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

COURT (PLENARY)

CASE OF KLASS AND OTHERS v. GERMANY

(Application no. 5029/71)

JUDGMENT

STRASBOURG

6 September 1978

In the case of Klass and others,

The European Court of Human Rights, taking its decision in plenary session in application of Rule 48 of the Rules of Court and composed of the following judges:

Mr. G. BALLADORE PALLIERI, *President*,
Mr. G. WIARDA,
Mr. H. MOSLER,
Mr. M. ZEKIA,
Mr. J. CREMONA,
Mr. P. O'DONOGHUE,
Mr. Thór VILHJÁLMSSON,
Mr. W. GANSHOF VAN DER MEERSCH,
Sir Gerald FITZMAURICE,
Mrs D. BINDSCHEDLER-ROBERT,
Mr. P.-H. TEITGEN,
Mr. G. LAGERGREN,
Mr. L. LIESCH,
Mr. F. GÖLCÜKLÜ,
Mr. F. MATSCHER,
Mr. J. PINHEIRO FARINHA,

and also Mr. H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 11, 13 and 14 March, and then on 30 June, 1, 3 and 4 July 1978,

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

PROCEDURE

1. The case of Klass and others was referred to the Court by the European Commission of Human Rights (hereinafter called "the Commission"). The case originated in an application against the Federal Republic of Germany lodged with the Commission on 11 June 1971 under Article 25 (art. 25) of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter called "the Convention") by five German citizens, namely Gerhard Klass, Peter Lubberger, Jürgen Nussbruch, Hans-Jürgen Pohl and Dieter Selb.

2. The Commission's request, which referred to Articles 44 and 48, paragraph (a) (art. 44, art. 48-a), and to which was attached the report provided for in Article 31 (art. 31), was lodged with the registry of the Court on 15 July 1977, within the period of three months laid down in Articles 32 para. 1 and 47 (art. 32-1, art. 47). The purpose of the request is

to obtain a decision from the Court as to whether or not the facts of the case disclose a breach by the respondent State of its obligations under Articles 6 para. 1, 8 and 13 (art. 6-1, art. 8, art. 13) of the Convention.

3. On 28 July, the President of the Court drew by lot, in the presence of the Registrar, the names of five of the seven judges called upon to sit as members of the Chamber; Mr. H. Mosler, the elected judge of German nationality, and Mr. G. Balladore Pallieri, the President of the Court, were ex officio members under Article 43 (art. 43) of the Convention and Rule 21 para. 3 (b) of the Rules of Court respectively. The five judges thus designated were Mr. J. Cremona, Mr. W. Ganshof van der Meersch, Mr. D. Evrigenis, Mr. G. Lagergren and Mr. F. Gölcüklü (Article 43 in fine of the Convention and Rule 21 para. 4 of the Rules of Court) (art. 43) .

Mr. Balladore Pallieri assumed the office of president of the Chamber in accordance with Rule 21 para. 5.

4. The President of the Chamber ascertained, through the Registrar, the views of the Agent of the Government and the Delegates of the Commission regarding the procedure to be followed. By an Order of 12 August, the President decided that the Government should file a memorial within a time-limit expiring on 28 November and that the Delegates of the Commission should be entitled to file a memorial in reply within two months of receipt of the Government's memorial.

5. At a meeting held in private on 18 November in Strasbourg, the Chamber decided under Rule 48 to relinquish jurisdiction forthwith in favour of the plenary Court, on the ground "that the case raise(d) serious questions affecting the interpretation of the Convention".

6. The Government filed their memorial on 28 November. On 27 January 1978, a memorial by the Principal Delegate of the Commission was received at the registry; at the same time, the Secretary to the Commission advised the Registrar that the Delegates would reply to the Government's memorial during the oral hearings.

7. After consulting, through the Registrar, the Agent of the Government and the Delegates of the Commission, the President directed by an Order of 24 February 1978 that the oral hearings should open on 10 March.

8. The Court held a preparatory meeting on 10 March, immediately before the opening of the hearings. At that meeting the Court, granting a request presented by the Government, decided that their Agent and counsel would be authorised to address the Court in German at the hearings, the Government undertaking, inter alia, responsibility for the interpretation into French or English of their oral arguments or statements (Rule 27 para. 2). In addition, the Court took note of the intention of the Commission's Delegates to be assisted during the oral proceedings by one of the applicants, namely Mr. Pohl; the Court also authorised Mr. Pohl to speak in German (Rules 29 para. 1 in fine and 27 para. 3).

9. The oral hearings took place in public at the Human Rights Building, Strasbourg, on 10 March.

There appeared before the Court:

- for the Government:
  Mrs. I. MAIER, Ministerialdirigentin
  at the Federal Ministry of Justice, *Agent*,
  Mr. H. G. MERK, Ministerialrat
  at the Federal Ministry of the Interior,
  Mr. H. STÖCKER, Regierungsdirektor
  at the Federal Ministry of Justice,
  Mrs. H. SEIBERT, Regierungsdirektorin
  at the Federal Ministry of Justice, *Advisers*;
- for the Commission:
  Mr. G. SPERDUTI, *Principal Delegate*,
  Mr. C. A. NØRGAARD, *Delegate*,
  Mr. H.-J. POHL, Applicant, assisting the Delegates
  under Rule 29 para. 1, second sentence.

The Court heard addresses by Mrs. Maier for the Government and by Mr. Sperduti, Mr. Nørgaard and Mr. Pohl for the Commission, as well as their replies to questions put by several members of the Court.

AS TO THE FACTS

10. The applicants, who are German nationals, are Gerhard Klass, an Oberstaatsanwalt, Peter Lubberger, a lawyer, Jürgen Nussbruch, a judge, Hans-Jürgen Pohl and Dieter Selb, lawyers. Mr. Nussbruch lives in Heidelberg, the others in Mannheim.

All five applicants claim that Article 10 para. 2 of the Basic Law (Grundgesetz) and a statute enacted in pursuance of that provision, namely the Act of 13 August 1968 on Restrictions on the Secrecy of the Mail, Post and Telecommunications (Gesetz zur Beschränkung des Brief-, Post- under Fernmeldegeheimnisses, hereinafter referred to as "the G 10"), are contrary to the Convention. They do not dispute that the State has the right to have recourse to the surveillance measures contemplated by the legislation; they challenge this legislation in that it permits those measures without obliging the authorities in every case to notify the persons concerned after the event, and in that it excludes any remedy before the courts against the ordering and execution of such measures. Their application is directed against the legislation as modified and interpreted by the Federal Constitutional Court (Bundesverfassungsgericht).

11. Before lodging their application with the Commission, the applicants had in fact appealed to the Federal Constitutional Court. By judgment of 15

December 1970, that Court held that Article 1 para. 5, sub-paragraph 5 of the G 10 was void, being incompatible with the second sentence of Article 10 para. 2 of the Basic Law, in so far as it excluded notification of the person concerned about the measures of surveillance even when such notification could be given without jeopardising the purpose of the restriction. The Constitutional Court dismissed the remaining claims (Collected Decisions of the Constitutional Court, Vol. 30, pp. 1 et seq.).

Since the operative provisions of the aforementioned judgment have the force of law, the competent authorities are bound to apply the G 10 in the form and subject to the interpretation decided by the Constitutional Court. Furthermore, the Government of the Federal Republic of Germany were prompted by this judgment to propose amendments to the G 10, but the parliamentary proceedings have not yet been completed.

12. As regards the applicants' right to apply to the Constitutional Court, that Court held, inter alia:

> "In order to be able to enter a constitutional application against an Act, the applicant must claim that the Act itself, and not merely an implementary measure, constitutes a direct and immediate violation of one of his fundamental rights ... These conditions are not fulfilled since, according to the applicants' own submissions, it is only by an act on the part of the executive that their fundamental rights would be violated. However, because they are not apprised of the interference with their rights, the persons concerned cannot challenge any implementary measure. In such cases, they must be entitled to make a constitutional application against the Act itself, as in cases where a constitutional application against an implementary measure is impossible for other reasons ..." (ibid, pp. 16-17).

13. Although, as a precautionary measure, the applicants claimed before both the Constitutional Court and the Commission that they were being subjected to surveillance measures, they did not know whether the G 10 had actually been applied to them.

On this point, the Agent of the Government made the following declaration before the Court:

> "To remove all uncertainty as to the facts of the case and to give the Court a clear basis for its decision, the Federal Minister of the Interior, who has competence in the matter, has, with the G 10 Commission's approval, authorised me to make the following statement:
>
> At no time have surveillance measures provided for by the Act enacted in pursuance of Article 10 of the Basic Law been ordered or implemented against the applicants. Neither as persons suspected of one or more of the offences specified in the Act nor as third parties within the meaning of Article 1, paragraph 2, sub-paragraph 2, of the G 10 have the applicants been subjected to such measures. There is also no question of the applicants' having been indirectly involved in a surveillance measure directed against another person - at least, not in any fashion which would have permitted their identification. Finally, there is no question of the applicants' having been subjected to surveillance by mistake - for example through confusion over a telephone number -, since in such cases the person concerned is notified of the surveillance measure."

The contested legislation

14. After the end of the Second World War, the surveillance of mail, post and telecommunications in Germany was dealt with by the occupying powers. As regards the Federal Republic, neither the entry into force on 24 May 1949 of the Basic Law nor the foundation of the State of the Federal Republic on 20 September 1949 altered this situation which continued even after the termination of the occupation régime in 1955. Article 5 para. 2 of the Convention of 26 May 1952 on Relations between the Three Powers (France, the United States and the United Kingdom) and the Federal Republic - as amended by the Paris Protocol of 23 October 1954 - specified in fact that the Three Powers temporarily retained "the rights ... heretofore held or exercised by them, which relate to the protection of the security of armed forces stationed in the Federal Republic". Under the same provision, these rights were to lapse "when the appropriate German authorities (had) 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".

15. The Government wished to substitute the domestic law for the rights exercised by the Three Powers and to place under legal control interferences with the right, guaranteed by Article 10 of the Basic Law, to respect for correspondence. Furthermore, the restrictions to which this right could be subject appeared to the Government to be inadequate for the effective protection of the constitutional order of the State. Thus, on 13 June 1967, the Government introduced two Bills as part of the Emergency Legislation. The first sought primarily to amend Article 10 para. 2 of the Basic Law; the second - based on Article 10 para. 2 so amended - was designed to limit the right to secrecy of the mail, post and telecommunications. The two Acts, having been adopted by the federal legislative assemblies, were enacted on 24 June and 13 August 1968 respectively.

The Three Powers had come to the view on 27 May that these two texts met the requirements of Article 5 para. 2 of the above-mentioned Convention. Their statements declared:

> "The rights of the Three Powers heretofore held or exercised by them which relate to the protection of the security of armed forces stationed in the Federal Republic and which are temporarily retained pursuant to that provision will accordingly lapse as each of the above-mentioned texts, as laws, becomes effective."

16. In its initial version, Article 10 of the Basic Law guaranteed the secrecy of mail, post and telecommunications with a proviso that restrictions could be ordered only pursuant to a statute. As amended by the Act of 24 June 1968, it now provides:

> "(1) Secrecy of the mail, post and telecommunications shall be inviolable.
>
> (2) Restrictions may be ordered only pursuant to a statute. Where such restrictions are intended to protect the free democratic constitutional order or the existence or

security of the Federation or of a Land, the statute 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 agencies and auxiliary agencies appointed by the people's elected representatives."

17. The G 10, adopting the solution contemplated by the second sentence of paragraph 2 of the above-quoted Article 10, specifies (in Article 1 para. 1) the cases in which the competent authorities may impose the restrictions provided for in that paragraph, that is to say, may open and inspect mail and post, read telegraphic messages, listen to and record telephone conversations. Thus, Article 1 para. 1 empowers those authorities so to act in order to protect against "imminent dangers" threatening the "free democratic constitutional order", "the existence or the security of the Federation or of a Land", "the security of the (allied) armed forces" stationed on the territory of the Republic and the security of "the troops of one of the Three Powers stationed in the Land of Berlin". According to Article 1 para. 2, these measures may be taken only where there are factual indications (tatsächliche Anhaltspunkte) for suspecting a person of planning, committing or having committed certain criminal acts punishable under the Criminal Code, such as offences against the peace or security of the State (sub-paragraph 1, no. 1), the democratic order (sub-paragraph 1, no. 2), external security (sub-paragraph 1, no. 3) and the security of the allied armed forces (sub-paragraph 1, no. 5).

Paragraph 2 of Article 1 further states that the surveillance provided for in paragraph 1 is permissible only if the establishment of the facts by another method is without prospects of success or considerably more difficult (aussichtslos oder wesentlich erschwert). The surveillance may cover only "the suspect or such other persons who are, on the basis of clear facts (bestimmter Tatsachen), to be presumed to receive or forward communications intended for the suspect or emanating from him or whose telephone the suspect is to be presumed to use" (sub-paragraph 2).

18. Article 1 para. 4 of the Act provides that an application for surveillance measures may be made only by the head, or his substitute, of one of the following services: the Agencies for the Protection of the Constitution of the Federation and the Länder (Bundesamt für Verfassungsschutz; Verfassungsschutzbehörden der Länder), the Army Security Office (Amt für Sicherheit der Bundeswehr) and the Federal Intelligence Service (Bundesnachrichtendienst).

The measures are ordered, on written application giving reasons, either by the supreme Land authority in cases falling within its jurisdiction or by a Federal Minister empowered for the purpose by the Chancellor. The Chancellor has entrusted these functions to the Ministers of the Interior and of Defence each of whom, in the sphere falling within his competence, must personally take the decision as to the application of the measures (Article 1 para. 5, sub-paragraphs 1 and 2).

Measures ordered must be immediately discontinued once the required conditions have ceased to exist or the measures themselves are no longer necessary (Article 1 para. 7, sub-paragraph 2). The measures remain in force for a maximum of three months and may be renewed only on fresh application (Article 1 para. 5, sub-paragraph 3).

19. Under the terms of Article 1 para. 5, sub-paragraph 5, the person concerned is not to be notified of the restrictions affecting him. However, since the Federal Constitutional Court's judgment of 15 December 1970 (see paragraph 11 above), the competent authority has to inform the person concerned as soon as notification can be made without jeopardising the purpose of the restriction. To this end, the Minister concerned considers ex officio, immediately the measures have been discontinued or, if need be, at regular intervals thereafter, whether the person concerned should be notified. The Minister submits his decision for approval to the Commission set up under the G 10 for the purpose of supervising its application (hereinafter called "the G 10 Commission"). The G 10 Commission may direct the Minister to inform the person concerned that he has been subjected to surveillance measures.

20. Implementation of the measures ordered is supervised by an official qualified for judicial office (Article 1 para. 7, sub-paragraph 1). This official examines the information obtained in order to decide whether its use would be compatible with the Act and whether it is relevant to the purpose of the measure. He transmits to the competent authorities only information satisfying these conditions and destroys any other intelligence that may have been gathered.

The information and documents so obtained may not be used for other ends and documents must be destroyed as soon as they are no longer needed to achieve the required purpose (Article 1 para. 7 sub-paragraphs 3 and 4).

21. The competent Minister must, at least once every six months, report to a Board consisting of five Members of Parliament on the application of the G 10; the Members of Parliament are appointed by the Bundestag in proportion to the parliamentary groupings, the opposition being represented on the Board (Article 1 para. 9, sub-paragraph 1, of the G 10 and Rule 12 of the Rules of Procedure of the Bundestag). In addition, the Minister is bound every month to provide the G 10 Commission with an account of the measures he has ordered (Article 1 para. 9). In practice and except in urgent cases, the Minister seeks the prior consent of this Commission. The Government, moreover, intend proposing to Parliament to amend the G 10 so as to make such prior consent obligatory.

The G 10 Commission decides, ex officio or on application by a person believing himself to be under surveillance, on both the legality of and the necessity for the measures; if it declares any measures to be illegal or unnecessary, the Minister must terminate them immediately (Article 1 para. 9, sub-paragraph 2). Although not required by the Constitutional Court's

judgment of 15 December 1970, the Commission has, since that judgment, also been called upon when decisions are taken on whether the person concerned should be notified of the measures affecting him (see paragraph 19 above).

The G 10 Commission consists of three members, namely, a Chairman, who must be qualified to hold judicial office, and two assessors. The Commission members are appointed for the current term of the Bundestag by the above-mentioned Board of five Members of Parliament after consultation with the Government; they are completely independent in the exercise of their functions and cannot be subject to instructions.

The G 10 Commission draws up its own rules of procedure which must be approved by the Board; before taking this decision, the Board consults the Government.

For the Länder, their legislatures lay down the parliamentary supervision to which the supreme authorities are subject in the matter. In fact, the Länder Parliaments have set up supervisory bodies which correspond to the federal bodies from the point of view of organisation and operation.

22. According to Article 1 para. 9, sub-paragraph 5, of the G 10:

> "... there shall be no legal remedy before the courts in respect of the ordering and implementation of restrictive measures."

The official statement of reasons accompanying the Bill contains the following passage in this connection:

> "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, notification to this person is out of the question. For the same reason, it must be avoided that a person who intends to commit, or who has committed, the offences enumerated in the Act can, by using a legal remedy, inform himself whether he is under surveillance. Consequently, a legal remedy to impugn the ordering of restrictive measures had to be denied ...
>
> The Bill presented during the 4th legislative session ... provided for the ordering (of such measures) by an independent judge. The Federal Government abandoned this solution in the Bill amending Article 10 of the Basic Law, introduced as part of the Emergency Legislation, mainly because the Executive, which is responsible before the Bundestag, should retain the responsibility for such decisions in order to observe a clear separation of powers. The present Bill therefore grants the power of decision to a Federal Minister or the supreme authority of the Land. For the (above-)mentioned reasons ..., the person concerned is deprived of the opportunity of having the restrictive measures ordered examined by a court; on the other hand, the constitutional principle of government under the rule of law demands an independent control of interference by the Executive with the rights of citizens. Thus, the Bill, in pursuance of the Bill amending Article 10 of the Basic Law ..., prescribes the regular reporting to a Parliamentary Board and the supervision of the ordering of the restrictive measures by a Control Commission appointed by the Board ..." (Bundestag document V/1880 of 13 June 1967, p. 8).

23. Although access to the courts to challenge the ordering and implementation of surveillance measures is excluded in this way, it is still open to a person believing himself to be under surveillance pursuant to the G 10 to seek a constitutional remedy: according to the information supplied by the Government, a person who has applied to the G 10 Commission without success retains the right to apply to the Constitutional Court. The latter may reject the application on the ground that the applicant is unable to adduce proof to substantiate a complaint, but it may also request the Government concerned to supply it with information or to produce documents to enable it to verify for itself the individual's allegations. The authorities are bound to reply to such a request even if the information asked for is secret. It is then for the Constitutional Court to decide whether the information and documents so obtained can be used; it may decide by a two-thirds majority that their use is incompatible with State security and dismiss the application on that ground (Article 26 para. 2 of the Constitutional Court Act).

The Agent of the Government admitted that this remedy might be employed only on rare occasions.

24. If the person concerned is notified, after the measures have been discontinued, that he has been subject to surveillance, several legal remedies against the interference with his rights become available to him. According to the information supplied by the Government, the individual may: in an action for a declaration, have reviewed by an administrative court declaration, the legality of the application to him of the G 10 and the conformity with the law of the surveillance measures ordered; bring an action for damages in a civil court if he has been prejudiced; bring an action for the destruction or, if appropriate, restitution of documents; finally, if none of these remedies is successful, apply to the Federal Constitutional Court for a ruling as to whether there has been a breach of the Basic Law.

25. Article 2 of the G 10 has also amended the Code of Criminal Procedure by inserting therein two Articles which authorise measures of surveillance of telephone and telegraphic communications.

Under Article 100 (a), these measures may be taken under certain conditions, in particular, when there are clear facts on which to suspect someone of having committed or attempted to commit certain serious offences listed in that Article. Under Article 100 (b), such measures may be ordered only by a court and for a maximum of three months; they may be renewed. In urgent cases, the decision may be taken by the public prosecutor's department but to remain in effect it must be confirmed by a court within three days. The persons concerned are informed of the measures taken in their respect as soon as notification can be made without jeopardising the purpose of the investigation (Article 101 para. 1 of the Code of Criminal Procedure).

These provisions are not, however, in issue in the present case.

PROCEEDINGS BEFORE THE COMMISSION

26. In their application lodged with the Commission on 11 June 1971, the applicants alleged that Article 10 para. 2 of the Basic Law and the G 10 - to the extent that these provisions, firstly, empower the authorities to monitor their correspondence and telephone communications without obliging the authorities to inform them subsequently of the measures taken against them and, secondly, exclude the possibility of challenging such measures before the ordinary courts - violate Articles 6, 8 and 13 (art. 6, art. 8, art. 13) of the Convention.

On 18 December 1974, the Commission declared the application admissible. It found, as regards Article 25 (art. 25) of the Convention:

> "... only the victim of an alleged violation may bring an application. The applicants, however, state that they may be or may have been subject to secret surveillance, for example, in course of legal representation of clients who were themselves subject to surveillance, and that persons having been the subject of secret surveillance are not always subsequently informed of the measures taken against them. In view of this particularity of the case the applicants have to be considered as victims for the purpose of Article 25 (art. 25)."

27. Having been invited by the Government to consider the application inadmissible under Article 29 in conjunction with Articles 25 and 27 para. 2 (art. 29+25, art. 29+27-2) of the Convention, the Commission declared in its report of 9 March 1977 that it saw no reason to accede to this request. In this connection, the report stated:

> "The Commission is ... still of the opinion ... that the applicants must be considered as if they were victims. Some of the applicants are barristers and it is theoretically 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."

The Commission then expressed the opinion:

- by eleven votes to one with two abstentions, that the present case did not disclose any breach of Article 6 para. 1 (art. 6-1) of the Convention insofar as the applicants relied on the notion "civil rights";
- unanimously, that the present case did not disclose any breach of Article 6 para. 1 (art. 6-1) in so far as the applicants relied on the notion "criminal charge";
- by twelve votes in favour with one abstention, that the present case did not disclose any breach of Article 8 (art. 8) or of Article 13 (art. 13).

The report contains various separate opinions.

28. In her memorial of 28 November 1977, the Agent of the Government submitted in conclusion:

> "I ... invite the Court
>
> to find that the application was inadmissible;
>
> in the alternative, to find that the Federal Republic of Germany has not violated the Convention."

She repeated these concluding submissions at the hearing on 10 March 1978.

29. For their part, the Delegates of the Commission made the following concluding submissions to the Court:

> "May it please the Court to say and judge
>
> 1. Whether, having regard to the circumstances of the case, the applicants could claim to be 'victims' of a violation of their rights guaranteed by the Convention by reason of the system of surveillance established by the so-called G 10 Act;
>
> 2. And, if so, whether the applicants are actually victims of a violation of their rights set forth in the Convention by the very existence of that Act, considering that it gives no guarantee to persons whose communications have been subjected to secret surveillance that they will be notified subsequently of the measures taken concerning them."

AS TO THE LAW

I. ON ARTICLE 25 PARA. 1 (art. 25-1)

30. Both in their written memorial and in their oral submissions, the Government formally invited the Court to find that the application lodged with the Commission was "inadmissible". They argued that the applicants could not be considered as "victims" within the meaning of Article 25 para. 1 (art. 25-1) which provides as follows:

> "The Commission may receive petitions addressed to the Secretary-General of the Council of Europe from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognises the competence of the Commission to receive such petitions ..."

In the Government's submission, the applicants were not claiming to have established an individual violation, even potential, of their own rights but rather, on the basis of the purely hypothetical possibility of being

subject to surveillance, were seeking a general and abstract review of the contested legislation in the light of the Convention.

31. According to the reply given by the Delegates at the hearing, the Commission agreed with the Government that the Court is competent to determine whether the applicants can claim to be "victims" within the meaning of Article 25 para. 1 (art. 25-1). However, the Commission disagreed with the Government in so far as the latter's proposal might imply the suggestion that the Commission's decision on the admissibility of the application should as such be reviewed by the Court.

The Delegates considered that the Government were requiring too rigid a standard for the notion of a "victim" of an alleged breach of Article 8 (art. 8) of the Convention. They submitted that, in order to be able to claim to be the victim of an interference with the exercise of the right conferred on him by Article 8 para. 1 (art. 8-1), it should suffice that a person is in a situation where there is a reasonable risk of his being subjected to secret surveillance. In the Delegates' view, the applicants are not only to be considered as constructive victims, as the Commission had in effect stated: they can claim to be direct victims of a violation of their rights under Article 8 (art. 8) in that under the terms of the contested legislation everyone in the Federal Republic of Germany who could be presumed to have contact with people involved in subversive activity really runs the risk of being subject to secret surveillance, the sole existence of this risk being in itself a restriction on free communication.

The Principal Delegate, for another reason, regarded the application as rightly declared admissible. In his view, the alleged violation related to a single right which, although not expressly enounced in the Convention, was to be derived by necessary implication; this implied right was the right of every individual to be informed within a reasonable time of any secret measure taken in his respect by the public authorities and amounting to an interference with his rights and freedoms under the Convention.

32. The Court confirms the well-established principle of its own case-law that, once a case is duly referred to it, the Court is endowed with full jurisdiction and may take cognisance of all questions of fact or of law arising in the course of the proceedings, including questions which may have been raised before the Commission under the head of admissibility. This conclusion is in no way invalidated by the powers conferred on the Commission under Article 27 (art. 27) of the Convention as regards the admissibility of applications. The task which this Article assigns to the Commission is one of sifting; the Commission either does or does not accept the applications. Its decision to reject applications which it considers to be inadmissible are without appeal as are, moreover, also those by which applications are accepted; they are taken in complete independence (see the De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, pp. 29 and 30, paras. 47-54; see also the judgment of 9 February 1967 on

the preliminary objection in the "Belgian Linguistic" case, Series A no. 5, p. 18; the Handyside judgment of 7 December 1976, Series A no. 24, p. 20, para. 41; and the judgment of 18 January 1978 in the case of Ireland v. the United Kingdom, Series A no. 25, p. 63, para. 157).

The present case concerns, inter alia, the interpretation of the notion of "victim" within the meaning of Article 25 (art. 25) of the Convention, this being a matter already raised before the Commission. The Court therefore affirms its jurisdiction to examine the issue arising under that Article (art. 25).

33. While Article 24 (art. 24) allows each Contracting State to refer to the Commission "any alleged breach" of the Convention by another Contracting State, a person, non-governmental organisation or group of individuals must, in order to be able to lodge a petition in pursuance of Article 25 (art. 25), claim "to be the victim of a violation ... of the rights set forth in (the) Convention". Thus, in contrast to the position under Article 24 (art. 24) - where, subject to the other conditions laid down, the general interest attaching to the observance of the Convention renders admissible an inter-State application - Article 25 (art. 25) requires that an individual applicant should claim to have been actually affected by the violation he alleges (see the judgment of 18 January 1978 in the case of Ireland v. the United Kingdom, Series A no. 25, pp. 90-91, paras. 239 and 240). Article 25 (art. 25) does not institute for individuals a kind of actio popularis for the interpretation of the Convention; it does not permit individuals to complain against a law in abstracto simply because they feel that it contravenes the Convention. In principle, it does not suffice for an individual applicant to claim that the mere existence of a law violates his rights under the Convention; it is necessary that the law should have been applied to his detriment. Nevertheless, as both the Government and the Commission pointed out, a law may by itself violate the rights of an individual if the individual is directly affected by the law in the absence of any specific measure of implementation. In this connection, the Court recalls that, in two previous cases originating in applications lodged in pursuance of Article 25 (art. 25), it has itself been faced with legislation having such an effect: in the "Belgian Linguistic" case and the case of Kjeldsen, Busk Madsen and Pedersen, the Court was called on to examine the compatibility with the Convention and Protocol No. 1 of certain legislation relating to education (see the judgment of 23 July 1968, Series A no. 6, and the judgment of 7 December 1976, Series A no. 23, especially pp. 22-23, para. 48).

34. Article 25 (art. 25), which governs the access by individuals to the Commission, is one of the keystones in the machinery for the enforcement of the rights and freedoms set forth in the Convention. This machinery involves, for an individual who considers himself to have been prejudiced by some action claimed to be in breach of the Convention, the possibility of bringing the alleged violation before the Commission provided the other

admissibility requirements are satisfied. The question arises in the present proceedings whether an individual is to be deprived of the opportunity of lodging an application with the Commission because, owing to the secrecy of the measures objected to, he cannot point to any concrete measure specifically affecting him. In the Court's view, the effectiveness (l'effet utile) of the Convention implies in such circumstances some possibility of having access to the Commission. If this were not so, the efficiency of the Convention's enforcement machinery would be materially weakened. The procedural provisions of the Convention must, in view of the fact that the Convention and its institutions were set up to protect the individual, be applied in a manner which serves to make the system of individual applications efficacious.

The Court therefore accepts that an individual may, under certain conditions, claim to be the victim of a violation occasioned by the mere existence of secret measures or of legislation permitting secret measures, without having to allege that such measures were in fact applied to him. The relevant conditions are to be determined in each case according to the Convention right or rights alleged to have been infringed, the secret character of the measures objected to, and the connection between the applicant and those measures.

35. In the light of these considerations, it has now to be ascertained whether, by reason of the particular legislation being challenged, the applicants can claim to be victims, in the sense of Article 25 (art. 25), of a violation of Article 8 (art. 8) of the Convention - Article 8 (art. 8) being the provision giving rise to the central issue in the present case.

36. The Court points out that where a State institutes secret surveillance the existence of which remains unknown to the persons being controlled, with the effect that the surveillance remains unchallengeable, Article 8 (art. 8) could to a large extent be reduced to a nullity. It is possible in such a situation for an individual to be treated in a manner contrary to Article 8 (art. 8), or even to be deprived of the right granted by that Article (art. 8), without his being aware of it and therefore without being able to obtain a remedy either at the national level or before the Convention institutions.

In this connection, it should be recalled that the Federal Constitutional Court in its judgment of 15 December 1970 (see paragraphs 11 and 12 above) adopted the following reasoning:

> "In order to be able to enter a constitutional application against an Act, the applicant must claim that the Act itself, and not merely an implementary measure, constitutes a direct and immediate violation of one of his fundamental rights ... These conditions are not fulfilled since, according to the applicants' own submissions, it is only by an act on the part of the executive that their fundamental rights would be violated. However, because they are not apprised of the interference with their rights, the persons concerned cannot challenge any implementary measure. In such cases, they must be entitled to make a constitutional application against the Act itself, as in cases

where a constitutional application against an implementary measure is impossible for other reasons ..."

This reasoning, in spite of the possible differences existing between appeals to the Federal Constitutional Court under German law and the enforcement machinery set up by the Convention, is valid, mutatis mutandis, for applications lodged under Article 25 (art. 25).

The Court finds it unacceptable that the assurance of the enjoyment of a right guaranteed by the Convention could be thus removed by the simple fact that the person concerned is kept unaware of its violation. A right of recourse to the Commission for persons potentially affected by secret surveillance is to be derived from Article 25 (art. 25), since otherwise Article 8 (art. 8) runs the risk of being nullified.

37. As to the facts of the particular case, the Court observes that the contested legislation institutes a system of surveillance under which all persons in the Federal Republic of Germany can potentially have their mail, post and telecommunications monitored, without their ever knowing this unless there has been either some indiscretion or subsequent notification in the circumstances laid down in the Federal Constitutional Court's judgment (see paragraph 11 above). To that extent, the disputed legislation directly affects all users or potential users of the postal and telecommunication services in the Federal Republic of Germany. Furthermore, as the Delegates rightly pointed out, this menace of surveillance can be claimed in itself to restrict free communication through the postal and telecommunication services, thereby constituting for all users or potential users a direct interference with the right guaranteed by Article 8 (art. 8).

At the hearing, the Agent of the Government informed the Court that at no time had surveillance measures under the G 10 been ordered or implemented in respect of the applicants (see paragraph 13 above). The Court takes note of the Agent's statement. However, in the light of its conclusions as to the effect of the contested legislation the Court does not consider that this retrospective clarification bears on the appreciation of the applicants' status as "victims".

38. Having regard to the specific circumstances of the present case, the Court concludes that each of the applicants is entitled to "(claim) to be the victim of a violation" of the Convention, even though he is not able to allege in support of his application that he has been subject to a concrete measure of surveillance. The question whether the applicants were actually the victims of any violation of the Convention involves determining whether the contested legislation is in itself compatible with the Convention's provisions.

Accordingly, the Court does not find it necessary to decide whether the Convention implies a right to be informed in the circumstances mentioned by the Principal Delegate.

II. ON THE ALLEGED VIOLATION OF ARTICLE 8 (art. 8)

39. The applicants claim that the contested legislation, notably because the person concerned is not informed of the surveillance measures and cannot have recourse to the courts when such measures are terminated, violates Article 8 (art. 8) of the Convention which provides as follows:

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

40. According to Article 10 para. 2 of the Basic Law, restrictions upon the secrecy of the mail, post and telecommunications may be ordered but only pursuant to a statute. Article 1 para. 1 of the G 10 allows certain authorities to open and inspect mail and post, to read telegraphic messages and to monitor and record telephone conversations (see paragraph 17 above). The Court's examination under Article 8 (art. 8) is thus limited to the authorisation of such measures alone and does not extend, for instance, to the secret surveillance effect in pursuance of the Code of Criminal Procedure (see paragraph 25 above).

41. The first matter to be decided is whether and, if so, in what respect the contested legislation, in permitting the above-mentioned measures of surveillance, constitutes an interference with the exercise of the right guaranteed to the applicants under Article 8 para. 1 (art. 8-1).

Although telephone conversations are not expressly mentioned in paragraph 1 of Article 8 (art. 8-1), the Court considers, as did the Commission, that such conversations are covered by the notions of "private life" and "correspondence" referred to by this provision.

In its report, the Commission expressed the opinion that the secret surveillance provided for under the German legislation amounted to an interference with the exercise of the right set forth in Article 8 para. 1 (art. 8-1). Neither before the Commission nor before the Court did the Government contest this issue. Clearly, any of the permitted surveillance measures, once applied to a given individual, would result in an interference by a public authority with the exercise of that individual's right to respect for his private and family life and his correspondence. Furthermore, in the mere existence of the legislation itself there is involved, for all those to whom the legislation could be applied, a menance of surveillance; this menace necessarily strikes at freedom of communication between users of the postal and telecommunication services and thereby constitutes an "interference by a public authority" with the exercise of the applicants' right to respect for private and family life and for correspondence.

The Court does not exclude that the contested legislation, and therefore the measures permitted thereunder, could also involve an interference with the exercise of a person's right to respect for his home. However, the Court does not deem it necessary in the present proceedings to decide this point.

42. The cardinal issue arising under Article 8 (art. 8) in the present case is whether the interference so found is justified by the terms of paragraph 2 of the Article (art. 8-2). This paragraph, since it provides for an exception to a right guaranteed by the Convention, is to be narrowly interpreted. Powers of secret surveillance of citizens, characterising as they do the police state, are tolerable under the Convention only in so far as strictly necessary for safeguarding the democratic institutions.

43. In order for the "interference" established above not to infringe Article 8 (art. 8), it must, according to paragraph 2 (art. 8-2), first of all have been "in accordance with the law". This requirement is fulfilled in the present case since the "interference" results from Acts passed by Parliament, including one Act which was modified by the Federal Constitutional Court, in the exercise of its jurisdiction, by its judgment of 15 December 1970 (see paragraph 11 above). In addition, the Court observes that, as both the Government and the Commission pointed out, any individual measure of surveillance has to comply with the strict conditions and procedures laid down in the legislation itself.

44. It remains to be determined whether the other requisites laid down in paragraph 2 of Article 8 (art. 8-2) were also satisfied. According to the Government and the Commission, the interference permitted by the contested legislation was "necessary in a democratic society in the interests of national security" and/or "for the prevention of disorder or crime". Before the Court the Government submitted that the interference was additionally justified "in the interests of ... public safety" and "for the protection of the rights and freedoms of others".

45. The G 10 defines precisely, and thereby limits, the purposes for which the restrictive measures may be imposed. It provides that, in order to protect against "imminent dangers" threatening "the free democratic constitutional order", "the existence or security of the Federation or of a Land", "the security of the (allied) armed forces" stationed on the territory of the Republic or the security of "the troops of one of the Three Powers stationed in the Land of Berlin", the responsible authorities may authorise the restrictions referred to above (see paragraph 17).

46. The Court, sharing the view of the Government and the Commission, finds that the aim of the G 10 is indeed to safeguard national security and/or to prevent disorder or crime in pursuance of Article 8 para. 2 (art. 8-2). In these circumstances, the Court does not deem it necessary to decide whether the further purposes cited by the Government are also relevant.

On the other hand, it has to be ascertained whether the means provided under the impugned legislation for the achievement of the above-mentioned

aim remain in all respects within the bounds of what is necessary in a democratic society.

47. The applicants do not object to the German legislation in that it provides for wide-ranging powers of surveillance; they accept such powers, and the resultant encroachment upon the right guaranteed by Article 8 para. 1 (art. 8-1), as being a necessary means of defence for the protection of the democratic State. The applicants consider, however, that paragraph 2 of Article 8 (art. 8-2) lays down for such powers certain limits which have to be respected in a democratic society in order to ensure that the society does not slide imperceptibly towards totalitarianism. In their view, the contested legislation lacks adequate safeguards against possible abuse.

48. As the Delegates observed, the Court, in its appreciation of the scope of the protection offered by Article 8 (art. 8), cannot but take judicial notice of two important facts. The first consists of the technical advances made in the means of espionage and, correspondingly, of surveillance; the second is the development of terrorism in Europe in recent years. Democratic societies nowadays find themselves threatened by highly sophisticated forms of espionage and by terrorism, with the result that the State must be able, in order effectively to counter such threats, to undertake the secret surveillance of subversive elements operating within its jurisdiction. The Court has therefore to accept that the existence of some legislation granting powers of secret surveillance over the mail, post and telecommunications is, under exceptional conditions, necessary in a democratic society in the interests of national security and/or for the prevention of disorder or crime.

49. As concerns the fixing of the conditions under which the system of surveillance is to be operated, the Court points out that the domestic legislature enjoys a certain discretion. It is certainly not for the Court to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this field (cf., mutatis mutandis, the De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, pp. 45-46, para. 93, and the Golder judgment of 21 February 1975, Series A no. 18, pp. 21-22, para. 45; cf., for Article 10 para. 2, the Engel and others judgment of 8 June 1976, Series A no. 22, pp. 41-42, para. 100, and the Handyside judgment of 7 December 1976, Series A no. 24, p. 22, para. 48).

Nevertheless, the Court stresses that this does not mean that the Contracting States enjoy an unlimited discretion to subject persons within their jurisdiction to secret surveillance. The Court, being aware of the danger such a law poses of undermining or even destroying democracy on the ground of defending it, affirms that the Contracting States may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate.

50. The Court must be satisfied that, whatever system of surveillance is adopted, there exist adequate and effective guarantees against abuse. This assessment has only a relative character: it depends on all the circumstances

of the case, such as the nature, scope and duration of the possible measures, the grounds required for ordering such measures, the authorities competent to permit, carry out and supervise such measures, and the kind of remedy provided by the national law.

The functioning of the system of secret surveillance established by the contested legislation, as modified by the Federal Constitutional Court's judgment of 15 December 1970, must therefore be examined in the light of the Convention.

51. According to the G 10, a series of limitative conditions have to be satisfied before a surveillance measure can be imposed. Thus, the permissible restrictive measures are confined to cases in which there are factual indications for suspecting a person of planning, committing or having committed certain serious criminal acts; measures may only be ordered if the establishment of the facts by another method is without prospects of success or considerably more difficult; even then, the surveillance may cover only the specific suspect or his presumed "contact-persons" (see paragraph 17 above). Consequently, so-called exploratory or general surveillance is not permitted by the contested legislation.

Surveillance may be ordered only on written application giving reasons, and such an application may be made only by the head, or his substitute, of certain services; the decision thereon must be taken by a Federal Minister empowered for the purpose by the Chancellor or, where appropriate, by the supreme Land authority (see paragraph 18 above). Accordingly, under the law there exists an administrative procedure designed to ensure that measures are not ordered haphazardly, irregularly or without due and proper consideration. In addition, although not required by the Act, the competent Minister in practice and except in urgent cases seeks the prior consent of the G 10 Commission (see paragraph 21 above).

52. The G 10 also lays down strict conditions with regard to the implementation of the surveillance measures and to the processing of the information thereby obtained. The measures in question remain in force for a maximum of three months and may be renewed only on fresh application; the measures must immediately be discontinued once the required conditions have ceased to exist or the measures themselves are no longer necessary; knowledge and documents thereby obtained may not be used for other ends, and documents must be destroyed as soon as they are no longer needed to achieve the required purpose (see paragraphs 18 and 20 above).

As regards the implementation of the measures, an initial control is carried out by an official qualified for judicial office. This official examines the information obtained before transmitting to the competent services such information as may be used in accordance with the Act and is relevant to the purpose of the measure; he destroys any other intelligence that may have been gathered (see paragraph 20 above).

53. Under the G 10, while recourse to the courts in respect of the ordering and implementation of measures of surveillance is excluded, subsequent control or review is provided instead, in accordance with Article 10 para. 2 of the Basic Law, by two bodies appointed by the people's elected representatives, namely, the Parliamentary Board and the G 10 Commission.

The competent Minister must, at least once every six months, report on the application of the G 10 to the Parliamentary Board consisting of five Members of Parliament; the Members of Parliament are appointed by the Bundestag in proportion to the parliamentary groupings, the opposition being represented on the Board. In addition, the Minister is bound every month to provide the G 10 Commission with an account of the measures he has ordered. In practice, he seeks the prior consent of this Commission. The latter decides, ex officio or on application by a person believing himself to be under surveillance, on both the legality of and the necessity for the measures in question; if it declares any measures to be illegal or unnecessary, the Minister must terminate them immediately. The Commission members are appointed for the current term of the Bundestag by the Parliamentary Board after consultation with the Government; they are completely independent in the exercise of their functions and cannot be subject to instructions (see paragraph 21 above).

54. The Government maintain that Article 8 para. 2 (art. 8-2) does not require judicial control of secret surveillance and that the system of review established under the G 10 does effectively protect the rights of the individual. The applicants, on the other hand, qualify this system as a "form of political control", inadequate in comparison with the principle of judicial control which ought to prevail.

It therefore has to be determined whether the procedures for supervising the ordering and implementation of the restrictive measures are such as to keep the "interference" resulting from the contested legislation to what is "necessary in a democratic society".

55. Review of surveillance may intervene at three stages: when the surveillance is first ordered, while it is being carried out, or after it has been terminated. As regards the first two stages, the very nature and logic of secret surveillance dictate that not only the surveillance itself but also the accompanying review should be effected without the individual's knowledge. Consequently, since the individual will necessarily be prevented from seeking an effective remedy of his own accord or from taking a direct part in any review proceedings, it is essential that the procedures established should themselves provide adequate and equivalent guarantees safeguarding the individual's rights. In addition, the values of a democratic society must be followed as faithfully as possible in the supervisory procedures if the bounds of necessity, within the meaning of Article 8 para. 2 (art. 8-2), are not to be exceeded. One of the fundamental principles of a democratic

society is the rule of law, which is expressly referred to in the Preamble to the Convention (see the Golder judgment of 21 February 1975, Series A no. 18, pp. 16-17, para. 34). The rule of law implies, inter alia, that an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure.

56. Within the system of surveillance established by the G 10, judicial control was excluded, being replaced by an initial control effected by an official qualified for judicial office and by the control provided by the Parliamentary Board and the G 10 Commission.

The Court considers that, in a field where abuse is potentially so easy in individual cases and could have such harmful consequences for democratic society as a whole, it is in principle desirable to entrust supervisory control to a judge.

Nevertheless, having regard to the nature of the supervisory and other safeguards provided for by the G 10, the Court concludes that the exclusion of judicial control does not exceed the limits of what may be deemed necessary in a democratic society. The Parliamentary Board and the G 10 Commission are independent of the authorities carrying out the surveillance, and are vested with sufficient powers and competence to exercise an effective and continuous control. Furthermore, the democratic character is reflected in the balanced membership of the Parliamentary Board. The opposition is represented on this body and is therefore able to participate in the control of the measures ordered by the competent Minister who is responsible to the Bundestag. The two supervisory bodies may, in the circumstances of the case, be regarded as enjoying sufficient independence to give an objective ruling.

The Court notes in addition that an individual believing himself to be under surveillance has the opportunity of complaining to the G 10 Commission and of having recourse to the Constitutional Court (see paragraph 23 above). However, as the Government conceded, these are remedies which can come into play only in exceptional circumstances.

57. As regards review a posteriori, it is necessary to determine whether judicial control, in particular with the individual's participation, should continue to be excluded even after surveillance has ceased. Inextricably linked to this issue is the question of subsequent notification, since there is in principle little scope for recourse to the courts by the individual concerned unless he is advised of the measures taken without his knowledge and thus able retrospectively to challenge their legality.

The applicants' main complaint under Article 8 (art. 8) is in fact that the person concerned is not always subsequently informed after the suspension of surveillance and is not therefore in a position to seek an effective remedy before the courts. Their preoccupation is the danger of measures being

improperly implemented without the individual knowing or being able to verify the extent to which his rights have been interfered with. In their view, effective control by the courts after the suspension of surveillance measures is necessary in a democratic society to ensure against abuses; otherwise adequate control of secret surveillance is lacking and the right conferred on individuals under Article 8 (art. 8) is simply eliminated.

In the Government's view, the subsequent notification which must be given since the Federal Constitutional Court's judgment (see paragraphs 11 and 19 above) corresponds to the requirements of Article 8 para. 2 (art. 8-2). In their submission, the whole efficacy of secret surveillance requires that, both before and after the event, information cannot be divulged if thereby the purpose of the investigation is, or would be retrospectively, thwarted. They stressed that recourse to the courts is no longer excluded after notification has been given, various legal remedies then becoming available to allow the individual, inter alia, to seek redress for any injury suffered (see paragraph 24 above).

58. In the opinion of the Court, it has to be ascertained whether it is even feasible in practice to require subsequent notification in all cases.

The activity or danger against which a particular series of surveillance measures is directed may continue for years, even decades, after the suspension of those measures. Subsequent notification to each individual affected by a suspended measure might well jeopardise the long-term purpose that originally prompted the surveillance. Furthermore, as the Federal Constitutional Court rightly observed, such notification might serve to reveal the working methods and fields of operation of the intelligence services and even possibly to identify their agents. In the Court's view, in so far as the "interference" resulting from the contested legislation is in principle justified under Article 8 para. 2 (art. 8-2) (see paragraph 48 above), the fact of not informing the individual once surveillance has ceased cannot itself be incompatible with this provision since it is this very fact which ensures the efficacy of the "interference". Moreover, it is to be recalled that, in pursuance of the Federal Constitutional Court's judgment of 15 December 1970, the person concerned must be informed after the termination of the surveillance measures as soon as notification can be made without jeopardising the purpose of the restriction (see paragraphs 11 and 19 above).

59. Both in general and in relation to the question of subsequent notification, the applicants have constantly invoked the danger of abuse as a ground for their contention that the legislation they challenge does not fulfil the requirements of Article 8 para. 2 (art. 8-2) of the Convention. While the possibility of improper action by a dishonest, negligent or over-zealous official can never be completely ruled out whatever the system, the considerations that matter for the purposes of the Court's present review are

the likelihood of such action and the safeguards provided to protect against it.

The Court has examined above (at paragraphs 51 to 58) the contested legislation in the light, inter alia, of these considerations. The Court notes in particular that the G 10 contains various provisions designed to reduce the effect of surveillance measures to an unavoidable minimum and to ensure that the surveillance is carried out in strict accordance with the law. In the absence of any evidence or indication that the actual practice followed is otherwise, the Court must assume that in the democratic society of the Federal Republic of Germany, the relevant authorities are properly applying the legislation in issue.

The Court agrees with the Commission that some compromise between the requirements for defending democratic society and individual rights is inherent in the system of the Convention (see, mutatis mutandis, the judgment of 23 July 1968 in the "Belgian Linguistic" case, Series A no. 6, p. 32, para. 5). As the Preamble to the Convention states, "Fundamental Freedoms ... are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which (the Contracting States) depend". In the context of Article 8 (art. 8), this means that a balance must be sought between the exercise by the individual of the right guaranteed to him under paragraph 1 (art. 8-1) and the necessity under paragraph 2 (art. 8-2) to impose secret surveillance for the protection of the democratic society as a whole.

60. In the light of these considerations and of the detailed examination of the contested legislation, the Court concludes that the German legislature was justified to consider the interference resulting from that legislation with the exercise of the right guaranteed by Article 8 para. 1 (art. 8-1) as being necessary in a democratic society in the interests of national security and for the prevention of disorder or crime (Article 8 para. 2) (art. 8-2). Accordingly, the Court finds no breach of Article 8 (art. 8) of the Convention.

III. ON THE ALLEGED VIOLATION OF ARTICLE 13 (art. 13)

61. The applicants also alleged a breach of Article 13 (art. 13) which provides:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

62. In the applicants' view, the Contracting States are obliged under Article 13 (art. 13) to provide an effective remedy for any alleged breach of the Convention; any other interpretation of this provision would render it

meaningless. On the other hand, both the Government and the Commission consider that there is no basis for the application of Article 13 (art. 13) unless a right guaranteed by another Article of the Convention has been violated.

63. In the judgment of 6 February 1976 in the Swedish Engine Drivers' Union case, the Court, having found there to be in fact an effective remedy before a national authority, considered that it was not called upon to rule whether Article 13 (art. 13) was applicable only when a right guaranteed by another Article of the Convention has been violated (Series A no. 20, p. 18, para. 50; see also the De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, p. 46, para. 95). The Court proposes in the present case to decide on the applicability of Article 13 (art. 13), before examining, if necessary, the effectiveness of any relevant remedy under German law.

64. Article 13 (art. 13) states that any individual whose Convention rights and freedoms "are violated" is to have an effective remedy before a national authority even where "the violation has been committed" by persons in an official capacity. This provision, read literally, seems to say that a person is entitled to a national remedy only if a "violation" has occurred. However, a person cannot establish a "violation" before a national authority unless he is first able to lodge with such an authority a complaint to that effect. Consequently, as the minority in the Commission stated, it cannot be a prerequisite for the application of Article 13 (art. 13) that the Convention be in fact violated. In the Court's view, Article 13 (art. 13) requires that where an individual considers himself to have been prejudiced by a measure allegedly in breach of the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress. Thus Article 13 (art. 13) must be interpreted as guaranteeing an "effective remedy before a national authority" to everyone who claims that his rights and freedoms under the Convention have been violated.

65. Accordingly, although the Court has found no breach of the right guaranteed to the applicants by Article 8 (art. 8), it falls to be ascertained whether German law afforded the applicants "an effective remedy before a national authority" within the meaning of Article 13 (art. 13).

The applicants are not claiming that, in relation to particular surveillance measures actually applied to them, they lacked an effective remedy for alleged violation of their rights under the Convention. Rather, their complaint is directed against what they consider to be a shortcoming in the content of the contested legislation. While conceding that some forms of recourse exist in certain circumstances, they contend that the legislation itself, since it prevents them from even knowing whether their rights under the Convention have been interfered with by a concrete measure of surveillance, thereby denies them in principle an effective remedy under national law. Neither the Commission nor the Government agree with this

contention. Consequently, although the applicants are challenging the terms of the legislation itself, the Court must examine, inter alia, what remedies are in fact available under German law and whether these remedies are effective in the circumstances.

66. The Court observes firstly that the applicants themselves enjoyed "an effective remedy", within the meaning of Article 13 (art. 13), in so far as they challenged before the Federal Constitutional Court the conformity of the relevant legislation with their right to respect for correspondence and with their right of access to the courts. Admittedly, that Court examined the applicants' complaints with reference not to the Convention but solely to the Basic Law. It should be noted, however, that the rights invoked by the applicants before the Constitutional Court are substantially the same as those whose violation was alleged before the Convention institutions (cf., mutatis mutandis, the judgment of 6 February 1976 in the Swedish Engine Drivers' Union case, Series A no. 20, p. 18, para. 50). A reading of the judgment of 15 December 1970 reveals that the Constitutional Court carefully examined the complaints brought before it in the light, inter alia, of the fundamental principles and democratic values embodied in the Basic Law.

67. As regards the issue whether there is "an effective remedy" in relation to the implementation of concrete surveillance measures under the G 10, the applicants argued in the first place that to qualify as a "national authority", within the meaning of Article 13 (art. 13), a body should at least be composed of members who are impartial and who enjoy the safeguards of judicial independence. The Government in reply submitted that, in contrast to Article 6 (art. 6), Article 13 (art. 13) does not require a legal remedy through the courts.

In the Court's opinion, the authority referred to in Article 13 (art. 13) may not necessarily in all instances be a judicial authority in the strict sense (see the Golder judgment of 21 February 1975, Series A no. 18, p. 16, para. 33). Nevertheless, the powers and procedural guarantees an authority possesses are relevant in determining whether the remedy before it is effective.

68. The concept of an "effective remedy", in the applicants' submission, presupposes that the person concerned should be placed in a position, by means of subsequent information, to defend himself against any inadmissible encroachment upon his guaranteed rights. Both the Government and the Commission were agreed that no unrestricted right to notification of surveillance measures can be deduced from Article 13 (art. 13) once the contested legislation, including the lack of information, has been held to be "necessary in a democratic society" for any one of the purposes mentioned in Article 8 (art. 8).

The Court has already pointed out that it is the secrecy of the measures which renders it difficult, if not impossible, for the person concerned to seek

any remedy of his own accord, particularly while surveillance is in progress (see paragraph 55 above). Secret surveillance and its implications are facts that the Court, albeit to its regret, has held to be necessary, in modern-day conditions in a democratic society, in the interests of national security and for the prevention of disorder or crime (see paragraph 48 above). The Convention is to be read as a whole and therefore, as the Commission indicated in its report, any interpretation of Article 13 (art. 13) must be in harmony with the logic of the Convention. The Court cannot interpret or apply Article 13 (art. 13) so as to arrive at a result tantamount in fact to nullifying its conclusion that the absence of notification to the person concerned is compatible with Article 8 (art. 8) in order to ensure the efficacy of surveillance measures (see paragraphs 58 to 60 above). Consequently, the Court, consistently with its conclusions concerning Article 8 (art. 8), holds that the lack of notification does not, in the circumstances of the case, entail a breach of Article 13 (art. 13).

69. For the purposes of the present proceedings, an "effective remedy" under Article 13 (art. 13) must mean a remedy that is as effective as can be having regard to the restricted scope for recourse inherent in any system of secret surveillance. It therefore remains to examine the various remedies available to the applicants under German law in order to see whether they are "effective" in this limited sense.

70. Although, according to the G 10, there can be no recourse to the courts in respect of the ordering and implementation of restrictive measures, certain other remedies are nevertheless open to the individual believing himself to be under surveillance: he has the opportunity of complaining to the G 10 Commission and to the Constitutional Court (see paragraphs 21 and 23 above). Admittedly, the effectiveness of these remedies is limited and they will in principle apply only in exceptional cases. However, in the circumstances of the present proceedings, it is hard to conceive of more effective remedies being possible.

71. On the other hand, in pursuance of the Federal Constitutional Court's judgment of 15 December 1970, the competent authority is bound to inform the person concerned as soon as the surveillance measures are discontinued and notification can be made without jeopardising the purpose of the restriction (see paragraphs 11 and 19 above). From the moment of such notification, various legal remedies - before the courts - become available to the individual. According to the information supplied by the Government, the individual may: in an action for a declaration, have reviewed by an administrative court the lawfulness of the application to him of the G 10 and the conformity with the law of the surveillance measures ordered; bring an action for damages in a civil court if he has been prejudiced; bring an action for the destruction or, if appropriate, restitution of documents; finally, if none of these remedies is successful, apply to the Federal Constitutional

Court for a ruling as to whether there has been a breach of the Basic Law (see paragraph 24 above).

72. Accordingly, the Court considers that, in the particular circumstances of this case, the aggregate of remedies provided for under German law satisfies the requirements of Article 13 (art. 13).

IV. ON THE ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 (art. 6-1)

73. The applicants finally alleged a breach of Article 6 para. 1 (art. 6-1) which provides:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

74. According to the applicants, the surveillance measures which can be taken under the contested legislation amount both to an interference with a "civil right", and to the laying of a "criminal charge" within the meaning of Article 6 para. 1 (art. 6-1). In their submission, the legislation violates this Article (art. 6-1) in so far as it does not require notification to the person concerned in all cases after the termination of surveillance measures and excludes recourse to the courts to test the lawfulness of such measures. On the other hand, both the Government and the Commission concur in thinking that Article 6 para. 1 (art. 6-1) does not apply to the facts of the case under either the "civil" or the "criminal" head.

75. The Court has held that in the circumstances of the present case the G 10 does not contravene Article 8 (art. 8) in authorising a secret surveillance of mail, post and telecommunications subject to the conditions specified (see paragraphs 39 to 60 above).

Since the Court has arrived at this conclusion, the question whether the decisions authorising such surveillance under the G 10 are covered by the judicial guarantee set forth in Article 6 (art. 6) – assuming this Article (art. 6) to be applicable - must be examined by drawing a distinction between two stages: that before, and that after, notification of the termination of surveillance.

As long as it remains validly secret, the decision placing someone under surveillance is thereby incapable of judicial control on the initiative of the person concerned, within the meaning of Article 6 (art. 6); as a consequence, it of necessity escapes the requirements of that Article.

The decision can come within the ambit of the said provision only after discontinuance of the surveillance. According to the information supplied

by the Government, the individual concerned, once he has been notified of such discontinuance, has at his disposal several legal remedies against the possible infringements of his rights; these remedies would satisfy the requirements of Article 6 (art. 6) (see paragraphs 24 and 71 above).

The Court accordingly concludes that, even if it is applicable, Article 6 (art. 6) has not been violated.

FOR THESE REASONS, THE COURT

1. holds unanimously that it has jurisdiction to rule on the question whether the applicants can claim to be victims within the meaning of Article 25 (art. 25) of the Convention;

2. holds unanimously that the applicants can claim to be victims within the meaning of the aforesaid Article (art. 25);

3. holds unanimously that there has been no breach of Article 8, Article 13 or Article 6 (art. 8, art. 13, art. 6) of the Convention.

Done in French and English, both texts being authentic, at the Human Rights Building, Strasbourg, this sixth day of September, nineteen hundred and seventy-eight.

For the President
Gérard WIARDA
Vice-President

On behalf of the Registrar
Herbert PETZOLD
Deputy Registrar

The separate opinion of Judge PINHEIRO FARINHA is annexed to the present judgment in accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 50 para. 2 of the Rules of Court.

G.W.
H.P.

SEPARATE OPINION OF JUDGE PINHEIRO FARINHA

(Translation)

I agree with the judgment's conclusions, but on different grounds.

1. The G 10 Act specifies, in Article 1 para. 1, the cases in which the competent authorities may impose restrictions, that is to say, may open and inspect mail and post, read telegraphic messages, listen to and record telephone conversations. It empowers those authorities so to act, inter alia, in order to protect against "imminent dangers" threatening the "free democratic constitutional order", "the existence or the security of the Federation or of a Land", "the security of the (allied) armed forces" stationed on the territory of the Republic and the security of "the troops of one of the Three Powers stationed in the Land of Berlin". According to Article 1 para. 2, these measures may be taken only where there are factual indications (tatsächliche Anhaltspunkte) for suspecting a person of planning, committing, or having committed certain criminal acts punishable under the Criminal Code, such as offences against the peace or security of the State (sub-paragraph 1, no. 1), the democratic order (sub-paragraph 1, no. 2), external security (sub-paragraph 1, no. 3) and the security of the allied armed forces (sub-paragraph 1, no. 5) (see paragraph 17 of the judgment).

For all those persons to whom the G 10 can be applied, the mere facts of its existence creates a very real menace that their exercise of the right to respect for their private and family life and their correspondence may be the subject of surveillance.

Clearly, therefore, a person may claim to be a victim for the purposes of Article 25 (art. 25) of the Convention. Consequently, the applicants have a direct interest (Jose Alberto dos Reis, Codigo do Processo Civil Anotado, vol. 1, p. 77), which is an ideal condition (Carnelutti, Sistemo del diritto processuale civile, vol. 1, pp. 361 and 366) for an application to the Commission.

In my view, the applicants are the victims of a menace and for this reason can claim to be victims within the meaning of Article 25 (art. 25).

2. I would mention in passing one point of concern, namely, that the majority opinion, contained in paragraph 56, could take the interpretation of Article 8 (art. 8) in a direction which, if I may say so, might not be without risk.

The measures are ordered, on written application giving reasons, either by the supreme Land authority in cases falling within its jurisdiction or by a Federal Minister empowered for the purpose by the Chancellor. The Chancellor has entrusted these functions to the Ministers of the Interior and of Defence, each of whom, in the sphere falling within his competence, must personally take the decision as to the application of the measures

(Article 1 para. 5, sub-paragraphs 1 and 2) (see paragraph 18 of the judgment).

Implementation of the measures ordered is supervised by an official qualified for judicial office (Article 1 para. 7, sub-paragraph 1) (see paragraph 20 of the judgment).

I believe that separation of powers is a basic principle of a democratic society and that, since the measures can be ordered where there are mere factual indications that criminal acts are about to be or are in the course of being committed, this principle requires that the measures be ordered by an independent judge - as was in fact contemplated by the German legislature (see paragraph 22 of the judgment).

I have difficulty in accepting that the political authority may decide by itself whether there exist factual indications that criminal acts are about to be or are in the course of being committed.

3. Acting in the general interest, the States, as the High Contracting Parties, safeguard the Convention against any breaches attributable to another State; such breaches can consist in the danger and threat to democracy which the publication of a law in itself may pose.

In cases originating in an application by individuals, it is necessary to show, in addition to the threat or danger, that there has been a specific violation of the Convention of which they claim to be the victims.

There is no doubt that a law can in itself violate the rights of an individual if it is directly applicable to that individual without any specific measure of implementation.

This is the case with a law which denies those who reside in a particular area access to certain educational establishments, and with a law which makes sex education one of the compulsory subjects on the curriculum: these laws are applicable without the need for any implementing measure (see the "Belgian Linguistic" case and the Kjeldsen, Busk Madsen and Pedersen case).

The same does not hold true for the German G 10.

The Act certainly makes provision for telephone-tapping and inspection of mail, although it delimits the scope of such measures and regulates the methods of enforcing them.

Surveillance of an "exploratory" or general kind is not, however, authorised by the legislation in question. If it were, then the Act would be directly applicable.

Instead, the measures cannot be applied without a specific decision by the supreme Land authority or the competent Federal Minister who must, in addition, consider whether there exist any factual indications that a criminal act is about to be or is in the course of being committed.

Thus, only where a surveillance measure has been authorised and taken against a given individual does any question arise of an interference by a

public authority with the exercise of that individual's right to respect for his private and family life and his correspondence.

So far as the case sub judice is concerned, on the one hand, the applicants do not know whether the G 10 has in fact been applied to them (see paragraph 12 of the judgment) and, on the other hand, the respondent Government state - and we have no reason to doubt this statement - that "at no time have surveillance measures provided for by the Act passed in pursuance of Article 10 of the Basic Law been ordered or implemented against the applicants.

The applicants have not been subjected to such measures either as persons suspected of one or more of the offences specified in the Act or as third parties within the meaning of Article 1, paragraph 2, sub-paragraph 2, of the G 10.

There is also no question of the applicants' having been indirectly involved in a surveillance measure directed against another person - at least, not in any fashion which would have permitted their identification.

Finally, there is no question of the applicants' having been subjected to surveillance by mistake - for example through confusion over a telephone number -, since in such cases the person concerned is notified of the surveillance measure" (see paragraph 13 of the judgment).

The Court may take into consideration only the case of the applicants (Engel and others judgment of 8 June 1976, Series A no. 22, p. 43, para. 106) and not the situation of other persons not having authorised them to lodge an application with the Commission in their name.

These are the reasons which lead me to conclude, as the Court does, that the case sub judice does not disclose any violation of the Convention.