COURT (PLENARY)

CASE OF MALONE v. THE UNITED KINGDOM

(Application no. 8691/79)

JUDGMENT

STRASBOURG

2 August 1984

In the Malone case,

The European Court of Human Rights, taking its decision in plenary session in application of Rule 50 of the Rules of Court* and composed of the following judges:

Mr. G. WIARDA, *President*,
Mr. R. RYSSDAL,
Mr. J. CREMONA,
Mr. Thór VILHJÁLMSSON,
Mr. W. GANSHOF VAN DER MEERSCH,
Mrs. D. BINDSCHEDLER-ROBERT,
Mr. D. EVRIGENIS,
Mr. G. LAGERGREN,
Mr. F. GÖLCÜKLÜ,
Mr. F. MATSCHER,
Mr. J. PINHEIRO FARINHA,
Mr. E. GARCÍA DE ENTERRÍA,
Mr. L.-E. PETTITI,
Mr. B. WALSH,
Sir Vincent EVANS,

Mr. R. MACDONALD,
Mr. C. RUSSO,
Mr. J. GERSING,
and also Mr. M.-A. EISSEN, *Registrar*, and Mr. H. PETZOLD, *Deputy Registrar*,
Having deliberated in private on 22 and 23 February and on 27 June 1984,
Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The present case was referred to the Court by the European Commission of Human Rights ("the Commission") on 16 May 1983, within the period of three months laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). The case originated in an application (no. 8691/79) against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission on 19 July 1979 under Article 25 (art. 25) by a United Kingdom citizen, Mr. James Malone.

2. The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 8 and 13 (art. 8, art. 13) of the Convention.

3. In response to the inquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, Mr. Malone stated that he wished to participate in the proceedings pending before the Court and designated the lawyers who would represent him (Rule 30).

4. The Chamber of seven judges to be constituted included, as ex officio members, Sir Vincent Evans, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr. G. Wiarda, the President of the Court (Rule 21 para. 3 (b)). On 27 May 1983, the President of the Court drew by lot, in the presence of the Registrar, the names of the five other members, namely Mr. M. Zekia, Mrs. D. Bindschedler-Robert, Mr. G. Lagergren, Mr. R. Bernhardt and Mr. J. Gersing (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43) .

Mr. Zekia and Mr. Bernhardt, who were prevented from taking part in the consideration of the case, were subsequently replaced by Mr. B. Walsh and Mr. E. García de Enterría, substitute judges (Rules 22 para. 1 and 24 para. 1).

5. Mr. Wiarda assumed the office of President of the Chamber (Rule 21 para. 5). He ascertained, through the Registrar, the views of the Agent of the Government of the United Kingdom ("the Government"), the Delegate of the Commission and the lawyers for the applicant regarding the need for a written procedure. On 24 June, he directed that the Agent and the lawyers for the applicant should each have until 16 September to file a memorial and that the Delegate should be entitled to file, within two months from the date of the transmission to him by the

Registrar of whichever of the aforesaid documents should last be filed, a memorial in reply (Rule 37 para. 1).

On 14 September, the President extended until 14 October each of the time-limits granted to the Agent and the applicant's lawyers.

6. The Government's memorial was received at the registry on 14 October, the applicant's memorial on 25 October. The Secretary to the Commission informed the Registrar by letter received on 22 December that the Delegate did not wish to file any written reply to these memorials but would be presenting his comments at the hearings.

7. On 27 October, the Chamber unanimously decided to relinquish jurisdiction forthwith in favour of the plenary Court (Rule 50). On the same day, after consulting, through the Registrar, the Agent of the Government, the Delegate of the Commission and the lawyers for the applicant, the President of the Court directed that the oral proceedings should open on 20 February 1984 (Rule 38).

8. By letter received on 6 October 1983, the Post Office Engineering Union ("the POEU") requested leave under Rule 37 para. 2 to submit written comments, indicating, inter alia, its "specific occupational interest" in the case and five themes it would want to develop in written comments. On 3 November, the President granted leave but on narrower terms than those sought: he specified that the comments should bear solely on certain of the matters referred to in the POEU's list of proposed themes and then only "in so far as such matters relate to the particular issues of alleged violation of the Convention which are before the Court for decision in the Malone case". He further directed that the comments should be filed not later than 3 January 1984.

On 16 December 1983, this time-limit was extended by the President by three weeks. The POEU's comments were received at the registry on 26 January 1984.

9. On 17 February 1984, the lawyers for the applicant filed the applicant's claims for just satisfaction under Article 50 (art. 50) of the Convention. On the same day, the Government supplied two documents whose production the Registrar had asked for on the instructions of the President. By letter received on 19 February, the Government, with a view to facilitating the hearings the following day, gave a clarification regarding a certain matter in the case.

10. The hearings were held in public at the Human Rights Building, Strasbourg, on 20 February. Immediately prior to their opening, the Court had held a preparatory meeting.

There appeared before the Court:

- for the Government

Mr. M. EATON, Legal Counsellor,
Foreign and Commonwealth Office, *Agent*,
Sir Michael HAVERS, Q.C., M.P., Attorney General,
Mr. N. BRATZA, Barrister-at-Law, *Counsel*,
Mr. H. STEEL, Law Officers' Department,
Mrs. S. EVANS, Legal Adviser, Home Office, *Advisers*;

- for the Commission

Mr. C. NØRGAARD, President
of the Commission, *Delegate*;

- for the applicant
Mr. C. ROSS-MUNRO, Q.C.,
Mr. D. SEROTA, Barrister-at-Law, *Counsel*.

The Court heard addresses by Sir Michael Havers for the Government, by Mr. Nørgaard for the Commission and by Mr. Ross-Munro for the applicant, as well as their replies to its questions.

11. On 27 February, in fulfilment of an undertaking given at the hearing, the Government supplied copies of extracts from a document which had been referred to in argument at the hearing. By letter received on 5 June, they notified the Registrar of an amendment to this document.

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

12. Mr. James Malone was born in 1937 and is resident in Dorking, Surrey. In 1977, he was an antique dealer. It appears that he has since ceased business as such.

13. On 22 March 1977, Mr. Malone was charged with a number of offences relating to dishonest handling of stolen goods. His trial, which took place in June and August 1978, resulted in his being acquitted on certain counts and the jury disagreeing on the rest. He was retried on the remaining charges between April and May 1979. Following a further failure by the jury to agree, he was once more formally arraigned; the prosecution offered no evidence and he was acquitted.

14. During the first trial, it emerged that details of a telephone conversation to which Mr. Malone had been a party prior to 22 March 1977 were contained in the note-book of the police officer in charge of the investigations. Counsel for the prosecution then accepted that this conversation had been intercepted on the authority of a warrant issued by the Secretary of State for the Home Department.

15. In October 1978, the applicant instituted civil proceedings in the Chancery Division of the High Court against the Metropolitan Police Commissioner, seeking, inter alia, declarations to the effect that interception, monitoring and recording of conversations on his telephone lines without his consent was unlawful, even if done pursuant to a warrant of the Secretary of State. The Solicitor General intervened in the proceedings on behalf of the Secretary of State but without being made a party. On 28 February 1979, the Vice-Chancellor, Sir Robert Megarry, dismissed the applicant's claim (Malone v. Commissioner of Police of the Metropolis (No. 2), [1979] 2 All England Law Reports 620; also reported at [1979] 2 Weekly Law Reports 700). An account of this judgment is set out below (at paragraphs 31-36).

16. The applicant further believed that both his correspondence and his telephone calls had been intercepted for a number of years. He based his belief on delay to and signs of interference with his correspondence. In particular, he produced to the Commission bundles of envelopes which had been delivered to him either sealed with an adhesive tape of an identical kind or in an unsealed

state. As to his telephone communications, he stated that he had heard unusual noises on his telephone and alleged that the police had at times been in possession of information which they could only have obtained by telephone tapping. He thought that such measures had continued since his acquittal on the charges against him.

It was admitted by the Government that the single conversation about which evidence emerged at the applicant's trial had been intercepted on behalf of the police pursuant to a warrant issued under the hand of the Secretary of State for the prevention and detection of crime. According to the Government, this interception was carried out in full conformity with the law and the relevant procedures. No disclosure was made either at the trial of the applicant or during the course of the applicant's proceedings against the Commissioner of Police as to whether the applicant's own telephone number had been tapped or as to whether other and, if so, what other, telephone conversations to which the applicant was a party had been intercepted. The primary reasons given for withholding this information were that disclosure would or might frustrate the purpose of telephone interceptions and might also serve to identify other sources of police information, particularly police informants, and thereby place in jeopardy the source in question. For similar reasons, the Government declined to disclose before the Commission or the Court to what extent, if at all, the applicant's telephone calls and correspondence had been intercepted on behalf of the police authorities. It was however denied that the resealing with adhesive tape or the delivery unsealed of the envelopes produced to the Commission was attributable directly or indirectly to any interception. The Government conceded that, as the applicant was at the material time suspected by the police of being concerned in the receiving of stolen property and in particular of stolen antiques, he was one of a class of persons against whom measures of interception were liable to be employed.

17. In addition, Mr. Malone believed that his telephone had been "metered" on behalf of the police by a device which automatically records all numbers dialled. As evidence for this belief, he asserted that when he was charged in March 1977 the premises of about twenty people whom he had recently telephoned were searched by the police. The Government affirmed that the police had neither caused the applicant's telephone calls to be metered nor undertaken the alleged or any search operations on the basis of any list of numbers obtained from metering.

18. In September 1978, the applicant requested the Post Office and the complaints department of the police to remove suspected listening devices from his telephone. The Post Office and the police both replied that they had no authority in the matter.

II. RELEVANT LAW AND PRACTICE

A. Introduction

19. The following account is confined to the law and practice in England and Wales relating to the interception of communications on behalf of the police for the purposes of the prevention and detection of crime. The expression "interception" is used to mean the obtaining of information about the contents of a communication by post or telephone without the consent of the parties involved.

20. It has for long been the practice for the interception of postal and telephone communications in England and Wales to be carried out on the authority of a warrant issued by a Secretary of State, nowadays normally the Secretary of State for the Home Department (the Home Secretary). There is no overall statutory code governing the matter, although various statutory provisions are applicable thereto. The effect in domestic law of these provisions is the subject of some dispute in the current proceedings. Accordingly, the present summary of the facts is limited to what is undisputed, the submissions in relation to the contested aspects of these provisions being dealt with in the part of the judgment "as to the law".

21. Three official reports available to the public have described and examined the working of the system for the interception of communications.

Firstly, a Committee of Privy Councillors under the chairmanship of Lord Birkett was appointed in June 1957 "to consider and report upon the exercise by the Secretary of State of the executive power to intercept communications and, in particular, under what authority, to what extent and for what purposes this power has been exercised and to what use information so obtained has been put; and to recommend whether, how and subject to what safeguards, this power should be exercised ...". The Committee's report (hereinafter referred to as "the Birkett report") was published in October 1957 (as Command Paper 283). The Government of the day announced that they accepted the report and its recommendations, and were taking immediate steps to implement those recommendations calling for a change in procedure. Subsequent Governments, in the person of the Prime Minister or the Home Secretary, publicly reaffirmed before Parliament that the arrangements relating to the interception of communications were strictly in accordance with the procedures described and recommended in the Birkett report.

Secondly, a Command Paper entitled "The Interception of Communications in Great Britain" was presented to Parliament by the then Home Secretary in April 1980 (Command Paper 7873 - hereinafter referred to as "the White Paper"). The purpose of the White Paper was to bring up to date the account given in the Birkett report.

Finally, in March 1981 a report by Lord Diplock, a Lord of Appeal in Ordinary who had been appointed to monitor the relevant procedures on a continuing basis (see paragraphs 54 and 55 below), was published outlining the results of the monitoring he had carried out to date.

22. The legal basis of the practice of intercepting telephone communications was also examined by the Vice-Chancellor in his judgment in the action which the applicant brought against the Metropolitan Police Commissioner (see paragraphs 31-36 below).

23. Certain changes have occurred in the organisation of the postal and telephone services since 1957, when the Birkett Committee made its report. The Post Office, which ran both services, was then a Department of State under the direct control of a Minister (the Postmaster General). By virtue of the Post Office Act 1969, it became a public corporation with a certain independence of the Crown, though subject to various ministerial powers of supervision and control exercised at the material time by the Home Secretary. The Post Office Act 1969 was repealed in part and amended by the British Telecommunications Act 1981. That Act divided the Post Office into two corporations: the Post Office, responsible for mail, and British Telecommunications, responsible for telephones. The 1981 Act made no change of substance in relation to the law governing

interceptions. For the sake of convenience, references in the present judgment are to the position as it was before the 1981 Act came into force.

B. Legal position relating to interception of communications prior to 1969

24. The existence of a power vested in the Secretary of State to authorise by warrant the interception of correspondence, in the sense of detaining and opening correspondence transmitted by post, has been acknowledged from early times and its exercise has been publicly known (see the Birkett report, Part I, especially paras. 11, 17 and 39). The precise origin in law of this executive authority is obscure (ibid., para. 9). Nevertheless, although none of the Post Office statutes (of 1710, 1837, 1908 or 1953) contained clauses expressly conferring authority to intercept communications, all recognised the power as an independently existing power which it was lawful to exercise (ibid., paras. 17 and 38).

25. At the time of the Birkett report, the most recent statutory provision recognising the right of interception of a postal communication was section 58 sub-section 1 of the Post Office Act 1953, which provides:

> "If any officer of the Post Office, contrary to his duty, opens ... any postal packet in course of transmission by post, or wilfully detains or delays ... any such postal packet, he shall be guilty of a misdemeanour ... .
>
> Provided that nothing in this section shall extend to ... the opening, detaining or delaying of a postal packet ... in obedience to an express warrant in writing under the hand of a Secretary of State."

"Postal packet" is defined in section 87 sub-section 1 of the Act as meaning:

> "a letter, postcard, reply postcard, newspaper, printed packet, sample packet or parcel and every packet or article transmissible by post, and includes a telegram".

Section 58, which is still in force, reproduced a clause that had been on the statute book without material amendment since 1710.

26. So far as telecommunications are further concerned, it is an offence under section 45 of the Telegraph Act 1863 if an official of the Post Office "improperly divulges to any person the purport of any message". Section 11 of the Post Office (Protection) Act 1884 creates a similar offence in relation to telegrams. In addition, section 20 of the Telegraph Act 1868 makes it a criminal offence if any Post Office official "shall, contrary to his duty, disclose or in any way make known or intercept the contents or any part of the contents of any telegraphic message or any message entrusted to the [Post Office] for the purpose of transmission".
These provisions are still in force.

27. It was held in a case decided in 1880 (Attorney General v. Edison Telephone Company, (1880) 6 Queen’s Bench Division 244) that a telephone conversation is a "telegraphic communication" for the purposes of the Telegraph Acts. It has not been disputed in the present proceedings that the offences under the Telegraph Acts apply to telephone conversations.

28. The power to intercept telephone messages has been exercised in England and Wales from time to time since the introduction of the telephone. Until the year 1937, the Post Office, which

was at that time a Department of Government, acted upon the view that the power which the Crown exercised in intercepting telephone messages was a power possessed by any operator of telephones and was not contrary to law. Consequently, no warrants by the Secretary of State were issued and arrangements for the interception of telephone conversations were made directly between the police authorities and the Director-General of the Post Office. In 1937, the position was reviewed by the Home Secretary and the Postmaster General (the Minister then responsible for the administration of the Post Office) and it was decided, as a matter of policy, that it was undesirable that records of telephone conversations should be made by Post Office servants and disclosed to the police without the authority of the Secretary of State. The view was taken that the power which had for long been exercised to intercept postal communications on the authority of a warrant of the Secretary of State was, by its nature, wide enough to include the interception of telephone communications. Since 1937 it had accordingly been the practice of the Post Office to intercept telephone conversations only on the express warrant of the Secretary of State (see the Birkett report, paras. 40-41).

The Birkett Committee considered that the power to intercept telephone communications rested upon the power plainly recognised by the Post Office statutes as existing before the enactment of the statutes (Birkett report, para. 50). It concluded (ibid., para. 51):

> "We are therefore of the opinion that the state of the law might fairly be expressed in this way.
>
> (a) The power to intercept letters has been exercised from the earliest times, and has been recognised in successive Acts of Parliament.
>
> (b) This power extends to telegrams.
>
> (c) It is difficult to resist the view that if there is a lawful power to intercept communications in the form of letters and telegrams, then it is wide enough to cover telephone communications as well."

C. Post Office Act 1969

29. Under the Post Office Act 1969, the "Post Office" ceased to be a Department of State and was established as a public corporation of that name with the powers, duties and functions set out in the Act. In consequence of the change of status of the Post Office and of the fact that the Post Office was no longer under the direct control of a Minister of the Crown, it became necessary to make express statutory provision in relation to the interception of communications on the authority of a warrant of the Secretary of State. By section 80 of the Act it was therefore provided as follows:

> "A requirement to do what is necessary to inform designated persons holding office under the Crown concerning matters and things transmitted or in course of transmission by means of postal or telecommunication services provided by the Post Office may be laid on the Post Office for the like purposes and in the like manner as, at the passing of this Act, a requirement may be laid on the Postmaster General to do what is necessary to inform such persons concerning matters and things transmitted or in course of transmission by means of such services provided by him."

30. The 1969 Act also introduced, for the first time, an express statutory defence to the offences under the Telegraph Acts mentioned above (at paragraph 26), similar to that which exists under section 58 para. 1 of the Post Office Act 1953. This was effected by paragraph 1 sub-paragraph 1 of Schedule 5 to the Act, which reads:

"In any proceedings against a person in respect of an offence under section 45 of the Telegraph Act 1863 or section 11 of the Post Office (Protection) Act 1884 consisting in the improper divulging of the purport of a message or communication or an offence under section 20 of the Telegraph Act 1868 it shall be a defence for him to prove that the act constituting the offence was done in obedience to a warrant under the hand of a Secretary of State."

D. Judgment of Sir Robert Megarry V.-C. in Malone v. Commissioner of Police of the Metropolis

31. In the civil action which he brought against the Metropolitan Police Commissioner, Mr. Malone sought various relief including declarations to the following effect:

- that any "tapping" (that is, interception, monitoring or recording) of conversations on his telephone lines without his consent, or disclosing the contents thereof, was unlawful even if done pursuant to a warrant of the Home Secretary;
- that he had rights of property, privacy and confidentiality in respect of conversations on his telephone lines and that the above-stated tapping and disclosure were in breach of those rights;
- that the tapping of his telephone lines violated Article 8 (art. 8) of the Convention.

In his judgment, delivered on 28 February 1979, the Vice-Chancellor noted that he had no jurisdiction to make the declaration claimed in respect of Article 8 (art. 8) of the Convention. He made a detailed examination of the domestic law relating to telephone tapping, held in substance that the practice of tapping on behalf of the police as recounted in the Birkett report was legal and accordingly dismissed the action.

32. The Vice-Chancellor described the central issue before him as being in simple form: is telephone tapping in aid of the police in their functions relating to crime illegal? He further delimited the question as follows:

"... the only form of telephone tapping that has been debated is tapping which consists of the making of recordings by Post Office officials in some part of the existing telephone system, and the making of those recordings available to police officers for the purposes of transcription and use. I am not concerned with any form of tapping that involved electronic devices which make wireless transmissions, nor with any process whereby anyone trespasses onto the premises of the subscriber or anyone else to affix tapping devices or the like. All that I am concerned with is the legality of tapping effected by means of recording telephone conversations from wires which, though connected to the premises of the subscriber, are not on them." ([1979] 2 All England Law Reports, p. 629)

33. The Vice-Chancellor held that there was no right of property (as distinct from copyright) in words transmitted along telephone lines (ibid., p. 631).

As to the applicant's remaining contentions based on privacy and confidentiality, he observed firstly that no assistance could be derived from cases dealing with other kinds of warrant. Unlike a search of premises, the process of telephone tapping on Post Office premises did not involve any act of trespass and so was not prima facie illegal (ibid., p. 640). Secondly, referring to the warrant of the Home Secretary, the Vice-Chancellor remarked that such warrant did not "purport to be issued under the authority of any statute or of the common law". The decision to introduce such warrants in 1937 seemed "plainly to have been an administrative decision not dictated or required by statute" (ibid.). He referred, however, to section 80 of the Post Office Act 1969 and Schedule 5 to the Act, on which the Solicitor General had based certain contentions summarised as follows:

"Although the previous arrangements had been merely administrative, they had been set out in the Birkett report a dozen years earlier, and the section plainly referred to these arrangements; ... A warrant was not needed to make the tapping lawful: it was lawful without any warrant. But where the tapping was done under warrant ... [section 80] afforded statutory recognition of the lawfulness of the tapping." (ibid., p. 641)

"In their essentials", stated the Vice-Chancellor, "these contentions seem to me to be sound." He accepted that, by the 1969 Act,

"Parliament has provided a clear recognition of the warrant of the Home Secretary as having an effective function in law, both as providing a defence to certain criminal charges, and also as amounting to an effective requirement for the Post Office to do certain acts" (ibid., pp. 641-642).

The Vice-Chancellor further concluded that there was in English law neither a general right of privacy nor, as the applicant had contended, a particular right of privacy to hold a telephone conversation in the privacy of one's home without molestation (ibid., pp. 642-644). Moreover, no duty of confidentiality existed between the Post Office and the telephone subscriber; nor was there any other obligation of confidence on a person who overheard a telephone conversation, whether by means of tapping or otherwise (ibid., pp. 645-647).

34. Turning to the arguments based on the Convention, the Vice-Chancellor noted firstly that the Convention was not part of the law of England and, as such, did not confer on the applicant direct rights that could be enforced in the English courts (ibid., p. 647).

He then considered the applicant's argument that the Convention, as interpreted by the European Court in the case of Klass and Others (judgment of 6 September 1978, Series A no. 28), could be used as a guide to assist in the determination of English law on a point that was uncertain. He observed that the issues before him did not involve construing legislation enacted with the purpose of giving effect to obligations imposed by the Convention. Where Parliament had abstained from legislating on a point that was plainly suitable for legislation, it was difficult for the court to lay down new rules that would carry out the Crown's treaty obligations, or to discover for the first time that such rules had always existed. He compared the system of safeguards considered in the Klass case with the English system, as described in the Birkett report, and concluded:

"... Not a single one of these safeguards is to be found as a matter of established law in England, and only a few corresponding provisions exist as a matter of administrative procedure.

It does not, of course, follow that a system with fewer or different safeguards will fail to satisfy Article 8 (art. 8) in the eyes of the European Court of Human Rights. At the same time, it is impossible to read the judgment in the Klass case without it becoming abundantly clear that a system which has no legal safeguards whatever has small chance of satisfying the requirements of that Court, whatever administrative provisions there may be. ... Even if the system [in operation in England] were to be considered adequate in its conditions, it is laid down merely as a matter of administrative procedure, so that it is unenforceable in law, and as a matter of law could at any time be altered without warning or subsequent notification. Certainly in law any 'adequate and effective safeguards against abuse' are wanting. In this respect English law compares most unfavourably with West German law: this is not a subject on which it is possible to feel any pride in English law.

I therefore find it impossible to see how English law could be said to satisfy the requirements of the Convention, as interpreted in the Klass case, unless that law not only prohibited all telephone tapping save in suitably limited classes of case, but also laid down detailed restrictions on the exercise of the power in those limited classes."

This conclusion did not, however, enable the Vice-Chancellor to decide the case in the way the applicant sought:

"It may perhaps be that the common law is sufficiently fertile to achieve what is required by the first limb of [the above-stated proviso]: possible ways of expressing such a rule may be seen in what I have already said. But

I see the greatest difficulty in the common law framing the safeguards required by the second limb. Various institutions or offices would have to be brought into being to exercise various defined functions. The more complex and indefinite the subject-matter the greater the difficulty in the court doing what it is really appropriate, and only appropriate, for the legislature to do. Furthermore, I find it hard to see what there is in the present case to require the English courts to struggle with such a problem. Give full rein to the Convention, and it is clear that when the object of the surveillance is the detection of crime, the question is not whether there ought to be a general prohibition of all surveillance, but in what circumstances, and subject to what conditions and restrictions, it ought to be permitted. It is those circumstances, conditions and restrictions which are at the centre of this case; and yet it is they which are the least suitable for determination by judicial decision.

... Any regulation of so complex a matter as telephone tapping is essentially a matter for Parliament, not the courts; and neither the Convention nor the Klass case can, I think, play any proper part in deciding the issue before me." (ibid., pp. 647-649)

He added that "this case seems to me to make it plain that telephone tapping is a subject which cries out for legislation", and continued:

"However much the protection of the public against crime demands that in proper cases the police should have the assistance of telephone tapping, I would have thought that in any civilised system of law the claims of liberty and justice would require that telephone users should have effective and independent safeguards against possible abuses. The fact that a telephone user is suspected of crime increases rather than diminishes this requirement: suspicions, however reasonably held, may sometimes prove to be wholly unfounded. If there were effective and independent safeguards, these would not only exclude some cases of excessive zeal but also, by their mere existence, provide some degree of reassurance for those who are resentful of the police or believe themselves to be persecuted." (ibid., p. 649)

35. As a final point of substance, the Vice-Chancellor dealt, in the following terms, with the applicant's contention that as no power to tap telephones had been given by either statute or common law, the tapping was necessarily unlawful:

"I have already held that, if such tapping can be carried out without committing any breach of the law, it requires no authorisation by statute or common law; it can lawfully be done simply because there is nothing to make it unlawful. Now that I have held that such tapping can indeed be carried out without committing any breach of the law, the contention necessarily fails. I may also say that the statutory recognition given to the Home Secretary's warrant seems to me to point clearly to the same conclusion." (ibid., p. 649)

36. The Vice-Chancellor therefore held that the applicant's claim failed in its entirety. He made the following concluding remarks as to the ambit of his decision:

"Though of necessity I have discussed much, my actual decision is closely limited. It is confined to the tapping of the telephone lines of a particular person which is effected by the Post Office on Post Office premises in pursuance of a warrant of the Home Secretary in a case in which the police have just cause or excuse for requesting the tapping, in that it will assist them in performing their functions in relation to crime, whether in prevention, detection, discovering the criminals or otherwise, and in which the material obtained is used only by the police, and only for those purposes. In particular, I decide nothing on tapping effected for other purposes, or by other persons, or by other means; nothing on tapping when the information is supplied to persons other than the police; and nothing on tapping when the police use the material for purposes other than those I have mentioned. The principles involved in my decision may or may not be of some assistance in such other cases, whether by analogy or otherwise: but my actual decision is limited in the way that I have just stated." (ibid., p. 651)

E. Subsequent consideration of the need for legislation

37. Following the Vice-Chancellor's judgment, the necessity for legislation concerning the interception of communications was the subject of review by the Government, and of Parliamentary discussion. On 1 April 1980, on the publication of the White Paper, the Home Secretary announced in Parliament that after carefully considering the suggestions proffered by the Vice-Chancellor in his judgment, the Government had decided not to introduce legislation. He explained the reasons for this decision in the following terms:

> "The interception of communications is, by definition, a practice that depends for its effectiveness and value upon being carried out in secret, and cannot therefore be subject to the normal processes of parliamentary control. Its acceptability in a democratic society depends on its being subject to ministerial control, and on the readiness of the public and their representatives in Parliament to repose their trust in the Ministers concerned to exercise that control responsibly and with a right sense of balance between the value of interception as a means of protecting order and security and the threat which it may present to the liberty of the subject.
>
> Within the necessary limits of secrecy, I and my right hon. Friends who are concerned are responsible to Parliament for our stewardship in this sphere. There would be no more sense in making such secret matters justiciable than there would be in my being obliged to reveal them in the House. If the power to intercept were to be regulated by statute, then the courts would have power to inquire into the matter and to do so, if not publicly, then at least in the presence of the complainant. This must surely limit the use of interception as a tool of investigation. The Government have come to the clear conclusion that the procedures, conditions and safeguards described in the [White] Paper ensure strict control of interception by Ministers, are a good and sufficient protection for the liberty of the subject, and would not be made significantly more effective for that purpose by being embodied in legislation. The Government have accordingly decided not to introduce legislation on these matters" (Hansard, House of Commons, 1 April 1980, cols. 205-207).

He gave an assurance that "Parliament will be informed of any changes that are made in the arrangements" (ibid., col. 208).

38. In the course of the Parliamentary proceedings leading to the enactment of the British Telecommunications Act 1981, attempts were made to include in the Bill provisions which would have made it an offence to intercept mail or matters sent by public telecommunication systems except pursuant to a warrant issued under conditions which corresponded substantially to those described in the White Paper. The Government successfully opposed these moves, primarily on the grounds that secrecy, which was essential if interception was to be effective, could not be maintained if the arrangements for interception were laid down by legislation and thus became justiciable in the courts. The present arrangements and safeguards were adequate and the proposed new provisions were, in the Government's view, unworkable and unnecessary (see, for example, the statement of the Home Secretary in the House of Commons on 1 April 1981, Hansard, cols. 334-338). The 1981 Act eventually contained a re-enactment of section 80 of the Post Office Act 1969 applicable to the Telecommunications Corporation (Schedule 3, para. 1, of the 1981 Act). Section 80 of the 1969 Act itself continues to apply to the Post Office.

39. In its report presented to Parliament in January 1981 (Command Paper 8092), the Royal Commission on Criminal Procedure, which had been appointed in 1978, also considered the possible need for legislation in this field. In the chapter entitled "Investigative powers and the rights of the citizen", the Royal Commission made the following recommendation in regard to what it termed "surreptitious surveillance" (paras. 3.56-3.60):

> "... [A]lthough we have no evidence that the existing controls are inadequate to prevent abuse, we think that there are strong arguments for introducing a system of statutory control on similar lines to that which we have recommended for search warrants. As with all features of police investigative procedures, the value of prescribing them in statutory form is that it brings clarity and precision to the rules; they are open to public scrutiny and to

the potential of Parliamentary review. So far as surveillance devices in general are concerned this is not at present so.

...

We therefore recommend that the use of surveillance devices by the police (including the interception of letters and telephone communications) should be regulated by statute."

These recommendations were not adopted by the Government.

40. A few months later, the Law Commission, a permanent body set up by statute in 1965 for the purpose of promoting reform of the law, produced a report on breach of confidence (presented to Parliament in October 1981 - Command Paper 8388). This report examined, inter alia, the implications for the civil law of confidence of the acquisition of information by surveillance devices, and made various proposals for reform of the law (paras. 6.35 - 6.46). The Law Commission, however, felt that the question whether "the methods which the police ... may use to obtain information should be defined by statute" was a matter outside the scope of its report (paras. 6.43 and 6.44 in fine). No action has been taken by the Government on this report.

F. The practice followed in relation to interceptions

41. Details of the current practices followed in relation to interceptions are set out in the Government's White Paper of 1980. The practices there summarised are essentially the same as those described and recommended in the Birkett report, and referred to in Parliamentary statements by successive Prime Ministers and Home Secretaries in 1957, 1966, 1978 and 1980.

42. The police, H.M. Customs and Excise and the Security Service may request authority for the interception of communications for the purposes of "detection of serious crime and the safeguarding of the security of the State" (paragraph 2 of the White Paper). Interception may take place only on the authority of the Secretary of State given by warrant under his own hand. In England and Wales, the power to grant such warrants is exercised by the Home Secretary or occasionally, if he is ill or absent, by another Secretary of State on his behalf (ibid.). In the case of warrants applied for by the police to assist them in the detection of crime, three conditions must be satisfied before a warrant will be issued:

(a) the offence must be "really serious";

(b) normal methods of investigation must have been tried and failed or must, from the nature of things, be unlikely to succeed;

(c) there must be good reason to think that an interception would be likely to lead to an arrest and a conviction.

43. As is indicated in the Birkett report (paras. 58-61), the concept of "serious crime" has varied from time to time. Changing circumstances have made some acts serious offences which were not previously so regarded; equally, some offences formerly regarded as serious enough to justify warrants for the interception of communications have ceased to be so regarded. Thus, the interception of letters believed to contain obscene or indecent matter ceased in the mid-1950s (Birkett report, para. 60); no warrants for the purpose of preventing the transmission of illegal lottery material have been issued since November 1953 (ibid., para. 59). "Serious crime" is defined

in the White Paper, and subject to the addition of the concluding words has been consistently defined since September 1951 (Birkett report, para. 64), as consisting of "offences for which a man with no previous record could reasonably be expected to be sentenced to three years' imprisonment, or offences of lesser gravity in which either a large number of people is involved or there is good reason to apprehend the use of violence" (White Paper, para. 4). In April 1982, the Home Secretary announced to Parliament that, on a recommendation made by Lord Diplock in his second report (see paragraph 55 below), the concept of a serious offence was to be extended to cover offences which would not necessarily attract a penalty of three years' imprisonment on first conviction, but in which the financial rewards of success were very large (Hansard, House of Commons, 21 April 1982, col. 95).

Handling (including receiving) stolen goods, knowing or believing them to be stolen, is an offence under section 22 of the Theft Act 1968, carrying a maximum penalty of fourteen years' imprisonment. According to the Government, the receiving of stolen property is regarded as a very serious offence since the receiver lies at the root of much organised crime and encourages large-scale thefts (see the Birkett report, para. 103). The detection of receivers of stolen property was at the time of the Birkett report (ibid.), and remains, one of the important uses to which interception of communications is put by the police.

44. Applications for warrants must be made in writing and must contain a statement of the purpose for which interception is requested and of the facts and circumstances which support the request. Every application is submitted to the Permanent Under-Secretary of State - the senior civil servant - at the Home Office (or, in his absence, a nominated deputy), who, if he is satisfied that the application meets the required criteria, submits it to the Secretary of State for approval and signature of a warrant. In a case of exceptional urgency, if the Secretary of State is not immediately available to sign a warrant, he may be asked to give authority orally, by telephone; a warrant is signed and issued as soon as possible thereafter (White Paper, para. 9).

In their submissions to the Commission and the Court, the Government supplemented as follows the information given in the White Paper. Except in cases of exceptional urgency, an application will only be considered in the Home Office if it is put forward by a senior officer of the Metropolitan Police, in practice the Assistant Commissioner (Crime), and also, in the case of another police force, by the chief officer of police concerned. Close personal consideration is given by the Secretary of State to every request for a warrant submitted to him. In the debate on the British Telecommunications Bill in April 1981, the then Home Secretary confirmed before Parliament that he did not and would not sign any warrant for interception unless he were personally satisfied that the relevant criteria were met (Hansard, House of Commons, 1 April 1981, col. 336).

45. Every warrant sets out the name and address of the recipient of mail in question or the telephone number to be monitored, together with the name and address of the subscriber. Any changes require the authority of the Secretary of State, who may delegate power to give such authority to the Permanent Under-Secretary. If both the mail and the telephone line of a person are to be intercepted, two separate warrants are required (White Paper, para. 10).

46. Every warrant is time-limited, specifying a date on which it expires if not renewed. Warrants are in the first place issued with a time-limit set at a defined date not exceeding two months from the date of issue. Warrants may be renewed only on the personal authority of the

Secretary of State and may be renewed for not more than one month at a time. In each case where renewal of a warrant is sought, the police are required first to satisfy the Permanent Under-Secretary of State at the Home Office that the reasons for which the warrant was first issued are still valid and that the case for renewal is justified: a submission to the Secretary of State for authority to renew the warrant is only made if the Permanent Under-Secretary is so satisfied (White Paper, para. 11).

47. Warrants are reviewed monthly by the Secretary of State. When an interception is considered to be no longer necessary, it is immediately discontinued and the warrant is cancelled on the authority of the Permanent Under-Secretary of State at the Home Office. In addition to the monthly review of each warrant by the Secretary of State, the Metropolitan Police carry out their own review each month of all warrants arising from police applications: where an interception is deemed to be no longer necessary, instructions are issued to the Post Office to discontinue the interception forthwith and the Home Office is informed so that the warrant can be cancelled (Birkett report, paras. 72-74; White Paper, paras. 12-13).

48. In accordance with the recommendations of the Birkett report (para. 84), records are kept in the Home Office, showing in respect of each application for a warrant:

(a) the ground on which the warrant is applied for;

(b) a copy of the warrant issued or a note of rejection of the application;

(c) the dates of any renewals of the warrant;

(d) a note of any other decisions concerning the warrant;

(e) the date of cancellation of the warrant (White Paper, para. 14).

49. On the issue of a warrant, the interception is effected by the Post Office. Telephone interceptions are carried out by a small staff of Post Office employees who record the conversation but do not themselves listen to it except from time to time to ensure that the apparatus is working correctly. In the case of postal communications, the Post Office makes a copy of the correspondence. As regards the interception of communications for the purpose of the detection of crime, in practice the "designated person holding office under the Crown" to whom the Post Office is required by sub-section 80 of the Post Office Act 1969 to transmit the intercepted information (see paragraph 29 above) is invariably the Commissioner of Police of the Metropolis. The product of the interception - that is, the copy of the correspondence or the tape-recording - is made available to a special unit of the Metropolitan Police who note or transcribe only such parts of the correspondence or the telephone conversation as are relevant to the investigation. When the documentary record has been made, the tape is returned to the Post Office staff, who erase the recording. The tape is subsequently re-used. The majority of recordings are erased within one week of their being taken (Birkett report, paras. 115-117; White Paper, para. 15).

50. A Consolidated Circular to Police, issued by the Home Office in 1977, contained the following paragraphs in a section headed "Supply of information by Post Office to police":

> "1.67 Head Postmasters and Telephone Managers have been given authority to assist the police as indicated in paragraph 1.68 below without reference to Post Office Headquarters, in circumstances where the police are seeking information
>
> (a) in the interests of justice in the investigation of a serious indictable offence; or

(b) when they are acting in a case on the instructions of the Director of Public Prosecutions; or

(c) when a warrant has been issued for the arrest of the offender, or the offence is such that he can be arrested without a warrant; or

...

1.68 Head Postmasters, or (in matters affecting the telecommunication service) Telephone Managers, may afford the following facilities in response to a request made by the officer locally in charge of the force at the town where the Head Postmaster is stationed

...

(g) Telegrams. Telegrams may be shown to the police on the authority of the sender or addressee. Apart from this the Post Office is prepared to give authority in particular cases of serious crime where the inspection of a telegram is a matter of urgency, and will do so at once on telephonic application, by a chief officer of police or a responsible officer acting on his behalf, to the Chief Inspector, Post Office Investigation Division. ...

...

1.69 ...

1.70 As regards any matter not covered by paragraphs 1.67 and 1.68 above, if the police are in urgent need of information which the Post Office may be able to furnish in connection with a serious criminal offence, the police officer in charge of the investigation should communicate with the Duty Officer, Post Office Investigation Division who will be ready to make any necessary inquiries of other branches of the Post Office and to communicate any information which can be supplied."

In May 1984, the Home Office notified chief officers of police that paragraph 1.68 (g), described as containing advice and information to the police which was "in some respects misleading", was henceforth to be regarded as deleted, with the exception of the first complete sentence. At the same time, chief officers of police were reminded that the procedures for the interception of communications were set out in the White Paper and rigorously applied in all cases.

51. The notes or transcriptions of intercepted communications are retained in the police interception unit for a period of twelve months or for as long as they may be required for the purposes of investigation. The contents of the documentary record are communicated to the officers of the appropriate police force engaged in the criminal investigation in question. When the notes or transcriptions are no longer required for the purposes of the investigation, the documentary record is destroyed (Birkett report, para. 118; White Paper, para. 15). The product of intercepted communications is used exclusively for the purpose of assisting the police to pursue their investigations: the material is not tendered in evidence, although the interception may itself lead to the obtaining of information by other means which may be tendered in evidence (Birkett report, para. 151; White Paper, para. 16). In accordance with the recommendation of the Birkett Committee (Birkett report, para. 101), information obtained by means of an interception is never disclosed to private individuals or private bodies or to courts or tribunals of any kind (White Paper, para. 17).

52. An individual whose communications have been intercepted is not informed of the fact of interception or of the information thereby obtained, even when the surveillance and the related investigations have terminated.

53. For security reasons it is the normal practice not to disclose the numbers of interceptions made (Birkett report, paras. 119-121; White Paper, paras. 24-25). However, in order to allay public

concern as to the extent of interception, both the Birkett report and the White Paper gave figures for the number of warrants granted annually over the years preceding their publication. The figures in the White Paper (Appendix III) indicate that in England and Wales between 1969 and 1979 generally something over 400 telephone warrants and something under 100 postal warrants were granted annually by the Home Secretary. Paragraph 27 of the White Paper also gave the total number of Home Secretary warrants in force on 31 December for the years 1958 (237), 1968 (273) and 1978 (308). The number of telephones installed at the end of 1979 was, according to the Government, 26,428,000, as compared with 7,327,000 at the end of 1957. The Government further stated that over the period from 1958 to 1978 there was a fourfold increase in indictable crime, from 626,000 to 2,395,000.

54. When the White Paper was published on 1 April 1980, the Home Secretary announced in Parliament that the Government, whilst not proposing to introduce legislation (see paragraph 37 above), intended to appoint a senior member of the judiciary to conduct a continuous independent check so as to ensure that interception of communications was being carried out for the established purposes and in accordance with the established procedures. His terms of reference were stated to be:

> "to review on a continuing basis the purposes, procedures, conditions and safeguards governing the interception of communications on behalf of the police, HM Customs and Excise and the security service as set out in [the White Paper]; and to report to the Prime Minister" (Hansard, House of Commons, 1 April 1980, cols. 207-208).

It was further announced that the person appointed would have the right of access to all relevant papers and the right to request additional information from the departments and organisations concerned. For the purposes of his first report, which would be published, he would examine all the arrangements set out in the White Paper; his subsequent reports on the detailed operation of the arrangements would not be published, but Parliament would be informed of any findings of a general nature and of any changes that were made in the arrangements (ibid.).

55. Lord Diplock, a Lord of Appeal in Ordinary since 1968, was appointed to carry out the review. In his first report, published in March 1981, Lord Diplock recorded, inter alia, that, on the basis of a detailed examination of apparently typical cases selected at random, he was satisfied

(i) that, in each case, the information provided by the applicant authorities to the Secretary of State in support of the issue of a warrant was stated with accuracy and candour and that the procedures followed within the applicant authorities for vetting applications before submission to the Secretary of State were appropriate to detect and correct any departure from proper standards;

(ii) that warrants were not applied for save in proper cases and were not continued any longer than was necessary to carry out their legitimate purpose.

Lord Diplock further found from his examination of the system that all products of interception not directly relevant to the purpose for which the warrant was granted were speedily destroyed and that such material as was directly relevant to that purpose was given no wider circulation than was essential for carrying it out.

In early 1982, Lord Diplock submitted his second report. As the Secretary of State informed Parliament, Lord Diplock's general conclusion was that during the year 1981 the procedure for the interception of communications had continued to work satisfactorily and the principles set out in the White Paper had been conscientiously observed by all departments concerned.

In 1982, Lord Diplock resigned his position and was succeeded by Lord Bridge of Harwich, a Lord of Appeal in Ordinary since 1980.

G. "Metering"

56. The process known as "metering" involves the use of a device called a meter check printer which registers the numbers dialled on a particular telephone and the time and duration of each call. It is a process which was designed by the Post Office for its own purposes as the corporation responsible for the provision of telephone services. Those purposes include ensuring that the subscriber is correctly charged, investigating complaints of poor quality service and checking possible abuse of the telephone service. When "metering" a telephone, the Post Office - now British Telecommunications (see paragraph 23 above) - makes use only of signals sent to itself.

In the case of the Post Office, the Crown does not require the keeping of records of this kind but, if the records are kept, the Post Office may be compelled to produce them in evidence in civil or criminal cases in the ordinary way, namely by means of a subpoena duces tecum. In this respect the position of the Post Office does not differ from that of any other party holding relevant records as, for instance, a banker. Neither the police nor the Crown are empowered to direct or compel the production of the Post Office records otherwise than by the normal means.

However, the Post Office do on occasions make and provide such records at the request of the police if the information is essential to police enquiries in relation to serious crime and cannot be obtained from other sources. This practice has been made public in answer to parliamentary questions on more than one occasion (see, for example, the statement by the Home Secretary to Parliament, Hansard, House of Commons, 23 February 1978, cols. 760-761).

H. Possible domestic remedies in respect of the alleged violation of the Convention

57. Commission, Government and applicant are agreed that, at least in theory, judicial remedies are available in England and Wales, in both the civil and the criminal courts, in respect of interceptions of communications carried out unlawfully. The remedies referred to by the Government were summarised in the pleadings as follows:

(i) In the event of any interception or disclosure of intercepted material effected by a Post Office employee "contrary to duty" or "improperly" and without a warrant of the Secretary of State, a criminal offence would be committed under the Telegraph Acts 1863 and 1868 and the Post Office (Protection) Act 1884 (as regards telephone interceptions) and under the Post Office Act 1953 (as regards postal interceptions) (see paragraphs 25-27 above). On complaint that communications had been unlawfully intercepted, it would be the duty of the police to investigate the matter and to initiate a prosecution if satisfied that an offence had been committed. If the police failed to prosecute, it would be open to the complainant himself to commence a private prosecution.

(ii) In addition to (i) above, in a case of unlawful interception by a Post Office employee without a warrant, an individual could obtain an injunction from the domestic courts to restrain the person or persons concerned and the Post Office itself from carrying out further unlawful interception of his communications: such an injunction is available to any person who can show that a private right or interest has been interfered with by a criminal act (see, for example, Gouriet v. The Union of Post Office Workers, [1977] 3 All England Law Reports 70; Ex parte Island Records Ltd., [1978] 3 All England Law Reports 795).

(iii) On the same grounds, an action would lie for an injunction to restrain the divulging or publication of the contents of intercepted communications by employees of the Post Office, otherwise than under a warrant of the Secretary of State, or to any person other than the police.

Besides these remedies, unauthorised interference with mail would normally constitute the tort of trespass to (that is, wrongful interference with) chattels and so give rise to a civil action for damages.

58. The Government further pointed to the following possible non-judicial remedies:

(i) In the event that the police were themselves implicated in an interception carried out without a warrant, a complaint could additionally be lodged under section 49 of the Police Act 1964, which a chief officer of police would, by the terms of the Act, be obliged to investigate and, if an offence appeared to him to have been committed, to refer to the Director of Public Prosecutions.

(ii) If a complainant were able to establish merely that the police or the Secretary of State had misappreciated the facts or that there was not an adequate case for imposing an interception, the individual concerned would be able to complain directly to the Secretary of State himself or through his Member of Parliament: if a complainant were to give the Home Secretary information which suggested that the grounds on which a warrant had been issued did not in fact fall within the published criteria or were inadequate or mistaken, the Home Secretary would immediately cause it to be investigated and, if the complaint were found to be justified, would immediately cancel the warrant.

(iii) Similarly, if there were non-compliance with any of the relevant administrative rules of procedure set out in the Birkett report and the White Paper, a remedy would lie through complaint to the Secretary of State who would, in a proper case, cancel or revoke a warrant and thereby terminate an interception which was being improperly carried out.

According to the Government, in practice there never has been a case where a complaint in any of the three above circumstances has proved to be well-founded.

PROCEEDINGS BEFORE THE COMMISSION

59. In his application of 19 July 1979 to the Commission (no. 8691/79), Mr. Malone complained of the admitted interception of a telephone conversation to which he had been a party. He further stated his belief that, at the behest of the police, his correspondence as well as that of his wife had been intercepted, his telephone lines "tapped" and, in addition, his telephone "metered" by a device recording all the numbers dialled. He claimed that by reason of these matters, and of relevant law and practice in England and Wales, he had been the victim of breaches of Articles 8 and 13 (art. 8, art. 13) of the Convention.

60. The Commission declared the application admissible on 13 July 1981.

In its report adopted on 17 December 1982 (Article 31) (art. 31), the Commission expressed the opinion:

- that there had been a breach of the applicant’s rights under Article 8 (art. 8) by reason of the admitted interception of a telephone conversation to which he was a party and of the law and

practice in England and Wales governing the interception of postal and telephone communications on behalf of the police (eleven votes, with one abstention);

- that it was unnecessary in the circumstances of the case to investigate whether the applicant's rights had also been interfered with by the procedure known as "metering" of telephone calls (seven votes to three, with two abstentions);

- that there had been a breach of the applicant's rights under Article 13 (art. 13) in that the law in England and Wales did not provide an "effective remedy before a national authority" in respect of interceptions carried out under a warrant (ten votes to one, with one abstention).

The full text of the Commission's opinion and of the two separate opinions contained in the report is reproduced as an annex to the present judgment.

FINAL SUBMISSIONS MADE TO THE COURT BY THE GOVERNMENT

61. At the hearings on 20 February 1984, the Government maintained the submissions set out in their memorial, whereby they requested the Court

> "(1) with regard to Article 8 (art. 8),
>
> (i) to decide and declare that the interference with the exercise of the rights guaranteed by Article 8 para. 1 (art. 8-1) of the Convention resulting from the measures of interception of communications on behalf of the police in England and Wales for the purpose of the detection and prevention of crime, and any application of those measures to the applicant, were and are justified under paragraph 2 of Article 8 (art. 8-2) as being in accordance with the law and necessary in a democratic society for the prevention of crime and for the protection of the rights and freedoms of others and that accordingly there has been no breach of Article 8 (art. 8) of the Convention;
>
> (ii) (a) to decide and declare that it is unnecessary in the circumstances of the present case to investigate whether the applicant's rights under Article 8 (art. 8) were interfered with by the so-called system of 'metering'; alternatively (b) to decide and declare that the facts found disclose no breach of the applicant's rights under Article 8 (art. 8) by reason of the said system of 'metering';
>
> (2) with regard to Article 13 (art. 13),
>
> to decide and declare that the circumstances of the present case disclose no breach of Article 13 (art. 13) of the Convention".

AS TO THE LAW

I. ALLEGED BREACH OF ARTICLE 8 (art. 8)

62. Article 8 (art. 8) 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."

The applicant alleged violation of this Article (art. 8) under two heads. In his submission, the first violation resulted from interception of his postal and telephone communications by or on behalf of the police, or from the law and practice in England and Wales relevant thereto; the second from "metering" of his telephone by or on behalf of the police, or from the law and practice in England and Wales relevant thereto.

A. Interception of communications

1. Scope of the issue before the Court

63. It should be noted from the outset that the scope of the case before the Court does not extend to interception of communications in general. The Commission's decision of 13 July 1981 declaring Mr. Malone's application to be admissible determines the object of the case brought before the Court (see, inter alia, the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 63, para. 157). According to that decision, the present case "is directly concerned only with the question of interceptions effected by or on behalf of the police" - and not other government services such as H.M. Customs and Excise and the Security Service - "within the general context of a criminal investigation, together with the legal and administrative framework relevant to such interceptions".

2. Whether there was any interference with an Article 8 (art. 8) right

64. It was common ground that one telephone conversation to which the applicant was a party was intercepted at the request of the police under a warrant issued by the Home Secretary (see paragraph 14 above). As telephone conversations are covered by the notions of "private life" and "correspondence" within the meaning of Article 8 (art. 8) (see the Klass and Others judgment of 6 September 1978, Series A no. 28, p. 21, para. 41), the admitted measure of interception involved an "interference by a public authority" with the exercise of a right guaranteed to the applicant under paragraph 1 of Article 8 (art. 8-1).

Despite the applicant's allegations, the Government have consistently declined to disclose to what extent, if at all, his telephone calls and mail have been intercepted otherwise on behalf of the police (see paragraph 16 above). They did, however, concede that, as a suspected receiver of stolen goods, he was a member of a class of persons against whom measures of postal and telephone interception were liable to be employed. As the Commission pointed out in its report (paragraph 115), the existence in England and Wales of laws and practices which permit and establish a system for effecting secret surveillance of communications amounted in itself to an "interference ... with the exercise" of the applicant's rights under Article 8 (art. 8), apart from any measures actually taken against him (see the above-mentioned Klass and Others judgment, ibid.). This being so, the Court, like the Commission (see the report, paragraph 114), does not consider it necessary to inquire into the applicant's further claims that both his mail and his telephone calls were intercepted for a number of years.

3. Whether the interferences were justified

65. The principal issue of contention was whether the interferences found were justified under the terms of paragraph 2 of Article 8 (art. 8-2), notably whether they were "in accordance with the law" and "necessary in a democratic society" for one of the purposes enumerated in that paragraph.

(a) "In accordance with the law"

(i) General principles

66. The Court held in its Silver and Others judgment of 25 March 1983 (Series A no. 61, pp. 32-33, para. 85) that, at least as far as interferences with prisoners' correspondence were concerned, the expression "in accordance with the law/ prévue par la loi" in paragraph 2 of Article 8 (art. 8-2) should be interpreted in the light of the same general principles as were stated in the Sunday Times judgment of 26 April 1979 (Series A no. 30) to apply to the comparable expression "prescribed by law/ prévues par la loi" in paragraph 2 of Article 10 (art. 10-2).

The first such principle was that the word "law/loi" is to be interpreted as covering not only written law but also unwritten law (see the above-mentioned Sunday Times judgment, p. 30, para. 47). A second principle, recognised by Commission, Government and applicant as being applicable in the present case, was that "the interference in question must have some basis in domestic law" (see the the above-mentioned Silver and Others judgment, p. 33, para. 86). The expressions in question were, however, also taken to include requirements over and above compliance with the domestic law. Two of these requirements were explained in the following terms:

> "Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail." (Sunday Times judgment, p. 31, para. 49; Silver and Others judgment, p. 33, paras. 87 and 88)

67. In the Government's submission, these two requirements, which were identified by the Court in cases concerning the imposition of penalties or restrictions on the exercise by the individual of his right to freedom of expression or to correspond, are less appropriate in the wholly different context of secret surveillance of communications. In the latter context, where the relevant law imposes no restrictions or controls on the individual to which he is obliged to conform, the paramount consideration would appear to the Government to be the lawfulness of the administrative action under domestic law.

The Court would reiterate its opinion that the phrase "in accordance with the law" does not merely refer back to domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law, which is expressly mentioned in the preamble to the Convention (see, mutatis mutandis, the above-mentioned Silver and Others judgment, p. 34, para. 90, and the Golder judgment of 21 February 1975, Series A no. 18, p. 17, para. 34). The phrase thus implies - and this follows from the object and purpose of Article 8 (art. 8) - that there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by paragraph 1 (art. 8-1) (see the report of the Commission, paragraph 121).

Especially where a power of the executive is exercised in secret, the risks of arbitrariness are evident (see the above-mentioned Klass and Others judgment, Series A no. 28, pp. 21 and 23, paras. 42 and 49). Undoubtedly, as the Government rightly suggested, the requirements of the Convention, notably in regard to foreseeability, cannot be exactly the same in the special context of interception of communications for the purposes of police investigations as they are where the object of the relevant law is to place restrictions on the conduct of individuals. In particular, the requirement of foreseeability cannot mean that an individual should be enabled to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly. Nevertheless, the law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence.

68. There was also some debate in the pleadings as to the extent to which, in order for the Convention to be complied with, the "law" itself, as opposed to accompanying administrative practice, should define the circumstances in which and the conditions on which a public authority may interfere with the exercise of the protected rights. The above-mentioned judgment in the case of Silver and Others, which was delivered subsequent to the adoption of the Commission's report in the present case, goes some way to answering the point. In that judgment, the Court held that "a law which confers a discretion must indicate the scope of that discretion", although the detailed procedures and conditions to be observed do not necessarily have to be incorporated in rules of substantive law (ibid., Series A no. 61, pp. 33-34, paras. 88-89). The degree of precision required of the "law" in this connection will depend upon the particular subject-matter (see the above-mentioned Sunday Times judgment, Series A no. 30, p. 31, para. 49). Since the implementation in practice of measures of secret surveillance of communications is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference.

(ii) Application in the present case of the foregoing principles

69. Whilst the exact legal basis of the executive's power in this respect was the subject of some dispute, it was common ground that the settled practice of intercepting communications on behalf of the police in pursuance of a warrant issued by the Secretary of State for the purposes of detecting and preventing crime, and hence the admitted interception of one of the applicant's telephone conversations, were lawful under the law of England and Wales. The legality of this power to intercept was established in relation to telephone communications in the judgment of Sir Robert Megarry dismissing the applicant's civil action (see paragraphs 31-36 above) and, as shown by the independent findings of the Birkett report (see paragraph 28 in fine above), is generally recognised for postal communications.

70. The issue to be determined is therefore whether, under domestic law, the essential elements of the power to intercept communications were laid down with reasonable precision in accessible

legal rules that sufficiently indicated the scope and manner of exercise of the discretion conferred on the relevant authorities.

This issue was considered under two heads in the pleadings: firstly, whether the law was such that a communication passing through the services of the Post Office might be intercepted, for police purposes, only pursuant to a valid warrant issued by the Secretary of State and, secondly, to what extent the circumstances in which a warrant might be issued and implemented were themselves circumscribed by law.

71. On the first point, whilst the statements of the established practice given in the Birkett report and the White Paper are categorical para. 55 of the Birkett report and para. 2 of the White Paper - see paragraph 42 above), the law of England and Wales, as the applicant rightly pointed out (see paragraph 56 of the Commission's report), does not expressly make the exercise of the power to intercept communications subject to the issue of a warrant. According to its literal terms, section 80 of the Post Office Act 1969 provides that a "requirement" may be laid on the Post Office to pass information to the police, but it does not in itself render illegal interceptions carried out in the absence of a warrant amounting to a valid "requirement" (see paragraph 29 above). The Commission, however, concluded that this appeared to be the effect of section 80 when read in conjunction with the criminal offences created by section 58 para. 1 of the Post Office Act 1953 and by the other statutory provisions referred to in paragraph 1, sub-paragraph 1 of Schedule 5 to the 1969 Act (see paragraphs 129-135 of the report, and paragraphs 25, 26 and 30 above). The reasoning of the Commission was accepted and adopted by the Government but, at least in respect of telephone interceptions, disputed by the applicant. He relied on certain dicta to the contrary in the judgment of Sir Robert Megarry (see paragraphs 31-36 above, especially paragraphs 33 and 35). He also referred to the fact that the 1977 Home Office Consolidated Circular to Police made no mention, in the section headed "Supply of information by Post Office to police", of the warrant procedure (see paragraph 50 above).

72. As to the second point, the pleadings revealed a fundamental difference of view as to the effect, if any, of the Post Office Act 1969 in imposing legal restraints on the purposes for which and the manner in which interception of communications may lawfully be authorised by the Secretary of State.

73. According to the Government, the words in section 80 - and, in particular, the phrase "for the like purposes and in the like manner as, at the passing of this Act, a requirement may be laid" - define and restrict the power to intercept by reference to the practice which prevailed in 1968. In the submission of the Government, since the entry into force of the 1969 Act a requirement to intercept communications on behalf of the police can lawfully be imposed on the Post Office only by means of a warrant signed personally by the Secretary of State for the exclusive purpose of the detection of crime and satisfying certain other conditions. Thus, by virtue of section 80 the warrant must, as a matter of law, specify the relevant name, address and telephone number; it must be time-limited and can only be directed to the Post Office, not the police. In addition, the Post Office is only required and empowered under section 80 to make information available to "designated persons holding office under the Crown". Any attempt to broaden or otherwise modify the purposes for which or the manner in which interceptions may be authorised would require an amendment to the 1969 Act which could only be achieved by primary legislation.

74. In its reasoning, which was adopted by the applicant, the Commission drew attention to various factors of uncertainty arguing against the Government's view as to the effect of the 1969 Act (see paragraphs 136-142 of the report).

75. Firstly, the relevant wording of the section, and especially the word "may", appeared to the Commission to authorise the laying of a requirement on the Post Office for whatever purposes and in whatever manner it would previously have been lawfully possible to place a ministerial duty on the Postmaster General, and not to be confined to what actually did happen in practice in 1968. Yet at the time of the Birkett report (see, for example, paragraphs 15, 21, 27, 54-55, 56, 62 and 75), and likewise at the time when the 1969 Act was passed, no clear legal restrictions existed on the permissible "purposes" and "manner". Indeed the Birkett report at one stage (paragraph 62) described the Secretary of State's discretion as "absolute", albeit specifying how its exercise was in practice limited.

76. A further difficulty seen by the Commission is that, on the Government's interpretation, not all the details of the existing arrangements are said to have been incorporated into the law by virtue of section 80 but at least the principal conditions, procedures or purposes for the issue of warrants authorising interceptions. Even assuming that the reference to "like purposes" and "like manner" is limited to previous practice as opposed to what would have been legally permissible, it was by no means evident to the Commission what aspects of the previous "purposes" and "manner" have been given statutory basis, so that they cannot be changed save by primary legislation, and what aspects remain matters of administrative discretion susceptible of modification by governmental decision. In this connection, the Commission noted that the notion of "serious crime", which in practice serves as a condition governing when a warrant may be issued for the purpose of the detection of crime, has twice been enlarged since the 1969 Act without recourse to Parliament (see paragraphs 42-43 above).

77. The Commission further pointed out that the Government's analysis of the law was not shared by Sir Robert Megarry in his judgment of February 1979. He apparently accepted the Solicitor General's contentions before him that section 80 referred back to previous administrative arrangements for the issue of warrants (see paragraph 33 above). On the other hand, he plainly considered that these arrangements remained administrative in character and had not, even in their principal aspects, been made binding legal requirements by virtue of section 80 (see paragraph 34 above).

78. It was also somewhat surprising, so the Commission observed, that no mention of section 80 as regulating the issue of warrants should have been made in the White Paper published by the Government in the wake of Sir Robert Megarry's judgment (see paragraph 21 above). Furthermore, the Home Secretary, when presenting the White Paper to Parliament in April 1980, expressed himself in terms suggesting that the existing arrangements as a whole were matters of administrative practice not suitable for being "embodied in legislation", and were subject to change by governmental decision of which Parliament would be informed (see paragraphs 37 in fine and 54 in fine above).

79. The foregoing considerations disclose that, at the very least, in its present state the law in England and Wales governing interception of communications for police purposes is somewhat

obscure and open to differing interpretations. The Court would be usurping the function of the national courts were it to attempt to make an authoritative statement on such issues of domestic law (see, mutatis mutandis, the Deweer judgment of 27 February 1980, Series A no. 35, p. 28, in fine, and the Van Droogenbroeck judgment of 24 June 1982, Series A no. 50, p. 30, fourth sub-paragraph). The Court is, however, required under the Convention to determine whether, for the purposes of paragraph 2 of Article 8 (art. 8-2), the relevant law lays down with reasonable clarity the essential elements of the authorities' powers in this domain.

Detailed procedures concerning interception of communications on behalf of the police in England and Wales do exist (see paragraphs 42-49, 51-52 and 54-55 above). What is more, published statistics show the efficacy of those procedures in keeping the number of warrants granted relatively low, especially when compared with the rising number of indictable crimes committed and telephones installed (see paragraph 53 above). The public have been made aware of the applicable arrangements and principles through publication of the Birkett report and the White Paper and through statements by responsible Ministers in Parliament (see paragraphs 21, 37-38, 41, 43 and 54 above).

Nonetheless, on the evidence before the Court, it cannot be said with any reasonable certainty what elements of the powers to intercept are incorporated in legal rules and what elements remain within the discretion of the executive. In view of the attendant obscurity and uncertainty as to the state of the law in this essential respect, the Court cannot but reach a similar conclusion to that of the Commission. In the opinion of the Court, the law of England and Wales does not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities. To that extent, the minimum degree of legal protection to which citizens are entitled under the rule of law in a democratic society is lacking.

(iii) Conclusion

80. In sum, as far as interception of communications is concerned, the interferences with the applicant's right under Article 8 (art. 8) to respect for his private life and correspondence (see paragraph 64 above) were not "in accordance with the law".

(b) "Necessary in a democratic society" for a recognised purpose

81. Undoubtedly, the existence of some law granting powers of interception of communications to aid the police in their function of investigating and detecting crime may be "necessary in a democratic society ... for the prevention of disorder or crime", within the meaning of paragraph 2 of Article 8 (art. 8-2) (see, mutatis mutandis, the above-mentioned Klass and Others judgment, Series A no. 28, p. 23, para. 48). The Court accepts, for example, the assertion in the Government's White Paper (at para. 21) that in Great Britain "the increase of crime,and particularly the growth of organised crime, the increasing sophistication of criminals and the ease and speed with which they can move about have made telephone interception an indispensable tool in the investigation and prevention of serious crime". However, the exercise of such powers, because of its inherent secrecy, carries with it a danger of abuse of a kind that is potentially easy in individual cases and could have harmful consequences for democratic society as a whole (ibid., p. 26, para. 56). This being so, the resultant interference can only be regarded as "necessary in a democratic society" if the particular system of secret surveillance adopted contains adequate guarantees against abuse (ibid., p. 23, paras. 49-50).

82. The applicant maintained that the system in England and Wales for the interception of postal and telephone communications on behalf of the police did not meet this condition.

In view of its foregoing conclusion that the interferences found were not "in accordance with the law", the Court considers that it does not have to examine further the content of the other guarantees required by paragraph 2 of Article 8 (art. 8-2) and whether the system circumstances.

B. Metering

83. The process known as "metering" involves the use of a device (a meter check printer) which registers the numbers dialled on a particular telephone and the time and duration of each call (see paragraph 56 above). In making such records, the Post Office - now British Telecommunications - makes use only of signals sent to itself as the provider of the telephone service and does not monitor or intercept telephone conversations at all. From this, the Government drew the conclusion that metering, in contrast to interception of communications, does not entail interference with any right guaranteed by Article 8 (art. 8).

84. As the Government rightly suggested, a meter check printer registers information that a supplier of a telephone service may in principle legitimately obtain, notably in order to ensure that the subscriber is correctly charged or to investigate complaints or possible abuses of the service. By its very nature, metering is therefore to be distinguished from interception of communications, which is undesirable and illegitimate in a democratic society unless justified. The Court does not accept, however, that the use of data obtained from metering, whatever the circumstances and purposes, cannot give rise to an issue under Article 8 (art. 8). The records of metering contain information, in particular the numbers dialled, which is an integral element in the communications made by telephone. Consequently, release of that information to the police without the consent of the subscriber also amounts, in the opinion of the Court, to an interference with a right guaranteed by Article 8 (art. 8).

85. As was noted in the Commission’s decision declaring Mr. Malone’s application admissible, his complaints regarding metering are closely connected with his complaints regarding interception of communications. The issue before the Court for decision under this head is similarly limited to the supply of records of metering to the police "within the general context of a criminal investigation, together with the legal and administrative framework relevant [thereto]" (see paragraph 63 above).

86. In England and Wales, although the police do not have any power, in the absence of a subpoena, to compel the production of records of metering, a practice exists whereby the Post Office do on occasions make and provide such records at the request of the police if the information is essential to police enquiries in relation to serious crime and cannot be obtained from other sources (see paragraph 56 above). The applicant, as a suspected receiver of stolen goods, was, it may be presumed, a member of a class of persons potentially liable to be directly affected by this practice. The applicant can therefore claim, for the purposes of Article 25 (art. 25) of the Convention, to be a "victim" of a violation of Article 8 (art. 8) by reason of the very existence of this practice, quite apart from any concrete measure of implementation taken against him (cf.,

mutatis mutandis, paragraph 64 above). This remains so despite the clarification by the Government that in fact the police had neither caused his telephone to be metered nor undertaken any search operations on the basis of any list of telephone numbers obtained from metering (see paragraph 17 above; see also, mutatis mutandis, the above-mentioned Klass and Others judgment, Series A no. 28, p. 20, para. 37 in fine).

87. Section 80 of the Post Office Act 1969 has never been applied so as to "require" the Post Office, pursuant to a warrant of the Secretary of State, to make available to the police in connection with the investigation of crime information obtained from metering. On the other hand, no rule of domestic law makes it unlawful for the Post Office voluntarily to comply with a request from the police to make and supply records of metering (see paragraph 56 above). The practice described above, including the limitative conditions as to when the information may be provided, has been made public in answer to parliamentary questions (ibid.). However, on the evidence adduced before the Court, apart from the simple absence of prohibition, there would appear to be no legal rules concerning the scope and manner of exercise of the discretion enjoyed by the public authorities. Consequently, although lawful in terms of domestic law, the interference resulting from the existence of the practice in question was not "in accordance with the law", within the meaning of paragraph 2 of Article 8 (art. 8-2) (see paragraphs 66 to 68 above).

88. This conclusion removes the need for the Court to determine whether the interference found was "necessary in a democratic society" for one of the aims enumerated in paragraph 2 of Article 8 (art. 8-2) (see, mutatis mutandis, paragraph 82 above).

C. Recapitulation

89. There has accordingly been a breach of Article 8 (art. 8) in the applicant’s case as regards both interception of communications and release of records of metering to the police.

II. ALLEGED BREACH OF ARTICLE 13 (art. 13)

90. The applicant submitted that no effective domestic remedy existed for the breaches of Article 8 (art. 8) of which he complained and that, consequently, there had also been a violation 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."

91. Having regard to its decision on Article 8 (art. 8) (see paragraph 89 above), the Court does not consider it necessary to rule on this issue.

III. APPLICATION OF ARTICLE 50 (art. 50)

92. The applicant claimed just satisfaction under Article 50 (art. 50) under four heads: (i) legal costs that he was ordered by Sir Robert Megarry to pay to the Metropolitan Commissioner of Police, assessed at £9,011.00, (ii) costs, including disbursements, paid by him to his own lawyers in connection with the same action, assessed at £5,443.20, (iii) legal costs incurred in the proceedings before the Commission and the Court, as yet unquantified, and (iv) "compensation of a moderate amount" for interception of his telephone conversations.

He further sought recovery of interest in respect of the first two items.

The Government have so far made no submissions on these claims.

93. The question is thus not yet ready for decision and must be reserved; in the circumstances of the case, it is appropriate to refer the matter back to the Chamber (Rule 53 paras. 1 and 3 of the Rules of Court).

FOR THESE REASONS, THE COURT

1. Holds unanimously that there has been a breach of Article 8 (art. 8) of the Convention;

2. Holds by sixteen votes to two that it is not necessary also to examine the case under Article 13 (art. 13);

3. Holds unanimously that the question of the application of Article 50 (art. 50) is not ready for decision;

accordingly,

(a) reserves the whole of the said question;

(b) refers back to the Chamber the said question.

Done in English and in French at the Human Rights Building, Strasbourg, this second day of August, one thousand nine hundred and eighty-four.

Gérard WIARDA
President

Marc-André EISSEN
Registrar

The separate opinions of the following judges are annexed to the present judgment in accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 52 para. 2 of the Rules of Court:

- partially dissenting opinion of Mr. Matscher and Mr. Pinheiro Farinha;

- concurring opinion of Mr. Pettiti.

G.W.
M.-A.E.

PARTIALLY DISSENTING OPINION OF JUDGES MATSCHER AND PINHEIRO FARINHA

(Translation)

We recognise that Article 13 (art. 13) constitutes one of the most obscure clauses in the Convention and that its application raises extremely difficult and complicated problems of interpretation. This is probably the reason why, for approximately two decades, the Convention institutions avoided analysing this provision, for the most part advancing barely convincing reasons.

It is only in the last few years that the Court, aware of its function of interpreting and ensuring the application of all the Articles of the Convention whenever called on to do so by the parties or the Commission has also embarked upon the interpretation of Article 13 (art. 13). We refer in particular to the judgments in the cases of Klass and Others (Series A no. 28, paras. 61 et seq.), Sporrong and Lönnroth (Series A no. 52, para. 88), Silver and Others (Series A no. 61, paras. 109 et seq.) and, most recently, Campbell and Fell (Series A no. 80, paras. 124 et seq.), where the Court has laid the foundation for a coherent interpretation of this provision.

Having regard to this welcome development, we cannot, to our regret, concur with the opinion of the majority of the Court who felt able to forego examining the allegation of a breach of Article 13 (art. 13). In so doing, the majority, without offering the slightest justification, have departed from the line taken inter alia in the Silver and Others judgment, which was concerned with legal issues very similar to those forming the object of the present case.

Indeed, applying the approach followed in the Silver and Others judgment, the Court ought in the present case, and to the same extent, to have arrived at a finding of a violation of Article 13 (art. 13).

CONCURRING OPINION OF JUDGE PETTITI

(Translation)

I have voted with my colleagues for the violation of Article 8 (art. 8), but I believe that the European Court could have made its decision more explicit and not confined itself to ascertaining whether, in the words of Article 8 (art. 8), the interference was "in accordance with the law", an expression which in its French version ("prévue par la loi") is used in Article 8 para. 2, Article 1

of Protocol No. 1 and Article 2 of Protocol No. 4 (art. 8-2, P1-1, P4-2), the term "the law" being capable of being interpreted as covering both written law and unwritten law.

The European Court considered that the finding of a breach on this point made it unnecessary, in the Malone case, to examine the British system currently in force, which was held to have been at fault because of a lack of "law", and to determine whether or not adequate guarantees existed.

In my view, however, the facts as described in the Commission's report and in the Court's summary of facts also called for an assessment of the British measures and practices under Article 8 para. 2 (art. 8-2).

This appears necessary to me because of the major importance of the issue at stake, which I would summarise as follows.

The danger threatening democratic societies in the years 1980-1990 stems from the temptation facing public authorities to "see into" the life of the citizen. In order to answer the needs of planning and of social and tax policy, the State is obliged to amplify the scale of its interferences. In its administrative systems, the State is being led to proliferate and then to computerise its personal data-files. Already in several of the member States of the Council of Europe each citizen is entered on 200 to 400 data-files.

At a further stage, public authorities seek, for the purposes of their statistics and decision-making processes, to build up a "profile" of each citizen. Enquiries become more numerous; telephone tapping constitutes one of the favoured means of this permanent investigation.

Telephone tapping has during the last thirty years benefited from many "improvements" which have aggravated the dangers of interference in private life. The product of the interception can be stored on magnetic tapes and processed in postal or other centres equipped with the most sophisticated material. The amateurish tapping effected by police officers or post office employees now exists only as a memory of pre-war novels. The encoding of programmes and tapes, their decoding, and computer processing make it possible for interceptions to be multiplied a hundredfold and to be analysed in shorter and shorter time-spans, if need be by computer. Through use of the "mosaic" technique, a complete picture can be assembled of the life-style of even the "model" citizen.

It would be rash to believe that the number of telephone interceptions is only a few hundred per year in each country and that they are all known to the authorities.

Concurrently with developments in the techniques of interception, the aims pursued by the authorities have diversified. Police interception for the prevention of crime is only one of the practices employed; to this should be added political interceptions, interceptions of communications of journalists and leading figures, not to mention interceptions required by national defence and State security, which are included in the "top-secret" category and not dealt with in the Court's judgment or the present opinion.

Most of the member States of the Council of Europe have felt the need to introduce legislation on the matter in order to bring to an end the abuses which were proliferating and making vulnerable even those in power.

The legislative technique most often employed is that of criminal procedure: the interception of communications is made subject to the decision and control of a judge within the framework of a criminal investigation by means of provisions similar to those governing searches carried out on the authority of a warrant.

The order by the judge must specify the circumstances justifying the measure, if need be subject to review by an appeal court. Variations exist according to the types of system and code of criminal procedure.

The governing principle of these laws is the separation of executive and judicial powers, that is to say, not to confer on the executive the initiative and the control of the interception, in line with the spirit of Article 8 (art. 8).

The British system analysed in the Malone judgment - and held by the Court not to be "in accordance with the law" - is a typical example of a practice that places interception of communications within the sole discretion and under the sole control of the Minister of the Interior, this being compounded by the fact that intercepted material is not disclosed to the judicial authorities (in the form of evidence), which therefore have no knowledge of the interception (see paragraph 51).

Even in the case of interception of communications required by the imperative necessities of counter-espionage and State security, most systems of law include strict rules providing for derogations from the ordinary law, the intervention and control of the Prime Minister or the Minister of Justice, and the recourse to boards or commissions composed of judges at the peak of the judicial hierarchy.

The European Court has, it is true, "considere[d] that it does not have to examine further the content of the other guarantees required by paragraph 2 of Article 8 (art. 8-2) and whether the system complained of furnished those guarantees in the particular circumstances" (paragraph 82).

This reservation makes clear that in limiting itself to finding a violation because the governmental interference was not in accordance with the law, the Court did not intend, even implicitly, to mark approval of the British system and thus reserved any adjudication on a possible violation of Article 8 para. 2 (art. 8-2).

In my opinion, however, the Court could at this point have completed its reasoning and analysed the components of the system so as to assess their compatibility and draw the conclusion of a breach of Article 8 para. 2 (art. 8-2), there being no judicial control.

Even if a "law", within the meaning of Article 8 paras. 1 and 2 (art. 8-1, art. 8-2), contains detailed rules which do not merely legalise practices but define and delimit them, the lack of judicial control could still entail, in my view, a violation of Article 8 para. 2 (art. 8-2), subject of course to review by the Court.

It must also be borne in mind that the practice of police interception leads to the establishment of "prosecution" files which thereafter carry the risk of rendering inoperative the rules of a fair trial provided for under Article 6 (art. 6) by building up a presumption of guilt. The judicial authorities should therefore be left a full power of appreciation over the field of decision and control.

The object of the laws in Europe protecting private life is to prevent any clandestine disclosure of words uttered in a private context; certain laws have even made illegal any tapping of a telephone communication, any interception of a message without the consent of the parties. The link between laws on "private life" and laws on "interception of communications" is very close.

German law enumerates the offences for the detection of which measures of interception may be ordered. The list of offences set out in this law is entirely directed towards the preservation of democracy, the sole justification for the attendant interference.

In the Klass case and the accompanying comparative examination of the rules obtaining in the different signatory States of the Convention, the need for a system of protection in this sphere was emphasised. It admittedly falls to the State to operate such a system, but only within the bounds set by Article 8 (art. 8).

There were, in the Malone case, factors permitting the Court to draw a distinction between the dangers of a crisis situation caused by terrorism (Klass case) and the dangers of ordinary

criminality, and hence to consider that two different sets of rules could be adopted. In so far as the prevention of crime under the ordinary law is concerned, it is difficult to see the reason for ousting judicial control, at the very least such control as would secure at a later stage the right to the destruction of the product of unjustified interceptions.

Reasoning along these lines could have been adopted by the Court, even on an alterative basis. The interference caused by interception of communications is more serious than an ordinary interference since the "innocent" victim is incapable of discovering it.

If, as the British Government submitted, only the suspected criminal is placed under secret surveillance, there can be no ground for denying a measure involving judicial or equivalent control, or for refusing to have a neutral and impartial body situated between the authority deciding on the interception and the authority responsible for controlling the legality of the operation and its conformity with the legitimate aims pursued.

The requirement of judicial control over telephone interceptions does not flow solely from a concern rooted in a philosophy of power and institutions but also from the necessities of protecting private life.

In reality, even justified and properly controlled telephone interceptions call for counter-measures such as the right of access by the subject of the interception when the judicial phase has terminated in the discharge or acquittal of the accused, the right to erasure of the data obtained, the right of restitution of the tapes.

Other measures are necessary, such as regulations safeguarding the confidentiality of the investigation and legal professional privilege, when the interception has involved monitoring a conversation between lawyer and client or when the interception has disclosed facts other than those forming the subject of the criminal investigation and the accusation.

Provisions of criminal procedure alone are capable of satisfying such requirements which, moreover, are consistent with the Council of Europe Convention of 1981 (Private Life, Data Banks). It is in fact impossible to isolate the issue of interception of communications from the issue of data banks since interceptions give rise to the filing and storing of the information obtained. For States which have also ratified the 1981 Convention, their legislation must satisfy these double requirements.

The work of the Council of Europe (Orwell Colloquy in Strasbourg on 2 April 1984, and Data Bank Colloquy in Madrid on 13 June 1984) has been directed towards the same end, namely the protection of the individual threatened by methods of storing and transmission of information. The mission of the Council of Europe and of its organs is to prevent the establishment of systems and methods that would allow "Big Brother" to become master of the citizen’s private life. For it is just as serious to be made subject to measures of interception against one’s will as to be unable to stop such measures when they are illegal or unjustified, as was for example the case with Orwell’s character who, within his own home, was continually supervised by a television camera without being able to switch it off.

The distinction between administrative interceptions and interceptions authorised by a judicial authority must be clearly made in the law in order to comply with Article 8 (art. 8); it would appear preferable to lay down the lawfulness of certain interventions within an established legal framework rather than leaving a legal vacuum permitting arbitrariness. The designation of the collective institutions responsible for ensuring the ex post facto control of the manner of implementation of measures of interception; the determination of the dates of cancellation of the tapping and monitoring measures, the means of destruction of the product of interception; the inclusion in the code of criminal procedure of all measures applying to such matters in order to

afford protection of words uttered in a private context or in a private place, verification that the measures do not constitute an unfair stratagem or a violation of the rights of the defence - all this panoply of requirements must be taken into consideration to judge whether or not the system satisfies the provisions of Article 8 (art. 8). The Malone case prompted queries of this kind since the State cannot enjoy an "unlimited discretion" in this respect (see the Klass judgment).

According to the spirit of the Council of Europe Convention of 1981 on private life and data banks, the right of access includes the right for the individual to establish the existence of the data, to establish the banks of which he is a "data subject", access properly speaking, the right to challenge the data, and the exceptions to and derogations from this right of access in the case notably of police or judicial investigations which must by nature remain secret during the initial phase so as not to alert the criminals or potential criminals.

Recommendation R (83) 10 of the Committee of Ministers of the Council of Europe states that respect for the privacy of individuals should be guaranteed "in any research project requiring the use of personal data".

The nature and implications of data processing are totally different as soon as computerisation enters the picture. The Karlsruhe Constitutional Court has rightly identified the concept of "informational self-determination", that is to say, the right of the individual to decide within what limits data concerning his private life might be divulged and to protect himself against an increasing tendency to make him "public property".

In 1950, techniques for interfering in private life were still archaic; the meaning and import of the term interference as understood at that time cannot prevail over the current meaning. Consequently, interceptions which in previous times necessitated recourse to tapping must be classified as "interferences" in 1984, even if they have been effected without tapping thanks to "bugging" and long-distance listening techniques.

For it is settled, as was recalled in paragraph 42 of the Klass judgment, that Article 8 para. 2 (art. 8-2), since it provides for an exception to a guaranteed right, "is to be narrowly interpreted" and that "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". To leave to the police alone, even subject to the control of the Home Office, the task of assessing the degree of suspicion or dangerousness cannot, in my opinion, be regarded as an adequate means consistent with the aim pursued, even if that aim be legitimate; and in any event, practices of systematic interception of communications in the absence of impartial, independent and judicial control would be disproportionate to the aim sought to be achieved. In this connection, the Malone judgment has to read with reference to the reasoning expounded in the Klass judgment.

States must admittedly be left a domestic discretion and the scope of this discretion is admittedly not identical in respect of each of the aims enumerated in Articles 8 and 10 (art. 8, art. 10), but the right to respect for private life against spying by executive authorities comes within the most exacting category of Convention rights and hence entails a certain restriction on this domestic "discretion" and on the margin of appreciation. In this sphere (more than in the sphere of morality - cf. the Handyside judgment), it can be maintained that it is possible, whilst still taking account of the circumstances resulting from the threat posed to democratic societies by terrorism, to identify European standards of State conduct in relation to surveillance of citizens. The shared characteristics of statutory texts or draft legislation on data banks and interception of communications is evidence of this awareness.

The Court in its examination of cases of violation of Article 8 (art. 8) must be able to inquire into all the techniques giving rise to the interference.

The Post Office Engineering Union, during the course of the Malone case, referred to proposals for the adoption of regulations capable of being adapted to new techniques as they are developed and for a system of warrants issued by "magistrates".

The Court has rightly held that there was also violation of Article 8 para. 1 (art. 8-1) in respect of metering.

On this point, it would likewise have been possible to have given a ruling by applying Article 8 para. 2 (art. 8-2). The comprehensive metering of telephone communications (origin, destination, duration), when effected for a purpose other than its sole accounting purpose, albeit in the absence of any interception as such, constitutes an interference in private life. On the basis of the data thereby obtained, the authorities are enabled to deduce information that is not properly meant to be within their knowledge. It is known that, as far as data banks are concerned, the processing of "neutral" data may be as revealing as the processing of sensitive data.

The simple reference in the judgment to the notion of necessity in a democratic society and to the requirement of "adequate guarantees", without any eludication of the principles and principal conditions attaching to these guarantees, might well be inadequate for the purposes of the interpretation that the State should give to the Convention and to the judgment.

The Malone judgment complementing as it does the Klass judgment, in that it arrives at a conclusion of violation by finding unsatisfactory a system that is laid down neither by statute nor by any statutory equivalent in Anglo-Saxon law, takes its place in that continuing line of decisions through which the Court acts as guardian of the Convention. The Court fulfils that function by investing Article 8 (art. 8) with its full dimension and by limiting the margin of appreciation especially in those areas where the individual is more and more vulnerable as a result of modern technology; recognition of his right to be "left alone" is inherent in Article 8 (art. 8). The Convention protects the community of men; man in our times has a need to preserve his identity, to refuse the total transparency of society, to maintain the privacy of his personality.

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* Note by the registry: The revised Rules of Court, which entered into force on 1 January 1983, are applicable to the present case.