(TRANSLATION)

THE FACTS

The applicant, a Swiss national, born in 1953, is resident in Basle. He is a printer.

In the proceedings before the Commission, he is represented by Mr. Martin Neidhart, a lawyer at Liestal (Switzerland).

The applicant is the spokesman for the regional section of an anti-nuclear movement at Kaiseraugst, near Basle. On 3 February 1983 a demonstration directed and organised by the applicant took place at Basle.

At the time of these events, a high tension pylon was criminally blown up at Pratteln, a town not far from Basle. According to the applicant, this act gave the Swiss authorities an excuse for tapping his private telephone.

In the first week of February the applicant had already noticed that he was being tailed by the police. On 22 August 1983, he was informed unofficially that his telephone had been tapped for one week in February.

On 12 September 1983, the applicant lodged a public law complaint with the Federal Court, challenging the telephone surveillance which he suspected.

By decision of 19 March 1984, the Federal Court dismissed the complaint, considering that such a complaint was not admissible unless directed against cantonal measures. That was not the case.

In a letter of 12 April 1984, the applicant then applied to the Attorney General of the Confederation to enquire whether he had ordered the telephone surveillance. The Attorney General's Office informed the applicant in a letter of 16 May 1984 that it was unable to give an answer on that point.

On 28 May, the applicant repeated his request, making a point of referring to Articles 6, 8 and 13 of the Convention. In a letter of 4 June 1984, the Office of the Attorney General of the Confederation cited several reasons which might have resulted in the applicant not being notified: either no telephone tapping had been ordered, or the measure was still in force, or it was no longer in force but had to remain secret so as not to interfere with the course of the investigation. In any case, it was claimed, the measure was in conformity with Section 66 of the Federal Law on Criminal Procedure (PPF) as well as with Article 8 para. 2 of the Convention.

On 25 June 1984, the applicant lodged with the Federal Department of Justice and Police a formal complaint under a "complaints to the supervising authority" procedure (Aufsichtsbeschwerde) against the refusal of the Attorney General's Office to give information about the reasons for and manner and duration of the telephone surveillance.

In a letter of 21 December 1984, the Federal Department of Justice and Police informed him that it treated any complaint founded on Section 71 of the Federal Law on Administrative Procedure as a formal complaint within the meaning of Sections 44 *et seq.* of that Law. Consequently, the applicant enjoyed all the recognised rights of parties and was entitled to an official decision by the Federal Department of Justice and Police. It follows that the conditions of Article 13 were respected.

In a letter of 11 January 1985, the applicant asked for right of access to the file on the procedure concerning the telephone surveillance. He was met by a refusal on the part of the Federal Department of Justice and Police in a letter of 30 January 1985.

In its final decision of 23 April 1985, the said Department dismissed the complaint.

Having pointed out that it was treating the applicant's complaint as a formal complaint under Section 44 of the Federal Law on Administrative Procedure and having once more refused the request for access to the file, the Department stated, in the first place, that the legal basis for a telephone surveillance was laid down in Sections 66, 66 *quater* and 72 PPF. At the same time it explained that the conditions laid down in these provisions were legitimate inasmuch as the purpose of the criminal investigation department was to prosecute offences against the internal and external security of the Confederation committed, as was the case in point, by groups belonging to the Kaiseraugst anti-nuclear movement, whose spokesman the applicant was. The fact of keeping any telephone tapping secret had to be considered separately in each case. In any event, there could be no breach of Article 8 of the Convention, since the practice adopted was in conformity with the case-law of the European Court (cf. Eur. Court H.R., Klass and others judgment of 6 September 1978, Series A no. 28, p. 30).

Lastly, the Department considered that pending an official revision of the provisions of the Federal Law on Criminal Procedure, the complaints procedure (Aufsichtsbeschwerde) constituted an effective remedy within the meaning of Article 13 of the Convention.

Indeed, the regulations provide that at the advance notification stage of the enquiry into the complaint it is ascertained from the President of the Indictments Chamber of the Swiss Federal Court whether and for what reasons telephone tapping has taken place and for what reasons information was subsequently withheld. Thanks to this procedure the Federal Department of Justice and Police has full knowledge, when it takes a decision on the complaint, of the decision taken in this context by the President of the Indictments Chamber of the Federal Court. It is thus in a position to evaluate the justification for the telephone tapping and for the refusal of subsequent information to the person subjected to this measure.

Notwithstanding, the applicant applied, on 8 May 1985, for an interpretation of the decision of the Federal Department of Justice and Police of 23 April 1985, under Section 69 of the Federal Law on Administrative Procedure. However, by decision of 23 May 1985, this latter authority informed the applicant that it was not taking up the matter of the interpretation request.

The applicant's *complaints* may be summed up as follows:

The applicant alleges, in the first place, a breach of Article 8 of the Convention, then of Articles 6 and 13 of the Convention and lastly of Article 17 of the Convention.

1. With regard to Article 8 of the Convention:

The applicant, who claims to have had his telephone tapped, states that this interference with his right to respect for his private life was not in accordance with any legal provision. He points out in this connection that the relevant provisions of Swiss law, unlike the provisions of the German Code of Criminal Procedure, make only vague and imprecise reference to the conditions in which surveillance measures in the form of telephone tapping may be ordered.

Furthermore, Swiss legislation authorises all technical means of implementing such measures. Lastly, he claims that the judicial control is perfunctory and that the legislation contains nothing concerning notification to the person concerned, either if that person's telephone is still being tapped or subsequently.

2. With regard to Articles 6 and 13 of the Convention:

The applicant considers that the complaints procedure (Aufsichtsbeschwerde) before the Federal Department of Justice and Police does not meet the requirements of Articles 6 and 13 of the Convention. He maintains that the authority in question here is not an "independent" authority, such as a "tribunal".

Furthermore, the failure to notify the person concerned deprives him of any possibility of seeking and securing reparation for any alleged injury.

3. With regard to Article 17 of the Convention:

The applicant considers that the measure allegedly ordered in respect of him not only constitutes a breach of the above-mentioned provisions of the Convention, but seriously infringes his right to respect for his private life and in that way exceeds the limits imposed by Article 17 of the Convention.

THE LAW

1. The applicant alleges a violation of Article 8 of the Convention because, he claims, his telephone was tapped. In his view, this constitutes an interference with his right to respect for his private life.

In addition, the applicant claims that his rights guaranteed in Articles 6 and 13 of the Convention have infringed, considering that the complaints procedure (Aufsichtsbeschwerde) before the Federal Department of Justice and Police does not meet the requirements of either of these provisions of the Convention because, on the one hand, that authority cannot be described as an "independent tribunal" within the

meaning of Article 6 and, on the other hand, the procedure does not constitute an effective remedy within the meaning of Article 13 to the situation complained of.

Lastly, the applicant considers that the measure alleged to have been ordered in respect of him fundamentally infringes his right to respect for his private life and so exceeds the limits imposed by Article 17 of the Convention.

From the outset, the respondent Government leave open the question whether surveillance by telephone tapping was in fact ordered. This raises the question whether in the present case the applicant can claim to be a victim within the meaning of Article 25 of the Convention, the first paragraph of which reads:

> "1. 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 ..."

The Government refer on this point to the following reasoning, advanced by the Commission in its decision on the admissibility of application No. 10628/83 (Dec. 14.10.85, D.R. 44 pp. 175, 191):

> "Referring to the European Court of Human Rights judgment in the Klass case (Eur. Court H.R., Klass and others judgment of 6 September 1978, Series A no. 28, para. 34), the Commission recalls that the Court accepted 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. In this respect the Court stated that 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.
>
> In this context the Commission notes that Swiss legislation has established a system of surveillance under which anyone's telephone communications may be controlled when the conditions prescribed by law are satisfied without the person subjected to this surveillance being informed of the fact. In these circumstances the Commission considers that the applicants are entitled to claim to be victims of a violation of the Convention although they are unable to bring evidence in support of their application to prove that they were subject to such a measure of surveillance."

The respondent Government also argue that, as regards the question of supervising telephone tapping, the applicant should have requested the competent national authorities and in particular the Federal Council to give a decision on the situation complained of, in particular by using the complaints procedure (Aufsichtsbeschwerde), which involves an *a posteriori* control of the expediency of a telephone surveillance order and, more generally, control of the proper application of the

relevant legal provisions. In the Government's view, the range of procedural guarantees available to the applicant in this case guaranteed him an effective remedy within the meaning of Article 26 of the Convention.

The applicant contests this point of view. In particular, he considers that the complaints procedure before the Federal Council advocated by the respondent Government is not an effective remedy within the meaning of Article 26 of the Convention and, more generally, that there are no remedies available in Swiss law capable of providing a solution for a situation such as that complained of. It could not, therefore, validly be maintained that the application is inadmissible for failure to exhaust the domestic remedies within the meaning of Article 26 of the Convention.

The Commission finds the question of the exhaustion of domestic remedies a difficult one which in the present case raises some uncertainty. It is strongly disputed between the parties. Nevertheless, the Commission does not consider it necessary to examine this question further, since the application is in any event inadmissible for other reasons.

2. The Commission will examine in the first place whether the alleged measures of surveillance and control by telephone tapping complained of by the applicant amount to an interference with his rights guaranteed by Article 8 of the Convention and, if so, whether such interference may be justified under paragraph 2 of that provision.

This article reads 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."

The Commission considers that these measures, assuming that they were applied to the applicant's telephone communications, constituted an interference with the exercise of his rights under paragraph 1 of Article 8. As the Court stated in its judgment in the Klass case (*loc. cit.*, para. 41):

"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 rights 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 menace of surveillance; this menace necessarily strikes at freedom of communication between users of the postal and telecommunication services and

therefore constitutes an 'interference by a public authority' with the exercise of the applicants' right to respect for private and family life and for correspondence."

However, paragraph 2 of Article 8 authorises certain restrictions on the exercise of these rights and the question arises whether the interferences provided for by Swiss legislation fall within the ambit of this paragraph.

As the Commission pointed out in its decision on Application No. 10628/83 referred to above, in order not to cause a breach of Article 8 of the Convention, the interference must in the first place have been "in accordance with the law". This requirement is fulfilled in the present case because the measures of surveillance and control by telephone tapping are provided for by Sections 72 and 66 to 66 *quater* of the Federal Law on Criminal Procedure (PPF).

Finally, the interference must be "necessary" in a democratic society, in particular for "national security, public safety ... or for the prevention of disorder or crime". The general responsibility for "investigations and intelligence for the purpose of protecting the internal and external security of the country" (Section 58 of the Federal Law on the Administration of 19 September 1978) lies with the Attorney General of the Confederation.

Furthermore, it is clearly specified in the wording of Sections 72 and 66 to 66 *quater* PPF that surveillance and control of the various forms of communication may only be ordered if various conditions are satisfied. In particular, there must be evidence providing a ground for suspicion that someone is planning, committing or has committed an offence, the seriousness or particular nature of which justifies this kind of intervention. Furthermore, a person subjected to surveillance must be suspected of having committed or taken part in committing such an offence; in addition, the ordinary measures of investigation must have proved inadequate owing to the nature of the facts and the circumstances of the case.

Under Section 72 PPF any measure connected with the prosecution of offences against the internal or external security of the Confederation must be ordered by the Attorney General of the Confederation himself, acting in complete independence. Within 24 hours of his decision he must submit it to the approval of the President of the Indictments Chamber of the Federal Court (Section 66 to 66 *quater* PPF).

Finally, there is a periodical control of the continuation of surveillance at least once every six months. On the expiry of this period a prolongation order must be made by the Attorney General and approved by the President of the Indictments Chamber.

The Commission notes that the measures of surveillance and control by telephone tapping are subject to a prior authorisation procedure and that this surveillance is terminated as soon as it is no longer necessary or the decision is revoked. The conditions set out by the Court in the Klass judgment (*loc. cit.*, paras. 51 and 52) are thus, generally speaking, satisfied in this case.

The fact that the judicial control procedure is "secret even with respect to the person affected" (Section 66 *quater* (1) PPF) cannot justify criticism from the point of view of Article 8 para. 2 of the Convention because this characteristic of the procedure is itself "in accordance with the law" and is "necessary" in a democratic society (Eur. Court H.R., *loc. cit.* para. 55).

Finally, as regards the absence of subsequent notification to the applicant, the Commission recalls that in the Klass judgment the Court stated that it cannot be incompatible with Article 8 para. 2 not to inform the person affected as soon as the surveillance has stopped because refraining from doing so is precisely what ensures the efficacy of the interference (Eur. Court H.R., *loc. cit.*, para. 58). It should be pointed out, moreover, that in the Swiss system it is permissible to refrain from subsequent notification only in cases where such information would risk compromising the aim and object of the telephone tapping measure.

Taking all these facts into consideration, the criteria stated by the Court in the above-cited judgment and the conclusion reached by the Commission in its decision on the above-mentioned application No. 10628/83, the Commission reaches the conclusion that the measures of surveillance and control by telephone tapping which can be ordered under Swiss legislation do not go beyond what is strictly necessary in a democratic society in the interests of national security, public safety or the prevention of disorder or crime.

It follows that in this respect the application is manifestly ill-founded and must be rejected under Article 27 para. 2 of the Convention.

3. The Commission must next take a decision on the applicant's allegation that the complaints procedure (Aufsichtsbeschwerde) before the Federal Department of Justice and Police did not meet the requirements of Article 6 of the Convention because that authority is not an "independent tribunal" within the meaning of that provision.

Here the Commission refers to the Court's Klass judgment (*loc. cit.*, para. 75). In that judgment the Court stated that as long as the surveillance remained validly secret, the decision placing someone under surveillance was thereby incapable of judicial control on the initiative of the person concerned, within the meaning of Article 6 and therefore of necessity escaped the requirements of that article. Following the same reasoning in the present case, the Commission reaches the conclusion that Article 6, assuming that it is applicable here, has not been violated. As the applicant received no subsequent notification of the application of telephone surveillance, it is unnecessary in this case to decide whether, if he had, there would have existed a judicial remedy satisfying the requirements of Article 6. It follows that this part of the application is manifestly ill-founded and must be rejected under Article 27 para. 2 of the Convention.

4. The applicant also complained of a violation of Article 13 of the Convention, which reads:

> "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."

The applicant claims in this connection that there is no effective remedy, in Switzerland, for the situation complained of. In particular, the complaints procedure (Aufsichtsbeschwerde) advocated by the Government does not satisfy the requirements of the said provision of the Convention.

In their observations, the Government made the general point that in Switzerland the individual has a number of remedies available in the matter of telephone tapping which, taken together, met the requirements of Article 13 of the Convention. These were control by the judicial authority in the person of the President of the Indictments Chamber of the Federal Court, action by the administrative authority, namely the Federal Attorney General's Office, combined with administrative remedies before the Federal Department of Justice and Police and before the Federal Council, administrative authorities with jurisdiction in this field.

In particular, the Government referred to the complaints procedure (Aufsichtsbeschwerde) pointing out that complaints based on Section 71 of the Federal Law on Administrative Procedure are treated as formal complaints within the meaning of Section 44 *et seq.* of that Law. Consequently, the person concerned enjoys all the recognised rights of parties and is entitled to an official decision by the Federal Department of Justice and Police, itself subject to appeal to the Federal Council.

The applicant replied that the authorities should have informed him whether his telephone had really been tapped. Moreover, he considers that the Federal Department of Justice and Police, as the hierarchical superior of the Federal Attorney General, could not be considered an independent appeal body.

Here the Commission recalls that, in accordance with its constant case-law, Article 13 of the Convention is concerned with a remedy for an alleged breach of one of the rights and freedoms set forth in other articles of the Convention. It also points to its conclusion in the Klass case (cf. above-cited judgment) that if notification ran counter to the purpose of the interference necessary for national security and justified by the Convention (Article 8 para. 2), an interpretation of Article 13 having the effect of creating a right to be informed would not be in harmony with the logic of the Convention (see Comm. Report 9.3.77, para. 71, Series B no. 26). This reasoning was endorsed by the Court in the same case (judgment, *loc. cit.*, para. 68).

The Commission points out that the system of remedies in the matter of telephone tapping raises special problems in relation to Article 13 of the Convention,

since even subsequent notification of the measure applied would be likely to defeat the purpose of that measure. Consequently, as the Court stated in the Klass case (*loc. cit.*, para. 69), an effective remedy under Article 13, in the specific situation of secret surveillance, 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. Whereas under the German system examined in the Klass case there was an obligation to notify the person concerned subsequently, provided this could be done without jeopardising the purpose of the restriction, the Luxembourg system, examined by the Commission in the cases of Mersch and others (No. 10439/83, No. 10440/83, No. 10441/83, No. 10452/83, No. 10512/83 and No. 10513/83, Dec. 10.5.85, D.R. 43 p. 34), was characterised by the total absence of any such notification. Nevertheless, the Commission considered that the right to apply to the Luxembourg Council of State, which was bound to institute an enquiry, together with the existence of certain other guarantees, namely the right to bring a civil action against the State and the prior control of the appropriateness of the surveillance, were of a nature to meet the requirements of Article 13.

In the summing up by the Court in the case of Silver and others (Eur. Court H.R., judgment of 25 March 1983, Series A no 61, p. 42, paras. 111-113) in the context of an examination of Articles 13 and 8 of the Convention taken together, it enunciated a number of principles, from the last of which it followed that "the application of Article 13 in a given case will depend upon the manner in which the Contracting State concerned has chosen to discharge its obligation under Article 1 directly to secure to anyone within its jurisdiction the rights and freedoms set out in Section I".

The Commission must now consider the various remedies available to the applicant under Swiss law in order to establish whether they are "effective" in this narrow sense.

It should be stressed that there exists in the Swiss system a prior control of the appropriateness of surveillance in as much as the authority which orders telephone tapping is obliged to seek, within 24 hours, the approval of the President of the Indictments Chamber of the Federal Court.

The Commission notes, moreover, that *a posteriori* control seems possible to a certain extent.

It is true that in this case the applicant has not so far been informed by the authorities as to whether or not his telephone calls have been monitored. It was in an exchange of letters between him and the Office of the Federal Attorney General and in the light of the written reply he received that the question of *a posteriori* control arose.

In a letter of 4 June 1984, that authority, replying to the applicant's request for information concerning orders that might have been given to tap his telephone, stated

that "either no surveillance had been ordered, or surveillance was still continuing, or surveillance had ceased but had not, or not yet, been notified because of the risk that such notification might jeopardise the purpose of the measure". It follows that once the measure has ceased, assuming that it was ordered, the applicant will be informed unless such information threatens to jeopardise the aim and object of the measure in question.

Where it is in the public interest to preserve secrecy, namely when the internal or external security of the Confederation is at stake, the Federal Attorney General's Office must secure the approval of the President of the Indictments Chamber of the Federal Court in order to be relieved of the obligation to inform the person concerned in the normal course of events of the telephone surveillance.

Lastly, it must be said that when the complaints procedure (Aufsichtsbeschwerde) is instituted before the Federal Department of Justice and Police against the refusal of the Federal Attorney General's Office to give information concerning the reasons for and the manner and duration of telephone surveillance, that authority, in accordance with recent practice, treats the complaints it receives under Section 71 of the Federal Law on Administrative Procedure as complaints within the meaning of Section 44 *et seq.* of that Law.

Consequently, the person concerned enjoys all the recognised rights of parties and, in particular, is entitled to a formal decision. The complaint gives rise to an enquiry addressed to the President of the Indictments Chamber of the Federal Court and, on the basis of the information received, the Federal Department of Justice and Police evaluates the legitimacy of the surveillance measure and of the absence of any subsequent notification to the person concerned, where that is the case. In addition, that authority takes an official decision against which it is possible to appeal to the Federal Council, the highest national instance.

The Commission notes that in this case the procedure described above was applied, inasmuch as the applicant made use of the legal means at his disposal, except, however, for the appeal to the Federal Council. The Commission accordingly considers that the range of remedies provided for in Swiss law meets the requirements of Article 13 of the Convention, having regard to the special field of surveillance by telephone tapping and to the specific circumstances of the case.

It follows that this part of the application is also manifestly ill-founded and must be rejected under Article 27 par. 2 of the Convention.

5. Lastly, in so far as the applicant alleges that the measure allegedly ordered in his case fundamentally infringed his right to respect for his private life, thus exceeding the limits imposed by Article 17 of the Convention, the Commission considers that there is no cause to take account of this provision of the Convention, having regard to the conclusions it has reached concerning the other points raised in the application.

For these reasons, the Commission

DECLARES THE APPLICATION INADMISSIBLE.