CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

COURT (PLENARY)

CASE OF SCHENK v. SWITZERLAND

(Application no. 10862/84)

JUDGMENT

STRASBOURG

12 July 1988

In the Schenk case*,

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

Mr. R. RYSSDAL, *President*,
Mr. J. CREMONA,
Mr. Thór VILHJÁLMSSON,
Mrs. D. BINDSCHEDLER-ROBERT,
Mr. F. GÖLCÜKLÜ,
Mr. F. MATSCHER,
Mr. J. PINHEIRO FARINHA,
Mr. L.-E. PETTITI,
Mr. B. WALSH,
Sir Vincent EVANS,
Mr. R. MACDONALD,
Mr. C. RUSSO,
Mr. R. BERNHARDT,
Mr. A. SPIELMANN,
Mr. J. DE MEYER,
Mr. J.A. CARRILLO SALCEDO,
Mr. N. VALTICOS,

and also of Mr. M.-A. EISSEN, *Registrar*, and Mr. H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 25 March and 24 June 1988,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") and by the Government of the Swiss Confederation ("the Government") on 15 and 28 July 1987 respectively, within the three-month period laid down in 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"). It originated in an application (no. 10862/84) against Switzerland lodged with the Commission

* Note by the registry: The case is numbered 8/1987/131/182. The second figure indicates the year in which the case was referred to the Court and the first figure its place on the list of cases referred in that year; the last two figures indicate, respectively, the case's order on the list of cases and of originating applications (to the Commission) referred to the Court since its creation.

under Article 25 (art. 25) by Mr. Pierre Schenk, a Swiss national, on 6 March 1984.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) of the Convention and to the declaration whereby Switzerland recognised the compulsory jurisdiction of the Court (Article 46) (art. 46); the Government's application referred to Articles 45, 47 and 48 (art. 45, art. 47, art. 48). Both sought a decision from the Court as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 para. 1 (art. 6-1).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings pending before the Court and designated the lawyer who would represent him (Rule 30).

3. The Chamber of seven judges to be constituted included ex officio Mrs. D. Bindschedler-Robert, the elected judge of Swiss nationality (Article 43 of the Convention) (art. 43), and Mr. R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 27 August 1987, Mr. J. Cremona, the Vice-President of the Court, drew by lot, in the presence of the Registrar, the names of the other five members, namely himself, Mr. F. Gölcüklü, Sir Vincent Evans, Mr. C. Russo and Mr. J.A. Carrillo Salcedo (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. Mr. Ryssdal had assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the Government, the Delegate of the Commission and the lawyer for the applicant on the need for a written procedure (Rule 37 para. 1). In accordance with the Order made in consequence on 7 September, the Registrar received the Government's memorial, on 30 November 1987, and the applicant's memorial, on 4 December. On 22 January 1988, the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

5. Having consulted, through the Registrar, those who would be appearing before the Court, the President directed on 14 December 1987 that the oral proceedings should commence on 22 March 1988 (Rule 38).

6. On 25 February 1988, the Chamber decided, pursuant to Rule 50, to relinquish jurisdiction forthwith in favour of the plenary Court.

7. The hearing was held in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting immediately beforehand.

There appeared before the Court:

- for the Government

Mr. O. JACOT-GUILLARMOD, Head
of the Department of International Affairs, Federal Office
of Justice, *Agent*,

Mr. C. VAUTIER, formerly a cantonal judge,

Mr. P. BOILLAT, Federal Office of Justice, *Counsel*;
- for the Commission
Mr. J.-C. SOYER, *Delegate*;
- for the applicant
Mr. D. PONCET, avocat,
Mr. R. ASSAEL, avocat,
Mr. M. HOTTELIER, avocat, *Counsel*.

The Court heard addresses by Mr. Jacot-Guillarmod for the Government, by Mr. Soyer for the Commission and by Mr. Poncet for the applicant.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. Mr. Pierre Schenk, a Swiss national born in 1912, resides in Tartegnin (Canton of Vaud). He is a company director.

In 1947, he married Josette P, who was born in 1927. In 1972, serious disagreements arose between them, and they separated the following year. In 1974, the applicant filed a petition for divorce, which was finally granted on 10 December 1981 after an agreement between the parties.

A. History of the case

9. On 28 February 1981, Mr. Schenk went to an advertising agency in Annemasse (Haute-Savoie), where, under the assumed name of Pierre Rochat, with an address in Lyons, he gave instructions for the following advertisement to be published:

> "Wanted. Former member of the Foreign Legion or similar for occasional assignments; offer with telephone number, address and curriculum vitae to RTZ 81 poste restante CH Basle 2."

From the replies to this advertisement the applicant selected a Mr. Pauty, whom he met on several occasions and paid to carry out a variety of assignments, including one in Haiti in May 1981.

10. At the beginning of June 1981, the applicant underwent an operation in hospital.

Mr. Pauty arrived in Switzerland on 12 June and telephoned Mrs. Schenk on the 18th. He visited her the following day and told her that he had been commissioned by her husband to kill her. After considering the possibility of killing Mr. Schenk or leading him to believe that his wife was dead so that Mr. Pauty could collect his fee, they went together to the investigating judge of the Canton of Vaud on 20 June 1981.

B. Police inquiry and the judicial investigation

11. On 20 June 1981, the investigating judge interviewed Mr. Pauty and then instructed Detective Inspector Rochat and Detective Inspector Messerli of the Vaud police to interrogate him more thoroughly, which they did on the same day. The judge interviewed Mrs. Schenk "orally", in other words her statements were not taken down in writing.

The following day, the Vaud police took a statement from Mr. Pauty, for the second time, and also one from Mrs. Schenk.

12. On 22 June, the investigating judge issued letters rogatory to the French authorities. He asked that, in order to further an investigation into an attempted murder by a person or persons unknown, a number of inquiries should be made and that Inspector Messerli should be authorised to take part in them. The judge noted in particular:

> "... it is necessary to discover what Mr. Pauty was doing in Paris from March to June 1981 and to obtain information regarding his character. It is also necessary to ascertain whether it is true that Mr. Pauty saw Schenk, whom he claims to have met at the Grand Hôtel, and with whom he allegedly went to buy an air ticket for Haiti."

On 23 June, the Crime Squad of the Paris Criminal Investigation Department formally proceeded to comply with the letters rogatory, and Mr. Pauty was accordingly interviewed the following day in the presence of Inspector Messerli. Mr. Pauty said, inter alia:

> "RTZ 81, that is to say Mr. Pierre Schenk, will certainly contact me before long to ask for details of the murder of his wife, Josette Schenk. He is supposed to send me or bring me the agreed amount of $40,000.
>
> You asked me to come here and I would now ask you to give me instructions as to how I should act when Mr. Schenk contacts me."

13. Mr. Pauty was expecting the applicant to telephone him and he therefore set up a cassette recorder at his mother’s home at Houilles near Paris and connected it by microphone to the second earphone of the telephone receiver.

On the morning of 26 June, at approximately 9.30 a.m., Mr. Schenk telephoned Mr. Pauty from a kiosk at Saint-Loup (Switzerland). Mr. Pauty recorded the conversation.

At about 10 a.m., Mr. Pauty telephoned the Crime Squad and was put through to Mr. Messerli, who had planned to return to Lausanne that same day by the midday train. Mr. Pauty played the recording back to the inspector and asked him whether he would like to have the cassette. Mr. Messerli said that he would and informed his French colleagues who were present of this. Approximately one hour later, Mr. Pauty arrived at the Crime Squad’s offices and handed the cassette over to Mr. Messerli.

14. Mr. Messerli, who on the previous day had telephoned the investigating judge of the Canton of Vaud, took the cassette back to

Lausanne the same evening. On 30 June, he played the recording back to Mrs. Schenk so that she could identify her husband's voice. On the same day, the judge issued a warrant for the applicant's arrest.

Mr. Schenk was arrested the next day, 1 July. Inspector Rochat and Inspector Messerli were instructed by the judge to arrange a confrontation between Mr. Pauty and Mr. Schenk, and they played back the recording in the latter's presence. In addition, the judge visited the police station, where he interviewed and charged the applicant; he also met the applicant's lawyer, who had been authorised to see his client.

15. On 2 July, the inspectors reported to the judge the results of the confrontation between Mr. Pauty and Mr. Schenk. They handed over to him the cassette, which was placed in an envelope and added to the file; it subsequently remained there except when removed for examination by an expert.

The judge ordered the applicant's release. He had a transcript made of the cassette and added it to the file on 12 July. On 6 August 1981, the inspectors drew up a detailed report on the case for him.

16. On 14 August, the file was sent to the applicant's lawyer, who returned it on the same day. On 11 September, he requested a full investigation of Mr. Pauty and an expert examination of the cassette, as in his view the recording was not a faithful and complete reproduction of the telephone conversation.

On 23 September, the judge directed that the cassette should be handed over to SK, the managing director of a tape-recorder factory, who carried out the expert examination with J-CS, one of his colleagues. At SK's request, the equipment that had been used to make the recording, which had been seized at Houilles on 1 October by the French police in the presence of Mr. Messerli, was also made available to him. He returned the cassette to the judge on 29 October and submitted his report on 12 November.

17. On 3 February 1982, the investigating judge issued an order discharging the applicant. The order read as follows:

> "...
>
> ... Prima facie Mr. Pauty's accusations are supported by a number of facts.
>
> It is, for instance, strange that Pierre Schenk carefully concealed his true identity from Richard Pauty and tried to cover his tracks (advertisement for a legionnaire in a French newspaper, use of an assumed name, use of a PO box in Basle, the fact that it was always Schenk who telephoned Pauty, etc.).
>
> ...
>
> It is clear that the recording of the telephone conversation of 26 June 1981 between Pierre Schenk and Richard Pauty has been neither shortened nor tampered with.
>
> It appears to confirm Richard Pauty's accusations.

Nevertheless, careful listening raises some doubt as to whether the participants completely understood each other. Pierre Schenk, in particular, gives the impression that he did not understand very well what Richard Pauty was implying.

In the light of Richard Pauty's character, his past and his explanations and statements to Josette Schenk, his statements cannot be relied on with absolute confidence.

...

In conclusion, Richard Pauty's accusations and the evidence gathered appear insufficient to commit Pierre Schenk for trial.

..."

18. On 23 February, the prosecutor appealed against the investigating judge's decision, and in response to this appeal Mr. Schenk filed a statement of defence on 8 March. In it he argued that the central figure in the case was not him but Mr. Pauty, who, according to information obtained, "[had] been a member of the Foreign Legion, a chief steward in the Navy, a stunt man, a bodyguard, an informer working for the Italian police, a circus employee and out of work". He supported the prosecutor's application to have the recording played, which in no way incriminated him. In his view, Mr. Pauty had been acting merely as an agent provocateur of the police on the day he made the recording.

On 21 April 1982, the Indictment Division of the Vaud Cantonal Court committed Mr. Schenk for trial at the Rolle District Criminal Court on a charge of attempted incitement to murder. On 10 June, it remanded the applicant in custody, but Mr. Schenk appealed and was released on 22 June.

C. The proceedings in the Rolle District Criminal Court

1. The trial on 9-13 August 1982

19. The proceedings at first instance at the Rolle District Criminal Court lasted from 9 to 13 August 1982. The court was composed of a professional judge, who presided, two lay judges and six jurors. The defendant was assisted by his lawyer, Mr. Luthy.

20. At the outset the applicant made an interlocutory application to have the recording removed from the file. The court dismissed this application on the same day on the following grounds:

"...

The file contains a recording whose removal is sought by the defendant.

It was made by Richard Pauty, a strong-arm man in the defendant's employ.

Pauty stated that he had made the recording in the following circumstances:

'I put the cassette in my recorder... Using the original microphone, I connected it up to the second earphone of the telephone in my mother's flat. I used brown self-adhesive tape to attach the microphone to the earphone...'.

The recording was not authorised or ordered by the competent authority.

Accordingly, by recording Pierre Schenk without his knowledge, Pauty may have committed an offence under Art. 179 ter CC [the Swiss Criminal Code].

However, this is not sufficient ground for ordering the removal of the recording from the file.

Art. 179 ter CC is applicable only where a complaint has been lodged, and Pierre Schenk has made no such complaint.

Thus Pauty would in any event no longer be liable to punishment in this respect.

In any case, the content of the recording could have been included in the file, either because the investigating judge had had Pauty's telephone tapped or simply because it would be sufficient to take evidence from Pauty regarding the content of the recording.

Acceptance of the defendant's argument would make it necessary to exclude a large proportion of evidence in criminal proceedings.

For instance, a firearm used without the appropriate permit would have to be held inadmissible as evidence.

That is why procedural law confers on the courts the power to assess evidence and its weight and probative value.

This case does not involve unlawful evidence within the meaning of the European Convention.

Moreover, it is interesting to note that the defendant appears to have shifted his ground during the police inquiry.

On page 5 of the pleadings that he submitted to the Indictment Division, counsel for the defence states as follows:

'The public prosecutor seeks to have played back the telephone conversation recorded on 26 June 1981. He is right to do so and we wish to support this application. He considers that this recording constitutes decisive evidence against my client. He is completely mistaken in this respect.'

The defendant was right to consider at the time that it should be left to the court to assess the evidence in the file."

21. Still on 9 August 1982, the presiding judge directed that the recording should be played back. It was played back in the courtroom in the

presence of the members of the court, the parties and the public on a cassette recorder with two loudspeakers installed by a specialist firm.

22. The same day, the court heard evidence from all the witnesses except HR, who failed to appear. Three of the witnesses had been subpoenaed by the court of its own motion (Mr. Pauty, Mrs. Schenk and HR). Three other witnesses had been called at the request of the defence (RF, JM-Z and GG). Inspector Messerli did not give evidence because he was not called either by the court or at the request of the public prosecutor or the defence.

In addition, J-CS, who had worked with the expert SK, gave evidence in the latter's stead on 9 and 10 August 1982.

The statements made by these witnesses were not taken down.

23. The presiding judge read out various documents: the order of the Indictment Division committing the applicant for trial; the police and intelligence reports in their entirety or in part; various documents produced by Mr. Schenk or cited by either the prosecution or the defence (Article 341, first paragraph, of the Vaud Code of Criminal Procedure); and the statements made during the police inquiry by HR, who was not present, but not those of the witnesses who had given evidence at the hearing (Article 341, second paragraph).

24. Under the Vaud Code of Criminal Procedure, the file is made available to the judges and jurors as soon as the trial commences. The judges, however, may in exceptional circumstances have access to it earlier (Article 333), but not the jurors (Article 386).

2. The judgment of 13 August 1982

25. The Rolle District Criminal Court delivered its judgment on 13 August 1982. It found Mr. Schenk guilty of attempted incitement to murder (Article 24 para. 2 of the Criminal Code) and sentenced him to ten years' imprisonment, the minimum statutory sentence. It ordered his immediate arrest.

26. The judgment contains the following account of the facts:

> "On 28 February 1981, Pierre Schenk went to an advertising agency in Annemasse, where, under the assumed name of Pierre Rochat, with an address in Lyons, he gave instructions for the following advertisement to be placed in three French newspapers, Le Provençal, Le Progrès de Lyon, and France-Soir:
>
> 'Wanted. Former member of the Foreign Legion or similar for occasional assignments; offer with telephone number, address and curriculum vitae to RTZ 81 poste restante CH Basle 2.'
>
> The agency employee warned him that the newspapers might not accept such an advertisement; and, in fact, the advertisement appeared only in France-Soir. Pierre Schenk paid the agency 1,520.57 FF. In reply to the advertisement he received several offers and selected two of them, one from a Richard Pauty, living at Houilles, near Paris, and another from someone whose first name was Robert. After meeting Robert,

Schenk decided against using him. He therefore chose Pauty, with whom he arranged at least two meetings in March and April 1981, at the Grand-Hôtel in Paris, which is not the hotel at which the defendant usually stays. On this point he explained at the hearing that he did not want Pauty to know where he lived in Paris. He introduced himself as a member of a very powerful organisation based in Germany. He told Pauty that he was the organisation's representative in France. He also said that Pauty would be under surveillance during his assignments.

The first assignment given to Richard Pauty concerned a certain [HR]. According to Richard Pauty, the mission - for which he was promised payment of 40,000 dollars plus expenses - was to kill [HR]. According to Pierre Schenk, Pauty was supposed to give [HR] a beating 'that he would remember for a long time'. He intended only that [HR] should receive several punches to the face and a black eye. The defendant stated that he had taken these steps 'in order to intimidate [HR], or rather, to punish him'.

The Court has not been able to establish with certainty the real assignment given to Pauty. ...

...

As nothing concrete appeared to come of this, the defendant gave Pauty another assignment. He explains that he realised that Pauty was not the sort of strong-arm man that he had hoped for. Pauty had told him that he had been a mercenary in the CSTM (Compagnie spéciale des troupes métropolitaines), then a 'bouncer', and had smuggled cars to Italy. Pierre Schenk explained that he had found Pauty quick-witted and cunning and had therefore decided that he could give him a second assignment, consisting in obtaining information about Josette Schenk. According to the defendant's version of events, Pauty was supposed to provide him with information on three matters:

(a) the amount that Mrs. Schenk had inherited from her father;

(b) whether she was having a house built in Haiti; and

(c) whether she had any funds in that country, perhaps as a result of a relationship he knew nothing about.

A fourth matter also interested him, namely whether his wife had had any contact with the drugs world.

According to Pauty, he was supposed to go to Haiti, murder Mrs. Schenk, for 40,000 dollars, covering his tracks by simulating a rape, a burglary or an accident. It is known that at the end of April 1981 Schenk went with Pauty to a Paris travel agency. For 8,667 FF, he bought him a fortnight's package holiday in Haiti and in addition gave him 4,000 CHF, i.e. approximately 10,000 FF, to cover his expenses. Pauty left for Haiti on 27 April 1981. He went to Port-au-Prince, where Mrs. Schenk spends three-quarters of the year. Pierre Schenk had given Pauty a photograph of his wife so that he could identify her. Josette Schenk left Port-au-Prince on 5 May 1981 and returned to Switzerland. Having established that Josette Schenk was not in Haiti, Pauty completed his stay and returned to France on 11 May, without moreover having obtained any information whatsoever, except for one detail, which was inaccurate - namely that Josette Schenk's husband was dead. On his return to France, Pauty was contacted by Schenk on a date which has not been established precisely, but which

must have been 14 May (according to Schenk) or 15 or 16 May (according to Pauty). Schenk claims that he telephoned Pauty from France. This is possible, although it has not been proved. But neither has it been established that he rang him from Switzerland. During this telephone conversation, Schenk learnt that Pauty had returned empty-handed from Haiti. He then instructed Pauty to come to Switzerland to continue his assignment. According to Pauty, he was supposed to kill Josette Schenk during the week of 12-18 June. According to Schenk, that was precisely the week in which Pauty was not supposed to come to Switzerland, because it was then that Mrs. Schenk's daughter was expected to give birth. Thereafter, there does not appear to have been any direct contact between Schenk and Pauty until 26 June 1981, when Schenk telephoned Pauty. This conversation will be considered further below. On 24 May 1981, Pauty sent a telegram to RTZ 81, worded as follows: 'Contact necessary'. At this stage Pauty was totally unaware of RTZ's real identity. A few days later, on 1 June 1981, when he entered St.-Loup Hospital for an operation and after he had led Pauty to believe that he would be away for two months in the Far East, Schenk sent 3,500 CHF to Pauty in an envelope posted at Eclépens to the address 'RD poste restante 1003 Lausanne-Gare'. The defendant underwent his operation at the beginning of June. On 12 June, Richard Pauty came to Switzerland and began to look for Mrs. Schenk. He contacted her by telephone on the evening of 18 June, having, he claimed, decided to abandon what he alleges to have been his assignment, i.e. to kill Mrs. Schenk, either because he would have had to wait until RTZ 81's ostensible return in two months' time to obtain more money, or because he realised that there was something suspicious about RTZ's explanations. On 19 June, Pauty met Mrs. Schenk. He explained to her that he had been instructed to kill her. Mrs. Schenk, who was terrified, asked Pauty on whose instructions and has stated that after a certain amount of explanation she realised that the order came from her husband. Pauty then suggested to Mrs. Schenk that she should disappear for a while so that he could collect his fee. Failing that, he proposed killing the defendant. Finally, Pauty and Mrs. Schenk went to the police to tell their story, and on 20 June 1981 the investigation commenced. On 20 June, Pauty was interviewed in Switzerland and on 24 June by the French police. On 26 June 1981, having received the telegram of 24 May, Pierre Schenk rang Pauty from St.-Loup Hospital. Pauty, who knew that RTZ 81, i.e. Pierre Schenk, would call him sooner or later, had put a cassette in a recorder which he had had for about a year and which belonged to his brother. Using the recorder's original microphone, he connected the apparatus directly to the second earphone of the telephone in his mother's flat. He attached the microphone to the earphone by means of self-adhesive tape. Schenk called from a telephone kiosk, although he had a telephone in his hospital room. He claims that he used seven one-franc coins for the call, but this fact has not been established. On the tape an unidentified person is heard answering Schenk's telephone call and putting him on to Pauty. Schenk asks Pauty what he has been doing and the following dialogue ensues:

RP Well, the jo...

PS I was wondering what you were d..., what had become of you.

RP Yes, no, there were one or two small problems and I didn't, I couldn't do the job until the 23rd.

PS The 23rd?

RP Yes, Monday 23rd, Mon..., Mon..., I think it was the 23rd.

PS But where did it happen?

RP Well, I went to fetch some friends in Italy because we couldn't manage to do the, because as you told me there were, the neighbours were always there etc.... I went twice and I was seen twice, so I waited until she left to go to the hospital and we arranged to bump into her car, so that she'd have to stop and talk about the damage and then, well it was like that, but I don't know because the body, we took the car and we and I took it to near Montreux. I don't know if it has been discovered yet because I haven't seen it in the papers.

PS But what are you going to do now?

RP Sorry?

PS What's going to happen now?

RP Well, now I'm going to do the Paris one, aren't I?

PS What?

RP I'll do Paris.

PS No, I mean about work, the job.

RP Well, don't ask me. It er the job's done and that's it.

PS It's odd the job's been done and there's been no news, isn't it?

RP I haven't seen it in the papers yet either, but it's like I said, I hid it, I didn't just leave it...

PS Right, listen, it's quite straightforward, I'll call you in a week's time.

RP In a week's time?

PS Will you be there in a week's time?

RP Yes, I'll be in Paris, yes.

PS Yes, yes, I... I... I follow you, right?

RP OK.

PS Good, because I... there hasn't been any news, I haven't heard anything.

The conversation ends with the usual greetings. Pauty received the call at approximately 9.30 a.m. At 10.00 a.m. he called the Paris Crime Squad, and at around midday, having travelled from Houilles to Paris, he brought the cassette to the inspector in charge of the inquiry. This cassette was examined by an expert, who found that:

1. The tape of the cassette had not been edited by the usual method of cutting and splicing.

2. The characteristics of the recording corresponded exactly to the recorder.

3. The tape did not have any usable traces of other recordings.

4. The background noise on the recording was very loud, which was to be expected, given the type of equipment used and the way the recording was made. But, as a result, it was not possible to state with certainty that it was not a copy.

The expert considered that it was possible that the conversation had first been recorded and that the tape had then been edited, i.e. passages had been removed, the order of the words altered or passages from other recordings added. The resulting tape could then have been copied on the cassette recorder examined. The expert stated further that he had 'found no evidence' to suggest that it was such a copy. That did not mean that it was not one, only that the editing would have required a very skilled operator, with sophisticated equipment at his disposal and plenty of time. At the trial the expert further clarified his opinion as follows.

He explained that he had detected four breaks; that he had not been able to prove that there had been a cut; that he was almost sure that no editing could have been carried out, since such editing would have required a day's work, even if the necessary equipment had been available. The expert noted in addition that in the most favourable circumstances with regard both to the equipment available and to whether a passage was in a position from which it could technically be simply removed, the removal of a passage would have required an hour to an hour and a half's work. He had not detected any such removal of a passage.

Giving evidence on this recording, the defendant admitted that it was his voice. He stated that he did not remember any reference to a body and that he had the impression that the recording had been shortened.

On the basis of the expert's findings, the court accepts that the recording which appears in the file is an accurate reproduction of the conversation between the defendant and Pauty on 26 June 1981. It considers that, as there is no evidence that the recording has been tampered with and in view of the short time available to Pauty between the telephone conversation and his handing over of the cassette to the police, the possibility that the recording was edited can be ruled out. Moreover, having regard to the fact that the recording contained the initial and final greetings, the possibility that the beginning or end of the recording was simply removed without any editing does not arise.

On 23 and 26 June 1981, Pauty sent two telegrams to RTZ 81. The first ran: 'Lausanne OK. Paris OK before 30. Need US d. for cigarettes.' The second was worded 'Contract completed. Check Lausanne-Montreux, no proof possible. Awaiting half US d. contract before steps HR Paris.' Schenk does not seem to have received these telegrams.

In seeking to ascertain the general circumstances of the case, the court has found that the Schenks, between whom there was an age-gap of some fifteen years, were married in 1947. Until 1969 it does not seem that the couple experienced any particular problems. It is, however, certain that Mrs. Schenk always felt very lonely. In

May 1972, whilst Mrs. Schenk was in hospital, an expert, [A], came to discuss with her a draft marriage contract and agreement concerning inheritance rights which Pierre Schenk had had prepared. This draft, which provided for a separation of property, stipulated in substance that Josette Schenk should waive any right to succeed to her husband's estate on the understanding that on his death she would receive a life interest in a portfolio of securities whose real value was to be at least one and a half million CHF, yielding an annual income of at least 60,000 CHF. It was also provided that if the marriage was dissolved for any reason other than death, Josette Schenk would have a life interest in a portfolio of securities with a real indexed value of one and a half million CHF.

Josette Schenk refused to sign this agreement. In 1973, she sought protective measures. At the end of 1973, she and her husband ceased to live together. Pierre Schenk instituted divorce proceedings in 1974. The spouses saw each other again only at the hearings in those proceedings, which were particularly bitter and lasted more than seven years. In early February 1981, Josette Schenk changed lawyers. Since her new lawyer appeared to favour a final settlement as part of a divorce, the defendant's lawyer informed him of this and told him what he intended to do to compel the new lawyer to raise the problem with Mrs. Schenk and make it easier to persuade the latter to review her position. On 8 April 1981, counsel for the defendant wrote to him to inform him that he hoped to be able to fix a date for the final hearing before long. In the event, this hearing was held on 10 December 1981, and the divorce decree - which took effect from 2 February 1982 - confirmed an agreement granting, inter alia, the wife the sum of one and a half million CHF in respect of the liquidation of joint assets and an indexed annuity paid in monthly instalments of 4,500 CHF.

The investigation showed that from the beginning of the divorce proceedings Pierre Schenk had doubts as to the faithfulness of his wife and suspected in particular that she had had a relationship prior to and during the early stages of the proceedings with a certain [E].

...

The trial hearing did not reveal any facts other than those which are set out above. The defendant continued to assert his version of events according to which Pauty was instructed to obtain information and confirmed that, as he saw it, Pauty could get the information in any way that suited him, for example by visiting Mrs. Schenk on some pretext and obtaining the information sought 'either by initiating an intimate relationship or by developing a friendship with her'. In an interview on 1 July 1981 the defendant stated that he had wished to obtain the desired information from Pauty within thirty days if possible. In court he declared that this was not the case, that he had told Pauty that he would be away for a while - so that the latter had plenty of time - and that he had instructed Pauty that he should not come to Lausanne during the week of 12-18 June because Mrs. Schenk's daughter was due to give birth then. Finally, it had been agreed that Pauty would be paid on Schenk's ostensible return from abroad on the basis of the information which he provided. For his part, Pauty confirmed that his assignment in Switzerland was to kill Mrs. Schenk and that he had decided to change his plans when he saw that it would be a long while before he received any more money from RTZ 81.

Richard Pauty's personality is not particularly easy to determine. He was born in 1947 and has had a number of somewhat ill-defined jobs. He has worked as a stunt man and has had various problems with the French civil and military authorities and

with the Italian authorities. Legally he is resident in Italy, but he in fact lives at Houilles. It appears that he has occasionally collaborated with the police, particularly the Italian police, on matters related to drugs.

On the basis of the foregoing considerations, the court has, by a majority, reached the conclusion that Pierre Schenk gave to Richard Pauty the assignment of killing Josette Schenk. The court's view is founded partly on the recording of the telephone conversation of 26 June 1981. Where Pauty states that he was not able to do the job until the 23rd, the defendant twice asks him where it happened, which is a ridiculous question if the job was merely a matter of obtaining information. At the end of a long sentence, spoken all at once without drawing breath and in which reference was made to a body taken in a car to somewhere near Montreux and not having been discovered because there had been no mention in the papers, the defendant does not reply 'What on earth is all this nonsense?' or 'I don't understand what you're talking about'. He says and asks twice what is going to happen now. When Pauty confirms that the job has been done, the defendant does not say to him 'In that case send me your report', which would have been logical if the assignment had been to obtain information, but says to him, not once but twice, 'it's odd the job's been done and there's been no news, isn't it?'. The defendant explained that he wished by this to lead Pauty to believe that his organisation (a non-existent organisation which was supposed to monitor Pauty's actions) had not told him of it. We know that Pauty's actions were not monitored. We also know that the 'organisation' did not exist and that the defendant, who was in hospital, could not have known at the time whether or not Pauty had contacted Mrs. Schenk. Moreover, at the time, this meant that it was absolutely impossible for the defendant - if the assignment in question was to obtain information - to know whether or not Pauty had carried out the assignment. The defendant's reply is meaningless unless he knew that the job had not been done, and he could not have known this unless the matter was public knowledge, for example because it had appeared in the press - which Pauty mentions, moreover. This consideration on its own lends credence to Pauty's version. But there is also all the other evidence before the court: the unbelievably elaborate precautions taken by the defendant; the fact that for years the defendant had had to pay an allowance to his wife although her misconduct, which the defendant was aware of but unable to prove, would probably have dictated a different assessment of the position; the fact that the agreement on ancillary matters was about to confirm that situation; the utter improbability of anyone's wanting to send a man who claimed to be a former member of the Foreign Legion and who lacked training, culture and ability to Haiti, and then to Switzerland, to obtain relatively innocuous information which was in any event of dubious relevance for the purpose of the divorce proceedings; the fact that after the failure of the [HR] assignment and the assignment in Haiti - from where Pauty could at least have been expected to return with the information whether Josette Schenk had or had not had a house built - there was no reason to send Pauty to Switzerland, where he had no contacts; the fact that the defendant had spent more than 10,000 CHF to obtain (if his version of events is accepted) very innocuous information; and, finally, the fact that at no time has the defendant taken any steps to lodge a complaint of malicious accusation.

The defendant stated that he had no motive to kill [HR]. But objectively he scarcely had any greater motive for having him beaten up six years after an alleged affront, anonymously and at a time when new commercial negotiations had begun. The fact that the private detectives he had employed had not yielded particularly good results did not mean that some kind of legionnaire who was more or less a police informer would be able to do any better. An intelligent person - and the accused is intelligent -

does not replace the intelligence officer of a battalion with the commander of a company of grenadiers. The fact that the divorce proceedings were about to reach a conclusion did not alter the fact that a relationship established after eight years of separation would have very little effect on the amount of maintenance or the fact that the moment when it would be necessary to liquidate joint assets and pay an allowance which Pierre Schenk knew to have been obtained unjustly was approaching. The fact that Pauty did not receive a large advance is not decisive, since it is not difficult to appreciate that Schenk wanted to see results before paying. This mistrust might moreover explain why Pauty changed sides. The defendant considered it inconceivable that Pauty should not have received a large advance, seeing that he had no means of finding RTZ 81, of whose identity he was unaware. That would be true if there had been only a single assignment, but not in the case of several. Moreover, the argument applies equally to an assignment to obtain information. It may be noted in passing that if it had been a question merely of information, it would not have mattered if Pauty had come to Switzerland in the week in which Mrs. Schenk's daughter was due to give birth.

The defendant put forward other suppositions, namely that Pauty tampered with the recording and used it to some extent with Mrs. Schenk's co-operation. There is, however, no evidence to support this theory. It should further be noted in connection with the recording that the defendant, who is hard of hearing (he suffers from a 50% hearing loss), claimed that he did not understand what Pauty said on the telephone. This assertion is not consistent with the defendant's concise and clear questions and replies, or with the fact that he never said that he had not heard or that he had misheard what Pauty said to him. On the basis of all these considerations, therefore, the court has reached the conclusion that in regard to Mrs. Schenk the assignment given to Pauty was to kill her.

In the case of [E], no steps were taken to carry out the assignment of giving him a beating. As far as [HR] is concerned, the court has been unable to reach a conclusion.

The investigation into the charges against the defendant ended in a finding that there was no case to answer. On appeal by the prosecution, the defendant was committed for trial at the Rolle Criminal Court. During the investigation he was held on remand for a fortnight.

Information obtained regarding the defendant's character is favourable. He is well known and respected in Rolle. He is extremely wealthy. He has never had any dealings with the police and has never been convicted."

D. Proceedings in the Criminal Cassation Division of the Vaud Cantonal Court

27. The applicant appealed on points of law. He complained in particular of the recording, arguing that it had been obtained unlawfully, after the investigation had commenced and with the aim of securing prosecution evidence; moreover, its use contravened the criminal law and it had played a part as direct evidence in the trial.

In a preliminary submission on 23 September 1982, the Principal Public Prosecutor of the Canton of Vaud contended that the court should dismiss

the appeal. He expressed the view that "the disputed recording [had been] made in the context of criminal proceedings and at the request of police officers". He did not provide any additional information on this point.

28. On 15 November 1982, the Criminal Cassation Division of the Vaud Cantonal Court dismissed the appeal on the following grounds:

> "The impugned judgment states expressly that the trial court relied partly on the disputed recording. Moreover, there is no doubt that the recording was such as to have a perhaps decisive influence, or at the least a not inconsiderable one, on the outcome of the criminal proceedings.
>
> Criminal procedure is subject to the inquisitorial principle, the aim of the trial being, by getting as close as possible to what actually happened, to establish the facts of the case and then to apply the law to the facts found. That being so, it is not possible to exclude automatically all evidence whose source is unlawful or criminal. However, the quest for the truth should not be carried out at the expense of disregarding principles which are sometimes more important (Walder, 'Rechtswidrig erlangte Beweismittel im Strafprozess', RPS [Revue pénale suisse] 1966, pp. 36 et seq.). In Clerc's view (Initiation à la justice pénale en Suisse, p. 150, no. 145), justice must be administered in accordance with the rules of good faith.
>
> According to precedent, which is scarce, the use of evidence which has been obtained unlawfully is excluded only where such evidence could not have been obtained under the existing law, but not where only a procedural rule has been infringed which was neither intended nor apt to prevent the search for evidence (RO [Judgments of the Swiss Federal Court] 96 I 437, c. 3 b, JT [Journal des Tribunaux] 1972 I 217 summary; RO 103 Ia 206 = JT 1979 IV 16; Belschaw, 3.9.1980; OG ZH [Court of Appeal of the Canton of Zürich]; SJZ [Schweizerische Juristen Zeitung] 1981, no. 28, p. 130; KG ZH [Court of Cassation of the Canton of Zürich]; BZR [Blätter für Zürcherische Rechtsprechung] 1974, no. 44, pp. 106 et seq.). But the distinction between unlawfulness and procedural irregularity is often a fine one (Hauser, 'Probleme und Tendenzen im Strafprozess', RPS 1972, pp. 129, 130).
>
> The criterion established by precedent has been considered unsatisfactory by academic opinion (Hauser, op. cit., p. 131; Hauser, Kurzlehrbuch des schweiz. Strafprozessrechts, p.147; Walder, 'Rechtswidrig erlangte Beweismittel im Strafprozess', RPS 1966, pp. 37 et seq.; Hutzli, Die verfassungsmässigen bundesrechtlichen Schranken im einzelstaatlichen Strafprozess, thesis, Berne, 1974, p. 227).
>
> In any event, as far as the admissibility of evidence is concerned, it is not decisive that it has been obtained by means of a criminal offence.
>
> Walder notes that as a general rule it is not so much the evidence as such as the manner in which the evidence has been obtained which may preclude its use (p. 41). He distinguishes between the infringement of an important right and that of a purely procedural requirement, and between evidence obtained judicially and evidence obtained extrajudicially (p. 43). In his view, certain evidence cannot be used directly, although its indirect use, i.e. the use of evidence obtained as a result of it, is possible (p. 45), or at least the use which has been made of evidence obtained unlawfully cannot be disregarded (p. 47). Walder concludes that it is necessary to consider each case individually to determine whether the unlawfulness in question is so serious that

the illegally obtained evidence cannot be used; this can be done only by weighing up the interests and rights at stake (p. 59). Thus, in this author's view, it is entirely permissible to use information regarding the commission of a serious crime which has been obtained in breach, for example, of statutory provisions on telephones (p. 51).

In Hauser's view (Kurzlehrbuch, p. 147), it is necessary to assess the rules under which evidence may be excluded as inadmissible in terms of what they were intended to protect. Evidence obtained in breach of a prohibition designed to obviate risks associated with establishing the truth - such as an extorted confession - must be excluded.

Generally speaking, it is accepted that the investigating authorities are prohibited from using coercion or threats, or from resorting to false statements or misleading questions (Pfenniger, Probleme des schweiz. Strafprozessrechts, p. 191; Hauser, Kurzlehrbuch, p. 146, para. 57 II 2, and p. 151, para. 58 III 2; Walder, op. cit., p. 52).

Examination of the foregoing in the light of Article 6 para. 2 (art. 6-2) of the European Convention on Human Rights, under which an accused may not be convicted unless proved guilty according to law, does not give rise to any different distinctions (see in particular Poncet, La protection de l'accusé par la CEDH, pp. 89 et seq.). According to Article 8 para. 2 (art. 8-2) ECHR [the European Convention on Human Rights], interference by a public authority with private life or with correspondence is permissible only where it is in accordance with the law and is necessary in a democratic society in the interests of, inter alia, public safety and the prevention of disorder or crime.

In the Klass judgment of 6 September 1978, the European Court of Human Rights took the view that the existence of some legislation granting powers of secret surveillance over the mail, post and telecommunications is, under exceptional conditions, necessary in a democratic society. It recognised that, as regards the fixing of the conditions under which the system of surveillance was to be operated, the legislature enjoyed a certain discretion (European Court of Human Rights, Series A, no. 28, paras. 48 and 49, p. 23; see the arguments before the European Commission of Human Rights, Yearbook of the European Convention on Human Rights 1974, pp. 178 et seq., esp. pp. 184 et seq.).

In an earlier case, the Committee of Ministers took the view, on 5 May 1971, that the tape recording of a private conversation unbeknown to the participants or one of them constituted in principle an interference with privacy but that the use by the court of the recording in evidence did not infringe the right to a fair trial guaranteed in Article 6 para. 1 (art. 6-1) of the Convention (Yearbook 1971, pp. 902 et seq.). The Commission expressed the same view (Yearbook 1969, pp. 156 et seq.).

More recently, the European Commission of Human Rights observed in a German case that the fact that the authorities charged with the telephone tapping generally did not fully respect the directives given to them - however regrettable it might be - did not by itself constitute a violation of the Convention, in particular of Article 8 para. 1 (art. 8-1) (13 December 1979, Decisions and Reports no. 18, p. 180).

It is worth noting further that the Commission has accepted, firstly, that police officers may take confidential information from persons with a legitimate interest in remaining anonymous, failing which much information needed if crimes are to be punished would never be brought to the knowledge of the prosecuting authorities; and,

secondly, that the statements of an informant could be taken into consideration where the jury's attention had been drawn to the status of a statement which was not corroborated under oath during the proceedings in court and where the accused had been able to produce in court various witnesses who denied that the events in question had occurred (4 May 1979, Decisions and Reports no. 16, pp. 207 et seq.).

It may be inferred from the foregoing that the view taken by the institutions responsible for the application of the ECHR is no stricter than the one adopted by the Federal Court in the decisions cited.

The rules set out and discussed here, which concern the investigating authorities, cannot as such apply to evidence unlawfully obtained by private individuals. Certain methods which are unacceptable in the case of the former are not necessarily so in the case of the latter (Walder, op. cit., p. 42). Academic writers accept, for example, that a victim of threats or blackmail may be compelled, where evidence of the fact is otherwise difficult to obtain, to make a secret recording of the perpetrator's statements (Hauser, Kurzlehrbuch, p. 148; Walder, op. cit., p. 48). As regards the acts of a private investigator, opinion is divided. Hauser considers that there are no grounds for distinguishing such investigators from official ones, since the dangers of falsifying facts are even greater (Kurzlehrbuch, p. 148). Previous decisions of the courts have left the question open (RO 99 V 15; RO 103 Ia 216, 9b; SJZ 1981 no. 28, 2b, p. 132).

It would have been unlawful for the police to record a telephone conversation in Switzerland without the authorisation of a judge. However, such authorisation could have been granted, since the investigation was instituted as a result of a serious criminal offence, by virtue of Art. 179 octies CC. The disputed recording does not in itself constitute prohibited evidence either under Swiss law or under the rules laid down by the European Court of Human Rights. It may be conceded to the appellant that even in the absence of any complaint, the private recording of Pauty's telephone conversation with the defendant amounts to an offence in itself (RO 81 IV 90 3a, JT 1955 IV 140). On the other hand, the rule that was infringed - Art. 179 bis CC - protects individual privacy and is not designed to eliminate the risk of mistake.

Moreover, if regard is had to the balance of the interests and rights at stake, as Walder recommends, it must be recognised that the difference between authorised tapping and unauthorised recording is not in itself sufficient to justify attaching greater importance to the protection of privacy than to the public interest in exposing a person guilty of a serious crime.

The method used by Pauty to obtain the appellant's incriminating statements is undoubtedly contrary to the rules of good faith, since it consisted in stating untruthfully that the killer's assignment had been carried out, which amounted to Pauty's laying a trap for his interlocutor. However, although any attempt by the authorities to incite a person to commit an offence is open to censure, the stratagem of inducing an offender to confess to a crime is not (Clerc, 'Les moeurs de la police et la morale', in Varia Juridica 1982, esp. p. 149). Thus the use of violence or even deceit to obtain a statement is unlawful but, on the other hand, it is permissible to use a trick (Clerc, op. cit., p. 146). Such a practice is common on the part of the authorities where, for example, the lives of hostages are in danger. Besides, a given method might be legitimate in one case and immoral in another (op. cit., p. 151).

It follows that the means used in this case remained within the limits of what is acceptable for the purposes of combating crime. In any event, the deceit concerned only one matter, namely the performance of the act contemplated.

In sum, the contested evidence is admissible under Swiss law and does not infringe the appellant's fundamental rights. Although the recording was made and acquired by the police in France, it is unnecessary to consider any more extensive rights which might exist under foreign law. After all, France also allows telephone tapping and the recording of telephone conversations, even though the French Criminal Code likewise penalises such recording where it is not authorised by the competent authority (Précis Dalloz, Procédure pénale, 1980, p. 34, Arts. 368 para. 1 and 372 para. 2 of the French Criminal Code). Furthermore, although in France attempted incitement is not an offence, it would have been possible under the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959, to which Switzerland and France have acceded, for Switzerland to issue letters rogatory requesting such monitoring. Unlike Switzerland, France has not made a reservation whereby execution of any letters rogatory requiring a coercive measure is conditional on the alleged offence's being punishable in both the requesting and the requested country. Telephone monitoring is regarded as equivalent to such a measure (Romanens, Die Telefonüberwachung als Gegenstand der Rechtshilfe in Strafsachen, Berne thesis, 1974, p. 108).

The appellant argues further that authorised tapping would have provided all the necessary safeguards as to the accuracy and completeness of the recording. An authorised recording inevitably constitutes more weighty evidence than a private recording, in view of the risk of faking in the second case. However, in this instance the circumstances of the recording were known and an expert report, for the purpose of which the cassette and the recorder had been examined, was made available to the court. The court also knew how much time had elapsed between the recording and the handing over of the recorded tape to the police. It was thus able to assess the value of the evidence having regard to its authenticity.

The use of a trick or subterfuge is similarly liable to affect the weight attributed to statements obtained in such a manner. The trial court was, however, in a position to assess the weight to be attached to the defendant's statements in the light of such a manner of proceeding, as the recording moreover reproduced a complete telephone conversation. In this respect too the contested evidence is admissible."

E. The proceedings in the Federal Court

29. Mr. Schenk lodged a public-law appeal and an application for a declaration of nullity with the Federal Court against the judgment of the Vaud Criminal Cassation Division. Both were founded on the same complaints regarding the disputed recording. The applicant claimed in substance that the recording was unlawful; that the Criminal Court should therefore have ruled it inadmissible as evidence; and that in not so doing, the court had infringed in particular Article 36, paragraph 4, of the Constitution, which guarantees the secrecy of communications, Article 11

of the Vaud Act implementing the Criminal Code of 27 February 1980 and Articles 6 para. 2 and 8 (art. 6-2, art. 8) of the Convention.

1. The public-law appeal

30. On 7 September 1983, the Federal Court (Criminal Cassation Division) dismissed the public-law appeal on the following grounds:

"(a) It can be accepted that the ingredients of an offence under Art. 179 ter CC were present as far as the disputed recording is concerned. However, Pauty made the recording in order to prove the truth of his statements at a time when he was under investigation for attempted murder. If a complaint had been lodged under Art. 179 ter, it is not certain that the proceedings would have resulted in the imposition of a sentence. But this question can remain open. The provisions of the Criminal Code and of the VACC [Vaud Act implementing the Criminal Code] concerning telephone tapping define lawful and unlawful tapping and fix the penalties for the latter. They contain no rules for determining the validity of such tapping as evidence at a trial.

(b) It is true that Swiss law authorises infringement of personal rights and of the confidentiality of communications in the form of telephone tapping only where such a measure has been ordered by the competent authority and approved by a judge. To conclude from this that any evidence derived from unauthorised tapping must never in any circumstances be used in evidence would be to adopt too dogmatic a position and would often lead to absurd results (see Hans Walder, 'Rechtswidrig erlangte Beweismittel im Strafprozessrecht', in RPS 1966, pp. 36 et seq., and Klaus Rogall, 'Gegenwärtiger Stand und Entwicklungstendenzen der Lehre von den strafprozessualen Beweisverboten', in Zeitschrift für die gesamte Strafrechtswissenschaft 1979, pp. 1 et seq., esp. p. 15; see also Karl Heinz Gössel, 'Kritische Bemerkungen zum gegenwärtigen Stand der Lehre von den Beweisverboten im Strafverfahren', in Neue juristische Wochenschrift 1981, p. 649). In such a case it is necessary to balance, on the one hand, the interest of the State in having a specific suspicion confirmed or disproved and, on the other, the legitimate interest of the person concerned in the protection of his personal rights. To this end, all the relevant circumstances should be taken into consideration.

In the Federal Republic of Germany, the Constitutional Court has reached the same conclusion. In a case where a person was suspected of having committed offences involving tax evasion, fraud and forgery of documents, the court refused to attach any probative weight to a recording made privately. It considered, however, that the position would have been different if there had been an imperative community interest at stake which took precedence over the private interest of the person concerned; thus it held that it would not generally be contrary to constitutional law, in cases of necessity, to allow the authorities to use a recording that had been made by a third party and which could lead to the identification of a criminal or exculpate a person who had been wrongly accused, where serious offences were involved, such as offences against the person, serious attacks on the constitutional order and democratic freedoms, and offences against legally protected interests of the same order (Entscheidungen des Bundesverfassungsgerichts 34 - 1973 - pp. 238 et seq., esp. 249).

In the instant case, it is necessary to weigh, on the one hand, the interest in confirming or proving unfounded the specific suspicions that Schenk was guilty of incitement to murder and, on the other, Schenk's interest in preserving the confidentiality of his conversation with Pauty. The conclusion is inescapable that the

public interest in having the truth established in the matter of an offence relating to murder overrides Schenk's interest in maintaining the confidentiality of a telephone conversation which in no way bore upon his privacy but related exclusively to the completion of an assignment entrusted to Pauty. The need to protect a person's privacy cannot have the effect of making such a recording inadmissible as evidence in criminal proceedings when there are strong suspicions concerning a very serious offence (see Rogall, op. cit., 1979, pp. 29 et seq.).

Moreover, it is relevant to point out that Swiss law authorises tapping the telephone of an individual suspected of involvement in a crime. Admittedly, such tapping is subject to authorisation by a judge, but the recording of a conversation is not, as such, evidence which the State would have refrained from using as a matter of principle and in order to protect the higher interests of the individual. This type of evidence cannot be compared with a truth drug, coercion or torture, which are absolutely prohibited as a matter of public policy. Accordingly, there would have been no legal bar to prevent the same recording, made in Switzerland on the line of the telephone kiosk in the hospital where Schenk was staying, from being lawful and being admitted in evidence. It follows that an infringement of personal rights which does not amount to a breach of the Constitution under Swiss law - when certain conditions are satisfied - may be classified as minor where it could have been ordered under Art. 179 octies para. 2 CC (see ATF [Judgments of the Swiss Federal Court] 96 I 440).

(c) In this case, as Schenk was strongly suspected of having participated in a crime intended to result in a person's death; as the judge would have been entitled to order that his conversation of 26 June 1981 with Pauty should be recorded; as it was the latter who made such a recording while under investigation for attempted murder with or without premeditation; and as the conversation did not concern facts of an intimate nature, the [Rolle] District Criminal Court was entitled to refuse to rule the tape inadmissible in evidence and could assess it as evidence without infringing Swiss constitutional law. Nor, in so doing, did that court infringe Arts. 6 and 8 (art. 6, art. 8) ECHR." (Judgments of the Swiss Federal Court, vol. 109, part I, pp. 246-248)

2. The application for a declaration of nullity

31. Also on 7 September 1983, the Federal Court (Criminal Cassation Division) dismissed the application for a declaration of nullity. In particular, it declared inadmissible the submission based on the playing of the telephone recording to the Criminal Court: it held that this issue related to the introduction of evidence, which was governed by cantonal procedure.

F. The applicant's release

32. On 6 July 1983, Mr. Schenk applied for a stay of execution of his sentence on health grounds. The Head of the Vaud Department of Justice, Police and Military Affairs rejected this application on 7 December, whereupon the applicant lodged an administrative-law appeal, which was dismissed by the Federal Court on 21 February 1984.

33. In August 1983, the applicant was transferred to Chamblon geriatric hospital to complete his sentence.

On 5 December 1984, he was granted a partial pardon by the Grand Council of the Canton of Vaud whereby the remainder of his sentence was remitted, having regard in particular to the state of his health. He was released on 8 December 1984.

II. THE APPLICABLE DOMESTIC LAW

34. The Swiss Criminal Code contains the following provisions relating to telephone tapping:

Article 179 bis

"A person who, without the consent of all the participants, has listened to by means of a listening device or recorded on a recording apparatus a private conversation between other persons; or

a person who has used or made known to a third party a fact when he knew or should have assumed that his own knowledge of this fact had been obtained by means of an offence under the first paragraph; or

a person who has kept or made available to a third party a recording which he knew or should have assumed had been made by means of an offence under the first paragraph

shall be liable to imprisonment or a fine, if a complaint is made."

Article 179 ter

"A person who, without the consent of the other participants, has recorded on a recording apparatus a private conversation in which he took part; or

a person who has kept a recording which he knew or should have assumed had been made by means of an offence under the first paragraph, or who has used such a recording for his own benefit or has made it available to a third party

shall be liable to a period of imprisonment not exceeding one year or a fine, if a complaint is made."

Article 179 quinquies

"The following shall not be guilty of an offence under the first paragraph of Article 179 bis or the first paragraph of Article 179 ter:

a person who has, by means of a telephone or accessory equipment authorised by the telephone company, listened to, or who has recorded on a recording apparatus, a conversation transmitted by telephone equipment controlled by the telephone authority;

a person who has, by means of a telephone or accessory equipment connected to the main installation, listened to, or who has recorded on a recording apparatus, a conversation transmitted by equipment not controlled by the telephone authority."

Article 179 octies

"No offence is committed where a person by the express authorisation of the law orders official monitoring of postal, telephone or telegraphic communications of specified persons or orders the use of monitoring devices (Articles 179 bis et seq.), provided that he immediately seeks the approval of the competent judge.

The approval referred to in the first paragraph may be given in order to investigate or prevent a crime or an offence whose seriousness or special nature justifies the proposed action, or an offence committed by means of the telephone."

35. Article 5 of the Swiss Criminal Code provides that the Code may be applicable to offences committed abroad against Swiss nationals:

"The present Code shall be applicable to anyone committing an offence abroad against a Swiss national, provided that the offence is punishable also in the State in which it was committed, where the offender is in Switzerland and is not extradited abroad or where he is extradited to the Confederation on account of the offence. The foreign law shall, however, apply if it is more favourable to the person charged with the offence.

The offender shall no longer be punishable on account of his offence if he has undergone the penalty imposed on him abroad or if he has been granted remission of sentence or if the penalty is time-barred.

Where he has not undergone abroad the penalty imposed on him, it shall be undergone in Switzerland; if he has undergone abroad only part of the penalty, the remainder shall be undergone in Switzerland."

PROCEEDINGS BEFORE THE COMMISSION

36. Mr. Schenk lodged his application with the Commission on 6 March 1984 (application no. 10862/84). He claimed to be the victim of an infringement of his right to respect for his private life and his correspondence, which included the right to the confidentiality of telephone communications (Article 8) (art. 8). He also alleged that his right to a fair trial had been infringed by reason of the use of the disputed recording in evidence (Article 6 paras. 1 and 3) (art. 6-1, art. 6-3). Finally, he complained of a failure to comply with the principle of the presumption of innocence since his guilt had not been proved "according to law" (Article 6 para. 2) (art. 6-2).

37. The Commission ruled on the admissibility of the application on 6 March 1986. It dismissed the complaint based on Article 8 (art. 8)

concerning the making of the recording, on the ground that the domestic remedies had not been exhausted. On the other hand, it declared the application admissible in regard to the use of the recording, while stating that the complaint based on Article 6 para. 2 (art. 6-2) in fact came within the concept of fair trial.

In its report of 14 May 1987 (made under Article 31) (art. 31), it reached the conclusion, by eleven votes to two, that there had been no violation of Article 6 para. 1 (art. 6-1). The full text of the Commission's opinion and of the two dissenting opinions contained in the report is reproduced as an annex to this judgment.

THE GOVERNMENT'S FINAL SUBMISSIONS TO THE COURT

38. At the hearing on 22 March 1988, the Government confirmed the submissions set out in their memorial, in which they requested the Court to

> "find that in this instance there has been no violation of Article 6 para. 1 (art. 6-1) of the Convention".

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 (art. 6)

A. Article 6 para. 1 (art. 6-1)

39. Mr. Schenk claimed firstly that making the recording of his telephone conversation with Mr. Pauty and using it as evidence contravened Article 6 para. 1 (art. 6-1), which provides:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ..."

40. According to him, the recording was carried out at the instigation of the Swiss police. It was true that the Commission had declared inadmissible for failure to exhaust domestic remedies the complaint under Article 8 (art. 8) relating to the making of the recording, but in order to review the fairness of the trial it was nonetheless necessary to take as a basis the facts as they occurred, particularly where, as here, a decisive circumstance was involved.

The Court notes that the complaint that was declared inadmissible by the Commission related solely to Article 8 (art. 8). The Court has no jurisdiction to examine it as such, but that does not prevent consideration of it under another relevant provision, in this instance Article 6 para. 1 (art. 6-1).

41. Mr. Schenk also asserted that the use of unlawfully obtained evidence was enough to make the trial unfair and that his conviction rested mainly on the recording. He did consider it indeed necessary to weigh the conflicting interests - the public interest in establishing the truth in the matter of a serious criminal offence and the private interest in preserving the confidentiality of a telephone conversation - but, he submitted, this process had to take place before any telephone tapping, not after the event, and never unlawfully.

As to the rest, he made two submissions. Firstly, he complained that Inspector Messerli was never summoned to appear as a witness. Admittedly, the defence did not summon him to appear either during the judicial investigation or at the trial, but that omission, he said, was accounted for in the first case by the expectation - which was fulfilled - of a discharge (see paragraph 17 above) and, in the second case, by the fact that Mr. Messerli was convinced of the defendant’s guilt (see paragraph 15 above). Secondly, Mr. Schenk criticised the manner in which the Rolle Criminal Court heard the cassette. He contended that headphones should have been installed and even that special arrangements should have been made to cater for the fact that he was deaf.

42. The Government thought it necessary to distinguish between the case of the authorities using unlawful means to obtain or prepare evidence subsequently used by a court and the case of an unlawful act by an individual who subsequently handed over the evidence to the authorities. They added that the interests at stake had to be weighed and that, moreover, the recording was not the only piece of evidence; and they referred to the decisions of the courts in the instant case.

43. The Government did not dispute that the recording in issue was obtained unlawfully. The Swiss courts that dealt with the case had themselves recognised that.

The Rolle Criminal Court, for instance, had found that the recording "[had] not [been] authorised or ordered by the competent authority" (see paragraph 20 above).

The Criminal Cassation Division of the Vaud Cantonal Court said, "It may be conceded to the appellant that even in the absence of any complaint, the private recording of Pauty’s telephone conversation with the defendant amounts to an offence in itself" (see paragraph 28 above).

Lastly, the Federal Court held that "it [could] be accepted that the ingredients of an offence under Art. 179 ter CC were present as far as the disputed recording is concerned" (see paragraph 30 above).

44. The three courts nonetheless admitted the recording in evidence.

The Rolle Criminal Court held, inter alia, that "in any case, the content of the recording could have been included in the file, either because the investigating judge had had Pauty's telephone tapped or simply because it would be sufficient to take evidence from Pauty regarding the content of the recording" and that "acceptance of the defendant's argument would make it necessary to exclude a large proportion of evidence in criminal proceedings" (see paragraph 20 above).

The Criminal Cassation Division of the Vaud Cantonal Court noted that "the disputed recording [did] not in itself constitute prohibited evidence", that "if regard [was] had to the balance of the interests and rights at stake ..., the difference between authorised tapping and unauthorised recording [was] not in itself sufficient to justify attaching greater importance to the protection of privacy than to the public interest in exposing a person guilty of a serious crime" and that "the means used in this case remained within the limits of what is acceptable for the purposes of combating crime" (see paragraph 28 above).

The Federal Court held that "the public interest in having the truth established in the matter of an offence relating to murder [overrode] Schenk's interest in maintaining the confidentiality of a telephone conversation which in no way bore upon his privacy" (see paragraph 30 above).

45. According to Article 19 (art. 19) of the Convention, the Court's duty is to ensure the observance of the engagements undertaken by the Contracting States in the Convention. In particular, it is not its function to deal with errors of fact or of law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention.

46. While Article 6 (art. 6) of the Convention guarantees the right to a fair trial, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law.

The Court therefore cannot exclude as a matter of principle and in the abstract that unlawfully obtained evidence of the present kind may be admissible. It has only to ascertain whether Mr. Schenk's trial as a whole was fair.

47. Like the Commission it notes first of all that the rights of the defence were not disregarded.

The applicant was not unaware that the recording complained of was unlawful because it had not been ordered by the competent judge. He had the opportunity - which he took - of challenging its authenticity and opposing its use, having initially agreed that it should be heard (see paragraph 18 above). The fact that his attempts were unsuccessful makes no difference.

Furthermore, at the outset of the judicial investigation Mr. Schenk sought and obtained an investigation of Mr. Pauty (see paragraph 16 above).

Moreover, counsel for the applicant could have examined Mr. Pauty - who had been summoned as a witness - during the trial at the Rolle Criminal Court (see paragraph 22 above).

Lastly, Mr. Schenk did not summon Inspector Messerli to appear, although he was in charge of the investigation and responsible for obtaining evidence under the letters rogatory executed in France at the request of the Swiss authorities (see paragraph 12 above).

48. The Court also attaches weight to the fact that the recording of the telephone conversation was not the only evidence on which the conviction was based. The Rolle Criminal Court refused to declare the cassette inadmissible in evidence as it would have been sufficient to hear the evidence of Mr. Pauty as a witness in respect of the recording's content (see paragraph 20 above). It also heard evidence from several other witnesses, who were subpoenaed by the court of its own motion - like Mrs. Schenk - or called at the request of the defence (see paragraph 22 above). It carefully stated in several passages of its judgment that it relied on evidence other than the recording but which corroborated the reasons based on the recording for concluding that Mr. Schenk was guilty. Of particular significance in this connection is the following passage:

> "The court's view is founded partly on the recording of the telephone conversation of 26 June 1981. ... But there is also all the other evidence before the court: the unbelievably elaborate precautions taken by the defendant; the fact that for years the defendant had had to pay an allowance to his wife although her misconduct, which the defendant was aware of but unable to prove, would probably have dictated a different assessment of the position; the fact that the agreement on ancillary matters was about to confirm that situation; the utter improbability of anyone's wanting to send a man who claimed to be a former member of the Foreign Legion and who lacked training, culture and ability to Haiti, and then to Switzerland, in order to obtain relatively innocuous information which was in any event of doubtful relevance for the purpose of the divorce proceedings; the fact that after the failure of the [HR] assignment and the assignment in Haiti - from where Pauty could at least have been expected to return with the information whether Josette Schenk had or had not had a house built - there was no reason to send Pauty to Switzerland, where he had no contacts; the fact that the defendant had spent more than 10,000 CHF to obtain (if his version of events is accepted) very innocuous information; and, finally, the fact that at no time has the defendant taken any steps to lodge a complaint of malicious accusation." (See paragraph 26 above)

It emerges clearly from this passage that the criminal court took account of a combination of evidential elements before reaching its opinion.

49. In conclusion, the use of the disputed recording in evidence did not deprive the applicant of a fair trial and therefore did not contravene Article 6 para. 1 (art. 6-1).

B. Article 6 para. 2 (art. 6-2)

50. Mr. Schenk also claimed that, owing to the use of the unlawfully obtained recording, he had not been proved guilty "according to law". In his submission, there had been a failure to apply the principle of the presumption of innocence, guaranteed in Article 6 para. 2 (art. 6-2), which provides:

> "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

The Government challenged that assertion.

In the Commission's view, the complaint in reality came within the scope of the concept of fair trial. The reference to Article 6 para. 2 (art. 6-2) was the result of an erroneous interpretation. At the hearing before the Court the Delegate added that in the instant case the defendant had been presumed innocent until proved guilty according to law, as the Swiss courts had held the trial to have been perfectly lawful as a whole, despite the failure to comply with a "criminal provision".

51. In the Court's opinion, the record of the hearings of 9-13 August and the judgment of 13 August 1982 (see paragraphs 19-23 and 26 above) contain nothing to suggest that the Rolle Criminal Court treated Mr. Schenk as if he were guilty before it convicted him. The mere inclusion of the cassette in the evidence cannot suffice to support the applicant's allegation, with the result that there was no breach of the Convention here either.

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

52. Mr. Schenk claimed, lastly, to be the victim of a violation of his right to respect for his private life and his correspondence, a right which included the right to confidentiality of telephone communications. He relied on Article 8 (art. 8) of the Convention, which provides:

> "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."

He argued that the Commission had declared inadmissible only the complaint relating to the making of the disputed recording. He consequently asked the Court to examine under Article 8 (art. 8) the use of the cassette as evidence and to hold it to have been contrary to this provision too. He put forward the following factors: delivery of the cassette to the police and its use by them; its handing over to the investigating judge and his listening to

it; forwarding of the file to the Principal Public Prosecutor and then to the Indictment Division; dispatch to the lawyers by post; opportunity for access by many people, such as the employees of the registry; inclusion of the cassette in the file of the Rolle Criminal Court and its playback during the trial.

The Government regarded the discussion of the complaints based on Article 8 (art. 8) as closed and referred to the Commission's report.

53. The Court notes that in its decision of 6 March 1986 the Commission declared inadmissible, on the ground that domestic remedies had not been exhausted, only "the complaint concerning the making of the disputed recording" (see paragraph 37 above). That being so, nothing would prevent the Court from considering the question of the use made of the recording. However, this is not necessary in the instant case, as the issue is subsumed under the question (already dealt with from the point of view of Article 6) (art. 6) of the use made of the cassette during the judicial investigation and the trial.

FOR THESE REASONS, THE COURT

1. Holds by thirteen votes to four that there has been no violation of Article 6 para. 1 (art. 6-1) of the Convention;

2. Holds unanimously that there has been no violation of Article 6 para. 2 (art. 6-2);

3. Holds by fifteen votes to two that it is not necessary to examine the case under Article 8 (art. 8).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 12 July 1988.

Rolv RYSSDAL
President

For the Registrar
Jonathan L. SHARPE
Head of Division in the registry of the Court

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 52 para. 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) joint dissenting opinion of Mr. Pettiti, Mr. Spielmann, Mr. De Meyer and Mr. Carrillo Salcedo;

(b) joint dissenting opinion of Mr. Pettiti and Mr. De Meyer;

(c) dissenting opinion of Mr. De Meyer.

R.R.
J.L.S.

JOINT DISSENTING OPINION OF JUDGES PETTITI, SPIELMANN, DE MEYER AND CARRILLO SALCEDO

(Translation)

The majority of the Court considered that Article 6 (art. 6) of the Convention did not lay down any rules on "the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law". It held that it could not "exclude as a matter of principle and in the abstract that unlawfully obtained evidence of the ... kind [concerned] [might] be admissible" and that it had "only to ascertain whether [the] trial as a whole [had been] fair"[1].

Admittedly, the Court has limited the scope of its judgment by confining it to the particular facts, but it was, in our view, under an obligation to address the problem of the unlawfulness of the evidence.

To our very great regret, we cannot share the majority's view since, in our opinion, compliance with the law when taking evidence is not an abstract or formalistic requirement. On the contrary, we consider that it is of the first importance for the fairness of a criminal trial.

No court can, without detriment to the proper administration of justice, rely on evidence which has been obtained not only by unfair means but, above all, unlawfully. If it does so, the trial cannot be fair within the meaning of the Convention.

In the instant case, it is not disputed that "the recording in issue was obtained unlawfully"[2].

Even if the courts which determined the charge against the applicant relied, as is noted in the judgment, on "evidence other than the recording but which corroborated the reasons based on the recording for concluding that [the person concerned] was guilty"[3], it remains true that they "admitted the recording in evidence"[4] and that their decisions were "partly"[5] founded on the disputed cassette.

For these reasons, we have reached the conclusion that in this case there was a violation of the right to a fair trial as secured in Article 6 (art. 6) of the Convention.

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[1] para. 46 of the judgment.
[2] para. 43 of the judgment.
[3] para. 48 of the judgment.
[4] para. 44 of the judgment.
[5] paras. 26 and 48 of the judgment.

JOINT DISSENTING OPINION OF JUDGES PETTITI AND DE MEYER

(Translation)

We are of the view that the Court should have considered the facts under Article 8 (art. 8) of the Convention as well as under Article 6 (art. 6).

This would probably have led both of us to find that each of those Articles (art. 8, art. 6) had been violated.

DISSENTING OPINION OF JUDGE DE MEYER

(Translation)

In my opinion, the facts established in the judgment disclosed, both as regards the making of the disputed recording and as regards its use in court proceedings, a violation of the applicant's right to the confidentiality of his telephone communications as well as a violation of his right to a fair hearing.

It is true that the application was declared inadmissible by the Commission in so far as it related to the making of the recording.

But the "case"[1] was referred to us and, by that very fact, so also were "all questions of fact and of law" which arose in the course of considering it[2].

Furthermore, the making and use of the disputed recording were "directly related"[3] to each other: they formed a whole which could hardly be split up, both in law and in fact. The making of the recording was a necessary prerequisite of its use, just as its use was at the same time the purpose and "extension"[4] of the making of it. Both gave rise to complaints which were not only obviously connected[5] and "intimately linked"[6] but essentially the same.

There was accordingly no reason why we should not have looked at the process in issue as a whole. Everything pointed to the fact that in each of its two phases it had violated the two fundamental rights in question.

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[1] Article 45 (art. 45) of the Convention.

[2] De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, p. 29, para. 49. See also the Handyside judgment of 7 December 1976, Series A no. 24, p. 20, para. 41, and the Klass and Others judgment of 6 September 1978, Series A no. 28, p. 17, para. 32.

[3] See the Stögmüller judgment of 10 November 1969, Series A no. 9, p. 41, para. 7, and the Matznetter judgment of the same date, Series A no. 10, p. 31, para. 5.

[4] See the Stögmüller judgment previously cited, loc. cit., and the Matznetter judgment previously cited, p. 32, para. 5, and also the Weeks judgment of 2 March 1987, Series A no. 114, p. 21, para. 37, and the Olsson judgment of 24 March 1988, Series A no. 130, pp. 28-29, para. 56.

[5] See the following judgments: Delcourt, 17 January 1970, Series A no. 11, p. 20, para. 40; Winterwerp, 24 October 1979, Series A no. 33, p. 28, para. 72; Bönisch, 6 May 1985, Series A no. 92, p. 17, para. 37; and James and Others, 21 February 1986, Series A no. 98, p. 46, para. 8.

[6] See the Delcourt judgment previously cited, loc. cit., and the Winterwerp judgment previously cited, loc. cit.