised by them, which relate to the protection of the security of the armed forces stationed in the Federal Republic" continued to exist. Under that Convention their future expiration was made contingent upon the condition"that the appropriate German authorities have obtained similar powers under German legislation enabling them to take effective action to protect the security of those forces, including the ability to deal with a serious disturbance of public security and order".

On the basis of this legal situation measures of surveillance, in particular concerning telephone conversations, were at first continued in the Federal Republic of Germany under the responsibility of the Three Powers. As a matter of constitutional law and of constitutional policy, however, in order to protect from abuses, it appeared to be inevitable to subject interferences with mail, post and telecommunications to control under statutory law and in accordance with the requirements of a State governed by the rule of law.

14) The provisions governing restrictions on the secrecy of mail, post and telecommunications existing at that time in the Basic Law were considered inadequate to provide the State with effective protection against attacks on its existence, security or free democratic constitutional system. The were available only to prosecuting authorities in the course of a pending criminal investigation.

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(1) Federal Law Gazette 1955, part II, page 305.

On 13 June 1967, in order to take these considerations into account and to release the rights reserved by the Allies, the Federal Government submitted to the legislative bodies a Bill to Restrict the Privacy of Mail, Post and Telecommunications as well as a Bill providing for the 17th Act to Amend the Basic Law. The provisions impugned by the applicants, i.e. Art. 1, Sec. 5, para. 5 and Art. 1, Sec. 9, para. 5 of G10 and Art. 10, para. 2, phrase 2 of the Basic Law are founded on these Bills.

15) The novel character of the amendment (1) of the constitution lies in the fact that the person concerned need not be informed of the restriction and that recourse to the courts may be replaced by an examination by agencies and auxiliary agencies of the Federal Parliament. With the wording "... the law may provide ..." in Art. 10, para. 2, phrase 2, the authors of the constitution have left the final decision on the provisions relating to the information of the person concerned and his right of recourse to the courts to the ordinary legislator.

16) When it submitted the Bill for G10 the Federal Government decided in favour of the solution traced out by Art. 10, para. 2, phrase 2. The official reasons for the bill in this respect read as follows:

"The surveillance of the post and telecommunications of a certain person can serve a useful purpose only if the person concerned does not become aware of it. For this reason the notification of this person is out of the question. For the same reason it must be avoided that a person who intends to commit any of the offences enumerated in the Act or who has committed them can by using a legal remedy inform himself whether he is being watched. Therefore, a legal remedy through the courts to impugn the imposition of restrictive measures had to be denied ... Seeing that for the ... above-mentioned reasons the person concerned is deprived of the opportunity of having the imposition (of restrictive measures) examined by a court but that, on the other hand, the principle of government under the rule of law as laid down in the constitution demands an independent control of interference of the executive branch of government with the rights of citizens, the bill, in accordance with the supplementation of Art. 10 as provided for within the framework of the Emergency Constitution prescribes the regular information of a Parliamentary Board and the supervision of the impositions by a Control Commission appointed by the Board (Section 9)."

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(1) See text on p. 1, para. 2 of this Report.

17) These fundamental ideas have been approved by the legislative bodies of the Federal Republic and have found expression in the amendment of Art. 10, para. 2 of the Basic Law as well as in G10. They were likewise approved by the Federal Constitutional Court which in its judgment of 15 December 1970 stated as follows:

"Efforts, plans and measures directed against the constitutional order and against the security and existence of the State mostly originate from groups that conceal their work, doing it in secret, that are well organised and in a particular manner are dependent on the smooth operation of means of communication. Against such an organisation an agency for the protection of the constitution can work effectively only if its measures of surveillance remain on principle secret and, therefore, are kept from being discussed in judicial proceedings. Even the subsequent revelation of a measure of surveillance and its subsequent discussion in judicial proceedings may furnish the anti-constitutional activities with clues to the operating methods and the concrete field of observations of the Agency for the Protection of the Constitution and to the identification of its members who may so far have been unknown thereby considerably impeding its effectiveness. The authority not to inform the person concerned of a measure of surveillance and to refer its supervision to a board that is not a court, therefore, serves to enhance the effectiveness of the Agency for the Protection of the Constitution and, of course, makes monitoring and letter-opening a meaningful operation ..." (1).

However, as was already stated above (I, 1. a, para. 5), the Federal Constitutional Court held that a person concerned must be informed of the surveillance - subsequently - in those cases in which an endangering of the purpose of the surveillance measure may be excluded (2).

The Government of the Federal Republic of Germany has taken the quoted decision of the Federal Constitutional Court as a reason to propose an amendment to G10. The parliamentary discussions on the Bill and the consultations with the Three Powers were by the end of 1975 not yet finished and so far the envisaged amendment has not yet been enacted.

2) The functioning of the monitoring system

18) Interference with the rights of the individual is, under G10, allowed only when and insofar as this is necessary to attain the purpose of the Act.

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(1) Reports of the Federal Constitutional Court, Vol. 30, page 1, et seq. /pp. 18, 19/

(2) Ibid.

The Act sets up a series of strict conditions which have to be satisfied before measures imposing such restrictions can be ordered. There must be factual grounds for suspicion that a person was planning, committing or had committed one of the offences against the State specified in G10 (1), e.g. plotting aggression against the Federation, revolution or threats to the democratic constitutional system. A further requirement is that the investigation of the facts by methods not involving the imposition of such restrictions would offer no prospects of success or be considerably more difficult (2). Applications to impose such limitations can be made only by specified authorities statutorily empowered to make such applications. Every such application must state the type and extent of the measures applied for and the period for which they would continue; it must be in writing and contain reasons (3). The order authorising such measures is made - as concerns federal matters - by the Minister designated by the Federal Chancellor (4).

19) The Act further provides (5) that the responsible Minister shall report once a month on the measures he has ordered to a Commission. The members of the G10 Commission are independent in the exercise of their functions and not subject to directions. They are elected by a Board consisting of members of the Federal Parliament (Bundestag). The G10 Commission consists of a President, who must be qualified to hold judicial office, and two assessors (6). They are not necessarily chosen among members of Parliament but may also be independent persons. In any event, care is taken to see that the G10 Commission is composed of an equal number of representatives from each of the parties in the Bundestag. The same applies to the G10 Board.

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(1) Art. 1, Sec. 2 (1) of G10.

(2) Art. 1, Sec. 2 (2) of G10.

(3) Art. 1, Sec. 4 of G10.

(4) Art. 1, Sec. 5 (1) of G10.

(5) Art. 1, Sec. 9 (2) of G10.

(6) Art. 1, Sec. 9 (3).

20) The G10 Commission decides both on the legality (Zulässigkeit) of such restrictions and on the necessity for imposing them: if it declares any of the measures ordered unlawful or unnecessary, the responsible Federal Minister must terminate them immediately.

21) Although G 10 merely prescribes that the G10 Commission must be informed within a month after an Order was made, except in urgent cases, the practice now is that the responsible Federal Minister obtains the consent of the G10 Commission before putting such measures into effect. This practice has been followed for years with the object of increasing the protection of the persons concerned and it is intended by the respondent Government to give it statutory force by an Amendment Act.

A further controlling body is the above-mentioned G10 Board consisting of five Members of Parliament appointed by the Bundestag to which the responsible Federal Minister has to report on the implementation of the Act at intervals of not more than six months. The measures ordered are effective for three months on each occasion. On expiry of this period, they can only be continued on fresh application. Such continuation requires a decision by the responsible Federal Minister and its lawfulness and necessity must be decided by the G10 Commission within a month at the latest (1).

22) Apart from the three months' time-limit, the measures must be discontinued at once if the circumstances on the strength of which they had been ordered have ceased to obtain (2).

All measures arising out of an Order must be carried out under the supervision of an official qualified for judicial office (3). The information and documents obtained by such measures must not be employed for other purposes, not even for the investigation and prosecution of offences other than those serious offences against the security of the State specified in Sec. 2 of G 10 (4).

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(1) Art. 1, Sec. 5 (3) of G 10.
(2) Art. 1, Sec. 7 (2) of G 10.
(3) Art. 1, Sec. 7 (1) of G 10.
(4) Art. 1, Sec. 7 (3) of G 10.

23) All documents obtained by such measures must be destroyed as soon as they are no longer required for the purposes of these measures. The destruction must be carried out under the supervision of an official qualified to hold judicial office (1).

24) The above-mentioned decision of the Federal Constitutional Court of 15 December 1970 (see I, 1, a and II, 1) was directly effective and Sec. 5 (5) of G 10 insofar as it has been declared unconstitutional by that Court is accordingly no longer applied.

Since, and in accordance with that judgment, persons concerned are being informed of the measures ordered against them when they are discontinued and if it is possible to do so without endangering the purpose for which the measures were taken.

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(1) Art. 1, Sec. 7 (4) of G 10.

III. SUBMISSIONS OF THE PARTIES

1. As to the facts:

a) The applicants

25) The applicants pointed out that not only suspect persons, but also unlimited numbers of other persons, against whom there is no suspicion, may be subjected to supervision of their postal correspondence and telecommunications if there is a possibility of their being in any kind of contact with suspects. Nor was it certain that a degree of privileged treatment for lawyers, as provided for in the draft of an Amendment Bill, would become law, as the Bill had not yet been passed and the Länder of Baden-Württemberg and Bavaria had raised objections to it.

b) The respondent Government

26) The respondent Government stated that the surveillance of persons coming into contact with suspects (Kontaktperson) was the exception rather than the rule. In practice, the conversations listened to were recorded on tape and the tapes obliterated as soon as the information was no longer required. In such cases all other connected documents were also destroyed.

They emphasised that measures of surveillance could only be ordered if there were factual grounds for suspicion that someone was planning one of the specified offences. So-called exploratory listening was not permitted. State controls in current practice were in fact more stringent than required by G 10. Under G 10, the Minister appointed by the Federal Chancellor could order and set in motion surveillance before the case in question had been referred to the G 10 Commission. However, the Minister of the Interior did not normally arrange for immediate implementation of a surveillance order, but first referred the case to the G 10 Commission for examination. Only after this were the measures in question carried out. The statutory possibility of implementing such measures immediately was only used in urgent cases (1 in 10) which could not be postponed until the next session of the G10 Commission.

The G 10 Commission was also called upon to exercise its supervisory function when decisions were taken on subsequent notification, although this had not been required by the Federal Constitutional Court.

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In cases in which it was initially out of the question to inform the person concerned that such measures had been taken, the question whether it might be possible to inform him at a later stage was scrutinised at regular intervals. The Amendment Act would contain a special regulation applying to lawyers which was designed to take account of the confidential relationship existing between a lawyer and his client.

2. Legal arguments advanced by the parties:

a) The applicants

27) The applicants acknowledged that restrictions of postal and telecommunications secrecy in the interests of State security have to be accepted. They consider their rights to have been violated, however, on the ground that the restrictive measures are not subject to judicial control, as a result of which the danger of abuse due to unlimited State security measures or improper motives cannot be ruled out.

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aa) Art. 6 (1) of the Convention

28) The applicants argued that the right to protection of secrecy of correspondence and telecommunications (Art. 8 (1) of the Convention) is a civil right within the meaning of Art. 6 (1) because each restriction of this right affects the private sphere of a citizen. The exercise of private rights, for example in family or business matters, is seriously hindered if a person must be aware that all his correspondence and telecommunications are controlled. They pointed out that the restrictive measures introduced and the peculiar provisions for their control in G 10 for the first time raise issues which require the Commission to decide whether "civil rights" should be interpreted as meaning the rights of private individuals in general (Bürgerrechte) or are confined to the (mainly economic) rights governed by the civil law. They further pointed out that the original version of Art. 6 (1) of the Convention read, in English: "in the determination of any criminal charge against him or of his rights and obligations in a suit at law". The day before the Convention was signed by the Committee of Ministers, so they stated, the word "civil" was inserted before "rights and obligations", in order to bring the text into line with the French version. This argued against restricting the French "contestation sur les droits et obligations de caractère civil" to pure civil-law claims. In any event, there was no indication in the travaux-préparatoires that the word "rights" in the Convention was intended to bear a restricted meaning confined to civil-law claims. After all, the Convention was prompted by experience with the totalitarian States. The application of Art. 6 (1) sought by them was intended to secure protection against abusive interference with the basic rights of the individual citizen.

29) As the law stands at present, lawyers' telephones could be tapped and their correspondence monitored. As a result, law firms which may unknowingly be advising suspected persons could be subjected to full surveillance. Not only the lawyer actually advising the suspected person would have his telephone conversations and correspondence fully monitored, but also his partners, his employees and all the firm's clients. This completely undermined the confidence which is the lawyer's stock in trade. Furthermore, having regard to the legal relationship between counsel and client, the applicants regarded it as legally out of the question that even conversations between a person who has actually been charged and his counsel should be monitored.

Commercial firms or private individuals with delicate problems would not seek the advice of a law firm that may be under surveillance. On the other hand, lawyers could not afford to risk advising suspect persons. As a result, suspected persons were forced to use law firms with a particular political "label".

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30) A broad interpretation of Art. 6 (1) was also necessary because modern, subtle methods of surveillance and the conflict between State security and individual interests were not known at the time the Convention was drawn up. The abuse of surveillance for State security purposes by individual officials, intelligence services or even Ministers could never be ruled out in practice. Consequently, abuses could only be nipped in the bud by regular scrutiny after the event and by notification and participation of the persons concerned. The 5-member control commission provided for in G10 was not capable of making an objective appraisal of such drastic restrictions of basic rights once large numbers of State security cases occured. The members of parliament who sit on that G10 Commission were necessarily influenced by their party or the Government, if their party is represented in it. The person concerned could not defend his case before the G10 Commission, nor could he challenge the members of that Commission and present or cross-examine witnesses.

Although, according to the decision of the Federal Constitutional Court, the authorities have, in certain cases to inform the person concerned of the measures which have been taken against him, there was still no possibility to complain against such measures to a court and to find out in advance whether one is a victim of wiretapping and control and for what reason. Furthermore, it was entirely up to the discretion of the authorities and subject to no control whether or not a person should be subsequently informed of the measures taken against him.

31) Art. 6 (1) also applied because the restrictive measures are ordered according to Art. 1, Sec. 2 (2), G 10, only in connection with criminal investigations, so that a "criminal charge" is involved.

32) Art. 6 guaranteed a fair hearing. A fair hearing must, in the Federal Republic of Germany at least, be a hearing by a court of law. These conditions, however, were not satisfied by the procedure for scrutinising restrictions of basic rights under Art. 1 Sec. 9 of G 10.

Therefore, Art. 6 (1) must be interpreted to the effect that it does not only guarantee a fair trial before an impartial tribunal if the Government has decided to institute such tribunals for certain matters, but on the contrary it guarantees a fair trial generally in each case where a civil right has allegedly been affected.

bb) Art. 8 (1) of the Convention

33) In this respect the applicants argued that the invasion of privacy and the acquisition of personal knowledge by third parties -- including the State -- against the will of the person

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concerned offend against human dignity. Intrusions into private life were, they admitted, indeed necessary to a certain extent in a democratic society for the purposes of self-defence; but there were limits which must be adhered to in such a democratic society if it is not to turn unnoticed into a totalitarian society. These limits were not removed by Art. 8 (2). If a country's citizens learn nothing about interference with their rights under Art. 8 (1) or learn of it only under certain circumstances depending on the discretion of the State with no possibility of verification, the rights enjoyed under Art. 8 were simply eliminated.

cc) Art. 13 of the Convention

34) Art. 13 was violated - according to the applicants - because the idea of effective remedy presupposes that the person concerned is given the necessary information to enable him to combat any inadmissible violation of his basic rights. Nor could the Parliamentary (G10) Board or the G10 (Control) Commission be regarded as "national authority" within the meaning of Art. 13. To qualify as such they would at least have to be bodies whose members enjoyed the safeguards of judicial independence and were impartial. Neither was the case in the two bodies in question.

In the applicants' view, the States are obliged under Art. 13 to provide an effective legal remedy for any alleged violation of the Convention. Any other interpretation of Art. 13 would render it meaningless: wherever Art. 6 and Art. 8 of the Convention are complied with, no reference to Art. 13 was necessary and there was no need for a national authority. If, on the other hand, one of these two provisions is violated, then it made no difference whether Art. 13 has been violated as well, since the complaint will then succeed anyway on substantive grounds. In examining Art. 13, the crucial point seemed to be that, for example, a violation of Art. 8 by abusive application of G 10 could never be substantiated; consideration of the merits was ruled out because no notification of the restrictive measures is given after the event. In the view of the applicants, the specific basic right referred to in Art. 13 could not be guaranteed unless the national legislature established a tribunal whose jurisdiction would cover the whole field of surveillance.

b) The respondent Government

aa) Art. 25 of the Convention

35) The respondent Government argued that the Commission's decision on the admissibility of the present case had not finally decided the question as to whether the applicants can be considered to be victims in the meaning of Art. 25 of the Convention. The respondent Government pointed out that

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if one of the reasons of inadmissibility mentioned in Art. 27 is established the Commission might under Art. 29 reject even a petition it has accepted. This provision meant that the question of being a victim and, consequently, the compatibility of the petition with the Convention (Art. 27, para. 2) is to be examined ex officio at every stage of the proceedings. This construction appeared to be reasonable because the Commission passed its decision of 18 December 1974 in summary proceedings which do not preclude a more thorough examination of the question whether the applicants are entitled to file the application.

36) In the present proceedings the applicants had not established any concrete facts showing that their mail, post, telegraphic messages or telecommunications are or were the subject of any surveillance by the Agencies for the Protection of the Constitution. Rather, they had insofar confined themselves to pointing to the possibility that without becoming aware thereof they may be or may have been the victims of surveillance. This abstract-hypothetical possibility did not exist specifically in respect of the applicants but practically in respect of everybody who fulfils the requirements under which the measures of surveillance in question may be imposed and executed within the area of application of G 10. Therefore, there were doubts about assuming that the applicants are victims of a violation of individual rights. Their real concern probably was that they aspire to an examination in abstracto of the provisions of Art. 1, Sec. 5, para. 5 and Art. 1, Sec. 9, para. 5 of G 10 and the constitutional provisions on which they are based in the light of the provisions of the Convention.

37) For the examination of the compatibility of a law with the Convention in abstracto, however, the Convention offered no foundation. In accordance with Art. 25, para. 1, phrase 1 of the Convention the Commission had consistently taken the view that it is not its duty to examine in abstracto the compatibility of provisions of national law with the Convention. In this respect, reference was made particularly to the Commission's decision of 18 December 1972 in the matter of application No. 5470/72 (1).

38) This jurisprudence of the Commission was, in the opinion of the respondent Government, justified not only by the wording of the Convention. It was also supported by the consideration that the contracting States have bound themselves to protect the rights guaranteed by the Convention but that the Convention leaves them free to decide how they are going to fulfil this obligation which they have assumed upon ratification. A ./.

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(1) Collection of Decisions 42, p.110.

provision of national law, which may not be compatible with the Convention, did not permit the cogent conclusion that the rights guaranteed by the Convention are not respected by the State concerned. There was no violation of the rights guaranteed by the Convention unless the provision of national law that is at variance with the Convention applied to the individual.

39) An individual grievance could be deduced alone from non-information only if it was to be assumed that the Convention grants the persons subjected to a measure of surveillance a right of (subsequent) information even if the suspicion continues. The existence of such a right, however, appeared to be doubtful. In this special case such an interpretation would hardly be compatible with Art. 17 of the Convention. For, if under Art. 1, Sec. 5, para. 5 of G 10 in accordance with the jurisprudence of the Federal Constitutional Court persons subject to surveillance are not informed of the measures of surveillance taken against them while the suspicion continues, it was because this was the only way effectively to counter anti-constitutional activities already at the preparatory stage. At least insofar as such activities are directed against the free democratic basic order of the Federal Republic of Germany they were necessarily at the same time directed against the human rights and fundamental freedoms granted by the Convention because most human rights and fundamental freedoms granted by the Convention are at the same time an integral part of the basic order as protected by domestic law. If persons suspected of such activities were to be prematurely informed of the surveillance measures taken against them, this would lead to a considerable impairment, if not paralyzation of the fight against activities which are (also) "aimed at the destruction of any of the rights and freedoms set forth ... in the Convention".

bb) Art. 6 (1) of the Convention

40) The defendant Government admitted that this provision could be interpreted to the effect that the contracting States must have courts, for the existence of legal protection by the courts is presupposed in Art. 6.

41) They argued that on the other hand, from Art. 6, para. 1, phrase 1, of the Convention it could not be inferred that all the contracting States are bound to grant legal protection by the courts for the satisfaction of every imaginable requirement of legal protection. A comparison of the wording of Art. 13 with Art. 6, para. 1, phrase 1, showed that the latter provision does not throughout presuppose the

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establishment of legal protection by the courts. For it would be incomprehensible why Art. 13 in the case of a violation of the Convention should grant a remedy before "a national authority", which must not necessarily be a court, if one had to proceed from the premise that the Contracting States, in excess thereof, were bound under Art. 6 to establish a system of an all-inclusive legal protection by the courts which would of necessity comprise the case provided for in Art. 13.

42) On the basis of this consideration it would have to be assumed especially that Art. 6, para. 1, phrase 1, of the Convention does not impose on the contracting States a duty to establish an all-inclusive legal protection by the courts against measures of administrative authorities (which, in a wider sense of the term, also includes agencies for the protection of the State). This assumption was supported by the consideration that Art. 6, para. 1, phrase 1, confines the claim to a court which has to determine "civil rights and obligations or ... any criminal charge". Therefore, as a matter of principle, disputes on the legality of sovereign acts were not included in the guarantee of legal protection by the courts which the contracting States are bound to provide under Art. 6, para. 1, phrase 1.

43) Nor could it be supposed in the circumstances that the contracting States, when agreeing on Art. 6, para. 1, phrase 1, intended to assume such an obligation, for the assumption of such an obligation would hardly be in consonance with the legal traditions to which some of the Contracting States adhered in 1950 and which are maintained by a few to this date. The tradition was founded on Art. 13 of the Second Title of the French Law on the Organisation of the Judiciary of 1790 where, on the basis of the doctrine of the separation of powers it was laid down as follows:

> "Les fonctions judiciaires sont distinctes et demeureront séparées des fonctions administratives. Les juges ne pourront, à peine de forfeiture, troubler de quelques manières que ce soit les opérations des corps administratifs ne citer devant eux les administrateurs pour raison de leurs fonctions."

Under the influence of this doctrine a specific system of legal protection immanent in the administrative authorities vis-à-vis acts of the executive branch of government (the system of the French Conseil d'Etat) developed in many countries of the European continent in the 19th century, whilst the jurisdiction of the courts of these countries was confined to administering law in the classical fields, i.e. civil and criminal law. In the 20th century, however, in

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many countries there had begun a development towards the establishment of legal protection by specific administrative tribunals (verwaltungsgerichtlicher Rechtsschutz). In respect of the extent of the existing legal protection vis-à-vis administrative acts as well as in respect of the question vis-à-vis what administrative acts legal protection will be granted there were still considerable differences in the various legal systems of the member States of the Council of Europe. Reference might be made to an analytical survey within the Council of Europe submitted by the C.C.J. concerning the protection of the individual in relation to acts of the administrative authorities, particularly Council of Europe document C.C.J. (74) 12 of 29 April 1974. These differences could not exist if one supposed that most of the member States of the Council of Europe who participated in this work were duty-bound as Contracting States of the Convention by Art. 6, if by no other provision, to establish a comprehensive legal protection by administrative tribunals.

Accordingly, the defendant Government concluded that Art. 6 (1) was not violated.

cc) Art. 8 of the Convention

44) The interference with mail, post, telegraphic messages and telecommunications admissible under G 10 was not inconsistent with the Convention because it is justified by Art. 8, para. 2. These measures of interference were provided for by law; they were necessary in a democratic society, such as is constituted by the Federal Republic of Germany, in the interests of national security and for the prevention of crime. For, under Art. 1, Sec. 1, phrase 1 of G 10, Agencies for the Protection of the State may interfere with mail, post, telegraphic messages and telecommunications only "to ward off dangers threatening the free democratic basic order or the existence or the security of the Federation or a Land including the security of the forces of the non-German contracting States of the North Atlantic Pact stationed in the Federal Republic of Germany or the forces of one of the Three Powers present in the Land Berlin". The inclusion of the security of the forces of the NATO partners stationed in the Federal Republic of Germany and the Land Berlin in the requirements for the admissibility of the interference was justified because these forces have a share in guaranteeing the national security of the Federal Republic of Germany. Moreover, by reason of its relations under public international law with the Three Powers the Federal Republic of Germany was bound to make provision for the protection of the forces of these powers from attacks on their security.

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45) Likewise, the surveillance of the mail, post, telegraphic messages and telecommunications was a "necessary" measure in the interest of national security. Most of the free democracies in the West - at least those which are to an appreciable degree exposed to such activities as espionage, subversion and other seditious practices - could not dispense with such measures. That they are indispensable for the Federal Republic of Germany in its exposed position was obvious, as regrettable as this may be in point of view of the desirability of the enjoyment of human rights and fundamental freedoms free from government interferences. The Federal Republic of Germany had not made it easy for itself in providing for the surveillance of the mail, post, telegraphic messages and telecommunications that is indispensable in the interest of its national security. This was understandable since the experiences made with secret services all over the world had not always been pleasant ones. In its legislation the Federal Republic of Germany had, therefore, tried to strike a balance between the interests of the individual, who is concerned by measures of surveillance and the interests of society in such surveillance - carried out in accordance with the principles of a State governed by the rule of law. The balance had been achieved in replacing the system of individual legal protection by supervision exercised by the Parliamentary (G10) Board in accordance with Art. 1, Sec. 9 of G10.

46) By institutionalising this parliamentary control machinery the Federal Republic of Germany had gone beyond the requirements set up by Art. 8, para. 2 of the Convention for the admissibility of an interference with the rights guaranteed in Art. 8, para. 1. The wording of Art. 8, para. 2 did not demand that a control machinery in accordance with the "rule of law" principle be established to counteract abuses that may happen in connection with interferences with the rights protected by Art. 8, para. 1. A duty to inform the suspects of any surveillance measures imposed or executed could not even be deduced by an extensive construction of Art. 8, para. 2. Against such a construction there would be the same objections derived from Art. 17 as mentioned before (supra. para. 39).

47) Consequently, the impugned provisions of German law were compatible with Art. 8 of the Convention.

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dd) Art. 13 of the Convention

48) As far as a violation of Art. 13 was concerned the different groups of cases must, according to the respondent Government, be considered separately. One must distinguish those cases in which the competent public authority imposes and executes surveillance measures in accordance with the legal provisions, especially with the provisions of G 10, from cases in which it does not observe these provisions.

49) As far as the first group of cases of properly executed surveillance measures was concerned, there could be no violation of Art. 13 because the right to a remedy guaranteed by this provision is tied to the condition that the rights and freedoms set forth in the Convention have been violated. This was not the case if the provisions of domestic law, in particular G 10, have been properly applied because these legal provisions are, as is set out under cc), compatible with the Convention.

50) A violation of Art. 13 would, however, come into consideration if surveillance measures were executed without the statutory requirements being fulfilled. This applied particularly to those cases in which the information gained has been improperly utilised. It was possible to imagine that monitored conversations held by public figures and suited to compromise them might be passed on to the press and published. A conceivable abuse might also consist in selling information gained from businessmen to competitors.

51) In such cases a violation of Art. 13 would have to be affirmed if the person concerned were without protection under German law vis-à-vis such serious interference with his rights, i.e. if he could neither demand to be informed thereof by the competent authority nor have recourse to the courts. This, however, was not the case for the following reasons:

- According to Art. 1, Sec. 9, para. 5 of G 10, recourse to the courts was not admissible "against the imposition of restrictive measures and their execution". Consequently, this was only a limitation of the recourse to the courts, not its total exclusion. The provision quoted, therefore, was not a bar to an action for damages on account of breach of official duty under Section 839 of the German Civil Code in conjunction with Art. 34 of the Basic Law. Particularly in the above-mentioned cases of abuse this would be of great practical importance. It constitutes an "effective remedy" within the meaning of Art. 13 of the Convention.

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The "effectiveness" of a claim for breach of official duty was not impaired by the fact that under Art. 1, Sec. 5, para. 5 of G10 the responsible authority might take the view that it was not obliged to give the claimant any information or advise him. For it was obvious that this provision refers to proper measures only which are executed in accordance with the statutory provisions of G10. It may not be relied on in order to cloak unlawful acts that are the subject of an action for breach of official duty.

It went without saying that recourse to the courts might also be had in those cases in which the person concerned is informed of surveillance measures executed in accordance with the above-mentioned jurisprudence of the Federal Constitutional Court, for the purpose of such information was i.a. to give the person concerned an opportunity to have recourse to the courts.

52) That, having regard to Art. 1, Sec. 5, para. 5 of G10, legal protection by the courts should be limited to an examination (of surveillance measures) after the incident and to possible damages was not at variance with Art. 13 of the Convention. This provision did not furnish preventive legal protection but only such as presupposes a violation of the rights of the Convention already committed. But beyond Art. 13 a person concerned by a surveillance measure was not without a remedy in the field of preventive legal protection. The person concerned could avoid a recognisable impending unlawful surveillance measure by lodging a disciplinary complaint (Dienstaufsichtsbeschwerde) with the superior authorities, for instance the competent Minister of the Interior, or by applying to the G10 Board. These agencies were a "national authority" within the meaning of Art. 13 of the Convention. Moreover, a complaint filed with them would be effective, for the officials and their superior officers must comply with the law. The effectiveness of any complaints filed with these bodies would also be assured by the fact that the authorities entrusted with the protection of the constitution have the greatest interest of their own in preventing an abuse of the powers granted them under G10 since such abuses discredit and considerably impede their work.

53. Accordingly Art. 13 of the Convention had not been violated, either.

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IV. GENERAL POINTS AT ISSUE

54) Issues arise under Arts. 6 (1), 8 and 13 of the Convention. These provisions have been invoked by the applicants and form the subject-matter of their application after the Commission's decision on admissibility of 18 December 1974.

55) The general points at issue are as follows:

Under Art. 6(1) of the Convention

- whether or not the measures which can be taken by the authorities against individuals in application of G10 constitute an interference with "civil rights" or signify the levelling of criminal charges in the meaning of Art. 6(1);

- if so, whether or not this obliges the respondent Government to inform in all cases the persons concerned subsequently of the measures which have been taken against them and whether or not these persons consequently have the right to have the lawfulness of these measures determined by an ordinary court.

Under Art. 8 of the Convention

- whether or not the measures which can be taken in application of G10 constitute an interference with the right to respect for private and family life, the home and correspondence;

- if so, whether or not such interferences are justified under para. 2 of this Article as being in accordance with the law and 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, or for the protection of the rights and freedoms of others.

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Under Art. 13 of the Convention

- whether or not it can be induced from the notion "effective remedy" within the meaning of this provision that the Federal Government is in all cases of secret surveillance under G10 obliged to inform the persons concerned subsequently of the measures taken against them;

- and whether or not the wording "effective remedy before a national authority" requires an independent and impartial tribunal.

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V. OPINION OF THE COMMISSION

1. As to Arts. 25(1) and 27(2) in conjunction with Art. 29 of the Convention.

56) The respondent Government suggested that the application be declared inadmissible under these Articles.

The Commission is, however, still of the opinion already expressed in its decision on the admissibility of this case (1) that the applicants must be considered as if they were victims. Some of the applicants are barristers and it is theoretically not excluded that they are in fact subject to secret surveillance in consequence of contacts they may have with clients who are suspected of anti-constitutional activities.

As it is the particularity of this case that persons subject to secret supervision by the authorities are not always subsequently informed of such measures taken against them, it is impossible for the applicants to show that any of their rights have been interfered with. In these circumstances the applicants must be considered to be entitled to lodge an application even if they cannot show that they are victims.

No new facts having been submitted, the Commission therefore sees no reason to declare the application inadmissible under Art. 29 in conjunction with Arts. 25 and 27(2) of the Convention.

2. As to Art. 6 of the Convention

57) The applicants have alleged a violation of Art. 6 (1) of the Convention. In their opinion the right to protection of secrecy for correspondence and telecommunications is a "civil right" within the meaning of this Article. They argue that consequently they should have access to the courts for the determination of this civil right.

The respondent Government are of the opinion that Art. 6(1) does not grant a general right of access to the courts in cases where acts of administrative authorities are in question.

58) Both the Commission and the Court have already expressed the opinion that the character of the legislation which governs how a matter is to be determined (civil, commercial, administrative law, etc.) and that of the authority which is invested with jurisdiction in the matter (ordinary court, administrative body, etc.) are of little consequence (2). The Commission stated in its decision on the admissibility of Application No. 1931/63 (3):
"the term 'civil rights and obligations' employed in Art. 6(1) of the Convention cannot be construed as a mere reference to

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(1) Annex II
(2) See Eur. Court. H.R., Ringeisen Case, Judgment of 16/7/71, p. 39
(3) Yearbook VII, pp. 213 et seq., at p. 222.

domestic law of the High Contracting Party concerned, but on the contrary, relates to an autonomous concept which must be interpreted independently of the rights existing in the law of the High Contracting Parties even though the general principles of the domestic law of the High Contracting Parties must necessarily be taken into consideration in any such interpretation".

However, to determine what is the scope meant by "civil rights" in Art. 6, some account must be taken of the legal tradition of the Member-States. Supervisory measures of the kind in question are typical acts of State authority in the public interest and carried out jure imperii. They cannot be questioned before any courts in many legal systems. They do not at all directly concern private rights. The Commission concludes therefore, that Art. 6 does not apply to this kind of State interference on security grounds.

59. It should be mentioned, however, that different considerations might arise if interferences with the use of postal and telecommunication services would be directed against private activities involving the exercise of "civil rights". That could be the case if interferences by third persons would become possible or if the State could arbitrarily exclude people from the use of these services thereby destroying their private business.

The German law in question does not disclose any such possibilities. It is on the contrary necessary for the protection of a democratic system to supervise by form of clandestine control all those groups of individuals who are suspected of illegal activities aiming, inter alia, at the destruction of the rights and freedoms guaranteed by the Convention (cf. Art. 17). The law limits the measure of supervision in a detailed way and sets up a system of controls to avoid any misuse.

60. The applicants have further argued that Art. 6(1) is applicable because secret supervision could, according to Art. 1 Sec. 2(2) of G10 only be ordered in the framework of criminal investigation so that a "criminal charge" was involved.

It is true that as a result of secret surveillance under G10 criminal charges may be levelled against the person concerned. It cannot, however, be argued that by taking any measures of secret surveillance the authorities level a criminal charge. The notion of "criminal charge" implies, in the opinion of the Commission, that the person concerned is himself informed of, or at least noticeably affected by, the charges. The aim of Art. 6(1) in criminal matters is to ensure that persons charged with having committed a criminal offence do not have to lie under such charge for too long (1). Therefore, as long as a person does not know of any investigations being carried out against him no criminal charge in the sense of Art. 6 (1) has been brought against him.

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(1) See Judgment of Eur. Court of H.R., "Wemhoff" case, 27 June 1968, page 26.

CONCLUSION

61. The Commission is of the opinion by eleven votes against one and two abstentions that the present case does not disclose a breach of Art. 6(1) of the Convention insofar as the applicants rely on the notion "civil rights". Insofar as they rely on the notion "criminal charge" the Commission is unanimously of the opinion that Art. 6(1) is not violated.

3. As to Art. 8 of the Convention

62. The applicants have also alleged a violation of Art. 8(1), according to which everyone has the right to respect for his private life as well as for his correspondence.

The secret control of letters is certainly an interference with the exercise of the rights guaranteed by Art. 8(1). But also the tapping of wires must be considered to be an interference with the right to respect for private life or, more particularly, correspondence in a broader sense. However, Art. 8(2) allows certain restrictions of these rights and it has to be decided if the interferences of the German Act are covered thereby.

63. Interferences must be in accordance with the law as Art. 8(2) expressly states. That must be taken to mean that the law sets up the conditions and procedures for an interference. Since the application is directed against the German legislation which provides for a detailed system of restricted interferences this requirement of Art. 8(2) is clearly fulfilled.

It has further to be noted that the German system regulating wire tapping and other forms of secret surveillance offers an extensive protection against misuse through the control of the supervising authorities by the G10 Board and the G10 Commission.

64. Secondly the restrictions must be necessary in a democratic society, inter alia, in the interest of national security or for the prevention of disorder of crime. It is spelled out in the text of the law in question that its goal is indeed the preservation of the national security. Internal security is the reason for the measure where G10 makes supervision possible if there are indications that acts of treason etc. are being planned (Art. 1, Sec. 2). External security is the reason for the measure where it is stated that acts against the defence system, acts against the Nato troops in Germany or the danger of an armed attack against the Federal Republic of Germany may justify supervision (Art. 1, Secs. 2 and 3).

In this context it has also to be noted, as was pointed out by the respondent Government, that the Federal Republic is bound by Art. 5 Section 2 of the treaty with the three Allied Powers of France, the United Kingdom and the U.S.A. (of 26 May 1952) to guarantee the security and safety of the troops of these allied powers in Western Germany.

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65. It remains to be answered if that system of interferences is necessary in a democratic society. From a comparative survey of the regulations of a similar kind in the different Convention States it becomes indeed clear that some system of that sort is deemed necessary in a democratic society in the sense of the Convention. The Commission finds that this is indeed the case. Certainly there can be discussions about the best way to handle the problem. However, it is left to the State to regulate the functioning of such system within, of course, the limits set by Art. 8 (1). The German legislation, which is rather detailed in restricting the interferences compared with other systems (2) is, in the view of the Commission, within these limits.

That holds true also for the exclusion of a formal notification of the person concerned. It is self-evident that a prior notification would run counter to the whole purpose of the interference. The Federal Constitutional Court has clarified that the German Constitution requires a notification of the persons involved as soon as that is compatible with the goal of the action.

66. Since the exclusion of a formal prior notification is required by the specific nature of the measures involved, the question does not arise if in other cases such an exclusion could by itself be considered as being a violation of Art. 8.

The subsequent notification is required by German law, as the Federal Constitutional Court has held, if it is possible without endangering the purpose of the surveillance.

67. It is true also that the application of the German legislation in any given case must be necessary in the sense of Art. 8(2) of the Convention in order not to violate it. It is the particularity of this application that neither the applicants nor the respondent Government can substantiate a concrete interference or element from which its necessity could be judged. The Commission must conclude therefore that measures of supervision are carried out only to the extent strictly necessary in the interests of national security as provided for in Art. 8(2) of the Convention.

68. From the point of view of the Convention it should be added that some compromise between the requirements for defending the constitutional democracy and the individual rights seems to be inherent in the system of the Convention. The preamble expressly states that the Fundamental Freedoms are best maintained on the

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(1) See Judgment of European Court of Human Rights, "Handyside" case, 7 December 1976, p. 17

(2) Cf. Newsletter on Legislative Activities, ed. by the Council of Europe, June-August 1976, No. 24, pp. 5 and 9 (Belgium and Switzerland).

one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend. Art. 17 makes it clear that nothing in the Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth therein. The balance found by the German legislation seems to be in line with the basic thought underlying the Convention.

CONCLUSION

69. The Commission is of the opinion by twelve votes and one abstention that the present case does not disclose a breach of Art. 8 of the Convention.

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4. As to Art. 13 of the Convention

70. The applicants finally allege a violation of Art. 13 of the Convention on the ground that the control organs provided for by the Act G10 are not independent and impartial tribunals.

According to the Commission's constant jurisprudence Art. 13 of the Convention relates exclusively to a remedy in respect of a violation of one of the rights and freedoms set forth in the other Articles of the Convention (1). In the present case no violation of one of the Articles invoked by the applicants has been established and there is consequently no basis for the application of Art. 13 of the Convention.

71. The Commission observes that even if Art. 13 of the Convention were to apply it could not generally be interpreted to the effect that an effective remedy in the sense of this provision presupposes the knowledge of a possible interference and therefore requires the notification of the person concerned, as was argued by the applicants.

The Commission observes that such notification would, as regards G10 measures, upset the purpose of such measures which are certainly interferences with the rights guaranteed by Art. 8(1) but which are necessary in the interest of national security (see above para. 64) and therefore justified and admitted by the Convention (Art. 8(2)). If the notification were to run counter to the goal of such interferences, an interpretation of Art. 13 creating a right to be informed would not be in harmony with the system of the Convention.

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(1) See e.g. decisions on the admissibility of Applications Nos. 3798/68, Yearbook XII, pp. 306, 324;
3937/69, Coll. 32, pp. 61, 63;
4517/70, Coll. 38, pp. 90, 98.

72. It is indeed clear that the information of the persons concerned, even after the measures, would in many cases make impossible or much more difficult the effective supervision of anti-constitutional activities. As the Federal Constitutional Court has stressed, the information would give hints about the way the security organs work and would identify their members thereby greatly diminishing the effectiveness of their work (1). Only the secrecy of the supervision makes it sensible, as the Federal Constitutional Court pointed out (2). It must be admitted that a very real danger exists for the Human Rights of citizens if the authorities misuse the power of clandestine supervision. It seems necessary, therefore, that all possible safeguards against such a misuse should be included in the system. The existence of an independent G10 Commission which must be informed monthly by the Minister about the measures taken and may receive complaints by anybody, as well as the special Board of Members of Parliament must be seen as such a safeguard.

73. Finally, the Commission notes that in consequence of the decision of the Federal Constitutional Court the judicial control appears to a certain extent to be possible. In fact in such cases where persons are subsequently informed of measures of supervision taken against them they may bring an action for damages as is described in the respondent Government's observations.

CONCLUSION

74. The Commission concludes by twelve votes with one abstention that the present case does not disclose a violation of Art. 13 of the Convention.

Secretary to the Commission — President of the Commission

(H.-C. KRÜGER) — (J.E.S. FAWCETT)

(1) BVerfGE Vol. 30, pp. 1, 19.
(2) Loc. cit., p. 19.

SEPARATE OPINION OF MR SPERDUTI

1. I was obliged to abstain on the various questions put to the vote and concerning the alleged violation of a number of Articles of the Convention, because I hold that these questions did not even arise in the light of the terms in which the application had been found admissible at that stage of the procedure.

In my view only one real question had to be answered in the context of these terms considered in their true meaning. But that question was not subjected to an examination likely to lead to a conclusion dealing wittingly and directly with it. My difficulty in agreeing with the line of reasoning followed in the report is due to the fact that this case raises a wholly new problem of interpretation.

2. When deciding on the admissibility, the Commission was careful to throw all possible light on the true reasons for the applicants' claim that they were "victims" within the meaning of Article 25. And, indeed, the Commission clearly showed that it linked the possibility of regarding persons as "victims", in conditions such as those alleged, with the fact that these persons "having been the subject of secret surveillance are not always subsequently informed of the measures taken against them" (Decision as to the admissibility, p. 63).

That starting point was then more or less set aside. From the first lines of the part of the Report entitled: "Opinion of the Commission" it becomes difficult to grasp the reasoning because of a statement whose scope is not easy to understand to the effect that "the applicants must be considered to be entitled to lodge an application even if they cannot show that they are victims" (page 27). One can, of course, admit that a court or other instance of judicial control considers in the course of the examination of a case the hypothetical violation of a right. However such consideration cannot be provisional, i.e. carried out subject to subsequent proof. But if it is certain from the beginning that it is impossible to submit the slightest proof, one fails to understand what purpose such a consideration can serve.

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The argument in the Report continues as follows:

> "As it is the particularity of this case that persons subject to secret supervision by the authorities are not always subsequently informed of such measures taken against them, it is impossible for the applicants to show that any of their rights have been interfered with" (ibid).

It would follow that in view of this impossibility the Commission would have had to conclude that any subsequent research into the violation of any other given article was unnecessary. Nevertheless the Commission deemed it necessary to carry out such research.

Admittedly the applicants, who were anxious to present their argument buttressed up by precise references to the Convention, alleged the violation of a number of articles, notably Arts.6(1), 8(1) and 13. But these allegations should be understood to mean that it was desirable to draw the Commission's attention to rights which, among those expressly recognised in the Convention, could be affected by measures of interference taken by the public authorities without the victims being able to claim the protection afforded to them by the Convention because they were not subsequently informed of those measures.

3. It will be seen that in the part of its report entitled "Points at issue", the Commission was obliged to take note of the fact that the applicants were asking it to carry out, in the context of the alleged violation of Art. 13, an examination as to the question:

> "Whether or not it can be induced from the notion 'effective remedy' within the meaning of this provision that the Federal Government is in all cases of secret surveillance under G10 obliged to inform the persons concerned subsequently of the measures taken against them" (page 26).

That examination was not, however, carried out, in view of the negative conclusions reached by the Commission with regard to the violation of Arts. 6 and 8. In accordance with the Commission's constant practice, confirmed in this case, the violation of Art. 13 presupposes the violation of rights recognised in other Articles of the Convention.

A similar and therefore conditional examination was envisaged in the "point at issue" concerning Art. 6(1), which reads as follows:

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"Whether or not the measures which can be taken by the authorities against individuals in application of G10 constitute an interference with 'civil rights' or signify the levelling of charges in the meaning of Art. 6(1).

"If so, whether or not this obliges the respondent Government to inform in all cases the persons concerned subsequently of the measures which have been taken against them and whether or not these persons consequently have the right to have the lawfulness of these measures determined by an ordinary court". (p. 25)

That examination did not take place either since the Commission states the following with regard to the applicability of Art. 6 (1):

"Supervisory measures of the kind in question are typical acts of State authority in the public interest and carried out jure imperii. They cannot be questioned before any courts in many legal systems. They do not at all directly concern private rights. The Commission concludes therefore, that Art. 6 does not apply to this kind of State interference on security grounds." (p. 28).

4. Let us now turn to the "point at issue" concerning Art. 8. There, too, the Commission begins by formulating a main question and then puts a subsidiary question. Here are the two propositions:

"Whether or not the measures which can be taken in application of G10 constitute an interference with the right to respect for private and family life, the home and correspondence".

"If so, whether or not such interferences are justified under para. 2 of this Article as being in accordance with the law and 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, or for the protection of the rights and freedoms of others" (p. 25)

Whilst the first proposition is undoubtedly correct, concerning, as it does, solely the question whether the measures envisaged in G10 are likely or not to constitute in themselves, i.e. such as this Act permits them, an interference by the public authorities with the right set out in Art. 8, it would be impossible to claim that the same is true of the second proposition. The latter also concerns the Act and only the Act, always regarded in its own right, i.e. in its general and abstract scope. It does not deal with the only point that really matters if a problem connected with the violation of Art. 8 is to arise: namely the need to determine how the public authorities did in fact act. In other words, we have left the ground covered by the Commission's constant practice in the case of individual applications concerning Art. 8. That practice consisted in examining the measures actually taken by the public authorities, which might have violated the Convention because, for instance, they had been taken and applied for a purpose other than that for which they had been intended.

If the applicants had asked the Commission to confine itself to an examination such as that carried out, i.e. an examination of the Act in abstracto, it would have been necessary to dismiss their application at the admissibility stage in accordance with the Commission's practice whereby

> "... the Commission can examine the compatibility of domestic legislation with the Convention only with respect to its application to a person, non-governmental organisation or group of individuals and only insofar as its application is alleged to constitute a violation of the Convention in regard to the applicant person, organisation or group in question. Therefore, in a case submitted by an individual under Article 25 the Commission is not competent to examine in abstracto the question of the conformity of domestic legislation with the provisions of the Convention" (Dec. Adm., Yearbook, III, p. 220; Dec. Adm., Yearbook IV, p. 276).

Admittedly, although it can be claimed that the Commission studied an abstract question, the applicants for their part may also have given the impression that they were concerned with a somewhat abstract subject since in fact, they referred to a possibility: namely that improper application of G10 might result in abuses being committed by the public authorities. But it is necessary to grasp the logical meaning of that reference clearly, since it was also made by the respondent Government (whose representatives conceded "that the Convention would certainly be violated if G10 were improperly used", Decision as to admissibility, p. 16). The danger of a violation of Act G 10, and simultaneously of Art. 8 of the Convention, was evoked and denounced by the applicants in the light of an interest which may, at will, be described as accessory compared with that of avoiding the aforesaid danger. But because of this close link there can be no denying that it was an interest which qualified for legal protection granted directly: namely the interest of everyone coming under the jurisdiction of a High Contracting Party to be able to defend the right vested in him in pursuance of Art. 8 in the matters referred to there after learning of measures taken in his respect by the public authorities in one of these matters.

Admittedly, the complexity of the case is due to the very fact that the language used by the applicants sometimes gives rise to confusion, particularly because they give the impression of concentrating on the danger referred to above as the true and direct subject of their application in such a way that they present themselves as potential victims; which is ambiguous and not admissible in the context of Art. 25.

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Thus in the decision as to the admissibility we read that:

"the applicats were merely asking for subsequent control of measures of surveillance because they were afraid there was a danger that citizens might be subjected to total surveillance" (page 16).

However, there seems no doubt that, as far as possible, it is necessary to understand the arguments they developed throughout the procedure as rational and legally pertinent, and this means they must be understood as concerning the aforesaid interest. Therefore it will be said that the applicants' complaint bore in substance upon a single right which is not expressly set forth in any Article of the Convention, namely the right to any person coming under the jurisdiction of a Contracting State to be informed within a reasonable time, according to the circumstances, of measures taken secretly in his respect by the public authorities and constituting forms of interference with the rights and freedoms recognised in the Convention.

If such a right is not apparent from the Convention, the application ought to have been dismissed on that account or to have led in the procedure on the merits to a conclusion, on that same count, that there had been no violation of the Convention. In any case the question of interpretation raised in substance by the applicants was the fundamental one calling for examination.

5. I do not, however, believe that this question calls for a negative reply. At this stage I would merely point out that the European Convention, as an international instrument designed to secure by a system of guarantees the effective enjoyment of given fundamental rights and freedoms, implies for that very reason an obligation on the part of the High Contracting Parties not to hinder the smooth working of the machinery set up to that end. That obligation is, indeed, expressly laid down in connection with the exercise of the right to individual application which the Convention refers to in Art. 25. As an implicit obligation, it has, in my view, a general scope. The corresponding scope of the subjective right of individuals which should also be affirmed by correlation can be expressed as follows: this is a right which, by its very nature, is an inherent right in that it is inseparably bound up with the various substantial rights recognised by the Convention. In short, it will be said that everyone has the right to have the benefit, without arbitrary interference, of the guarantees offered by the Convention for the enjoyment of the substantial rights it recognises. If that is true, it follows that every High Contracting Party is in duty bound to see to it that measures taken by public autorities and likely to derogate from the rights and freedoms recognised in the Convention do not remain unknown to the persons concerned, since that would be tantamount to depriving these persons of any possibility of availing themselves of the aforesaid guarantees.

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Admittedly, and the applicants did indeed admit this in the present case, the provision of information on some of the measures referred to above, particularly measures of surveillance taken by the public authorities concerning the correspondence and tele-communications of private persons, can, in principle, only be subsequent information. Similarly, the time-limits within which this information shall be furnished must be determined in the light of both the interests of individuals and the aims legitimately pursued by the public authorities when interfering with one of the substantial rights recognised in the Convention. The striking thing about the present case is that, although the decision of the Federal Constitutional Court dated 15 December 1970 did have certain repercussions on the subsequent application in the Federal Republic of G10, that application may not invariably be followed by subsequent notification (see under Friendly Settlement in the "Memorandum on the Delegates interview with the representatives of the Federal Government" in Appendix III, the percentage of such notifications).

To clarify this one can say that the right which arises from the Convention which because of that origin belongs to international law should be considered as having been violated by reason of the fact that internal law does not recognise it. This flaw in the internal legal system is in effect equivalent to a violation. It does not seem necessary to develop this aspect further by specifying from a technical legal point of view that the subjective international law which arises from the Convention has as its object recognition in the internal legal order of the right to receive certain information so that it is sufficient, for the Convention to be considered as violated, that this recognition should not have been present.

6. I do not say that in such cases the conclusion should be that there had been a violation of the Convention. In this connection reference should be made to the part of the aforesaid decision by the Federal Constitutional Court appearing on page 9 of the report of the Commission and concerning the reasons which might militate against "even the subsequent revelation of a measure of surveillance and its subsequent discussion in judicial proceedings": The arguments developed by the Court undoubtedly call for careful thought. Rather would I say that in cases of this kind the problem may arise of the exercise by a High Contracting Party of the right of derogation conferred in Article 15 of the Convention: that is suggested by the Federal Constitutional Court's references in the aforementioned sentence to threats against "the constitutional order and against the security and existence of the State". This is a subject which must be reserved for more profound study.

SEPARATE OPINION OF MR BUSUTTIL

I am compelled to abstain from expressing an opinion on the points at issue, as I do not consider that the applicants can be considered as "victims" within the context of Article 25. In this connection, I am content to follow the reasoning contained in paragraph 2 of Mr Sperduti's Separate Opinion.

SEPARATE OPINION OF MR TRECHSEL
JOINED BY MR FROWEIN

While I am in agreement with the final finding of the Commission I have to state that I dissent as far as the interpretation of Art. 13 is concerned. The Commission has always held that Art. 13 involves a right to an effective remedy only where rights and freedoms guaranteed under the Convention have actually been violated. This interpretation is supported by the wording of Art. 13 but cannot possibly express its true meaning. Like Art. 8 of the Universal Declaration of Human Rights, Art. 13 has the purpose of assuring that every individual has the possibility to turn to a national authority when he thinks that his human rights have been violated. Art. 13 is the logical counterpart to Art. 26 which reads as follows :

"The Commission may only deal with the matter after all domestic remedies have been exhausted according to the generally recognised rules of international law ....."

Art. 13 imposes on to the High Contracting Parties the duty to provide for such effective remedies the scope of which is to lead to a finding on whether the Convention has been violated or not. Now, it can not possibly be a prerequisite for the application of Art. 13 that the Convention be in fact violated. The establishment of a violation to be proved cannot be a condition for examining whether the same violation exists or not. Art. 13 gives an accessory guarantee in a way similar to Art. 14. It has no independent significance of its own but can only be violated in so far as one of the rights guaranteed under articles 2 - 12 of the Convention, 1 - 3 of the Protocol or 1 - 4 of Protocol No. 4 are at issue. It would lose all its meaning, however, if it were made dependent on the condition that one of these rights were actually violated.

Art. 13 cannot, therefore reasonably be construed in strict respect of its wording but only in the sense that everyone who alleges that he is a victim of a violation of his rights and freedoms as set forth in the Convention is entitled to an effective remedy before a national authority.

OBSERVATIONS BY MR. FROWEIN

I fully subscribe to the reasoning of our Commission concerning Article 8. However, in the light of recent developments in the Federal Republic of Germany, I feel bound to add the following.

It has been confirmed by the competent authorities of the Federation and the Lander that besides the application of G 10 other systems of secret surveillance by technical devices have been used in Germany although no legislation comparable to G 10 exists for them.

What has been stated by the Commission concerning Article 8 in this Report would, in my mind, apply also for these measures of surveillance. If one considers possibilities of secret surveillance in abstracto, i.e. not specific acts of surveillance - as the Commission had to do in this case - it is of great importance that the same level of safeguards exists in the different systems which may be used. Otherwise, the safeguards in G 10 would become meaningless because they could easily be circumvented.

APPENDIX I

History of Proceedings

Item	Date	Note
Examination of admissibility		
- Introduction of application	11.6.71	
- Registration of application	14.6.71	
- Examination by group of three members (Rules 54, 45 of former Rules of Procedure)	11.12.71	
- Commission's decision to give notice of the application to the respondent Government (Rule 45, 2 of the Rules of Procedure)	9.2.72	MM. Børrensen Fawcett Sperduti Triantafyllides Delcheye Lindal
- Respondent Government's observations on admissibility	29.3.72	Busuttil Kellberg Daver Opsahl Mangan
- Applicants' reply	31.5.72	
- Commission's decisions adjourning the examination of the case	19.8.72; 8.2.73; 20.7.73; 31.5.74	
- Commission's decision no longer to adjourn the examination of the case	17.7.74	MM. Fawcett Sperduti Ermacora Triantafyllides Welter Busuttil Kellberg Daver Mangan Custers Nørgaard Polak Frowein

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Appendix I

Item	Date	Note
- Further Report (Rule 45 of the Rules of Procedure)	18.9.74	
- Commission's decision to invite the parties for an oral hearing	8.10.74	MM. Fawcett Ermacora Triantafyllides Welter Kellberg Daver Opsahl Mangan Custers Nørgaard Polak Frowein Jörundsson
- Oral submissions made by the parties	17.12.74	
- Commission's deliberations and decision to declare the application admissible	18.12.74	MM. Fawcett Sperduti Ermacora Triantafyllides Welter Busuttil Kellberg Daver Mangan Custers Nørgaard Frowein Jörundsson Dupuy
Examination of merits		
- Applicant's observations on the merits	4.7.75	
- Respondent Government's observations	28.10.75	

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Item	Date	Note
- Commission's deliberations. It was decided not to hold an oral hearing on the merits.	6.3.76	MM. Fawcett Nørgaard Ermacora Busuttil Kellberg Daver Custers Frowein Jörundsson Tenekides Trechsel Kiernan Klecker
Commissions's deliberations	30.9.76	MM. Fawcett Sperduti Nørgaard Ermacora Triantafyllides Welter Busuttil Kellberg Daver Opsahl Mangan Custers Frowein Jörundsson
Commission's deliberations and final votes on Report	15.12.76	MM. Fawcett Sperduti Nørgaard Ermacora Busuttil Kellberg Daver * Custers Frowein Jörundsson Dupuy Trechsel Mangan Klecker

* Mr Daver only participated in the vote on the alleged violation of Art. 6 (1) insofar as the applicants rely on the notion "civil rights".

Item	Date	Note
- Commission unanimously adopts text of Report	9.3.77	MM. Nørgaard (Acting President, Rule 7 (1) of Rules of Procedure) Sperduti Busuttil Kellberg Daver Mangan Custers Frowein Jörundsson Tenekides Trechsel Klecker