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

COURT (CHAMBER)

CASE OF KRUSLIN v. FRANCE

(Application no. 11801/85)

JUDGMENT

STRASBOURG

24 April 1990

In the Kruslin case*,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,
Mrs D. BINDSCHEDLER-ROBERT,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Mr L.-E. PETTITI,
Mr B. WALSH,
Sir Vincent EVANS,

and also of Mr M.-A. Eissen, *Registrar*, and Mr H. Petzold, *Deputy Registrar*,

Having deliberated in private on 26 October 1989 and 27 March 1990,

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") on 16 March 1989, within the three-month period laid down by Article 32 § 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 11801/85) against the French Republic lodged with the Commission under Article 25 (art. 25) by a national of that State, Mr Jean Kruslin, on 16 October 1985.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby France 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 Article 8 (art. 8).

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

3. On 30 March 1989 the President of the Court decided, under Rule 21 § 6 and in the interests of sound administration of justice, that a single

* Note by the Registrar: The case is numbered 7/1989/167/223. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

Chamber should be constituted to consider both the instant case and the Huvig case*.

The Chamber thus constituted included ex officio Mr L.-E. Pettiti, the elected judge of French nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 § 3 (b)). On the same day, 30 March 1989, in the presence of the Registrar, the President drew by lot the names of the other five members, namely Mrs D. Bindschedler-Robert, Mr F. Gölcüklü, Mr F. Matscher, Mr B. Walsh and Sir Vincent Evans (Article 43 in fine of the Convention and Rule 21 § 4) (art. 43).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 § 5) and, through the Registrar, consulted the Agent of the French Government ("the Government"), the Delegate of the Commission and the lawyer for the applicant on the need for a written procedure (Rule 37 § 1). In accordance with his orders and instructions, the Registrar received, on 10 July 1989, Mr Kruslin's claims under Article 50 (art. 50) of the Convention and, on 17 August, the Government's memorial. On 19 October the Secretariat of the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

On 10 and 16 October 1989 the Commission supplied the Registrar with various documents he had asked for on the President's instructions.

5. Having consulted, through the Registrar, those who would be appearing before the Court, the President had directed on 21 June 1989 that the oral proceedings should open on 24 October 1989 (Rule 38).

On 29 September he granted the applicant legal aid (Rule 4 of the Addendum to the Rules of Court).

6. The hearing took place 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 J.-P. PUISSOCHET, Head
of the Department of Legal Affairs, Ministry of Foreign Affairs, *Agent*,

Mrs I. CHAUSSADE, magistrat,
on secondment to the Department of Legal Affairs, Ministry of Foreign Affairs,

Miss M. PICARD, magistrat,
on secondment to the Department of Legal Affairs, Ministry of Foreign Affairs,

Mr M. DOBKINE, magistrat,
Department of Criminal Affairs and Pardons, Ministry of

* Note by the Registrar: Case no. 4/1989/164/220.

Justice,
Mr F. LE GUNEHEC, magistrat,
Department of Criminal Affairs and Pardons, Ministry of Justice, *Counsel*;
- for the Commission
Mr S. TRECHSEL, *Delegate*;
- for the applicant
Ms C. WAQUET, avocat
at the Conseil d'État and the Court of Cassation, *Counsel*.

The Court heard addresses by Mr Puissochet for the Government, by Mr Trechsel for the Commission and by Ms Waquet for the applicant, as well as their answers to its questions.

7. On various dates between 24 October and 7 December 1989 the Government and Mr Kruslin's representative produced several documents, either of their own accord or because the Court had requested them at the hearing. To one of them Ms Waquet had attached a short memorandum of observations, and the President consented to this being filed; she also supplemented her client's claims for just satisfaction with pleadings which reached the registry on 24 November.

AS TO THE FACTS

I. CIRCUMSTANCES OF THE CASE

8. Mr Jean Kruslin, who is unemployed and has no fixed abode, is currently in custody at Fresnes (Val-de-Marne).

9. On 8 and 14 June 1982 an investigating judge at Saint-Gaudens (Haute-Garonne), who was inquiring into the murder of a banker, Mr Jean Baron, at Montréjeau on the night of 7-8 June ("the Baron case"), issued two warrants to the commanding officer of the investigation section of the Toulouse gendarmerie. In the second of these the officer was instructed to tap the telephone of a suspect, Mr Dominique Terrieux, who lived in Toulouse.

From 15 to 17 June the gendarmes intercepted seventeen telephone calls in all. The applicant, who was staying with Mr Terrieux at the time and occasionally used his telephone, had been a party to several of the telephone conversations and more especially to one between 9 p.m. and 11 p.m. on 17 June with someone calling him from a public telephone-box in Perpignan (Pyrénées-Orientales).

During their short conversation the two men had spoken in veiled terms about a different case from the Baron case, concerning in particular the

murder on 29 May 1982 of Mr Henri Père, an employee of the Gerbe d'Or jewellers in Toulouse ("the Gerbe d'Or case"). The gendarmes reported this the next day to colleagues from the criminal-investigation branch of the police. On 11 June 1982 an investigating judge in Toulouse had issued a warrant to these officers to investigate that case, and they now immediately listened to the recording of the telephone conversation in question, had it transcribed and appended the text to a report drawn up at midnight on 18 June; the original tape remained, sealed, with the gendarmerie.

10. At dawn on 18 June the gendarmes arrested Mr Kruslin at Mr Terrieux's home and held him in custody in connection with the Baron case.

Early that afternoon he was questioned about the Gerbe d'Or case by the police (who had already questioned him on 15 June and then released him after about four hours) and - the next day, it seems - he was charged together with Mr Terrieux and one Patrick Antoine with murder, aggravated theft and attempted aggravated theft. On 25 October 1982 the Toulouse investigating judge held a confrontation of the three men, during which after the seals had been broken in their presence - the aforementioned taperecording was heard in its entirety, including the conversation on the evening of 17 June.

Mr Kruslin adopted the same attitude as when questioned by the police on 18 June: he protested his innocence and denied - in respect of this conversation but not of the others - that the voice was his. Mr Terrieux now said that he did not recognise the voice, whereas he had identified it earlier.

The tape was resealed, again in the presence of the persons charged. The applicant refused to sign either the report or the form recording the sealing.

He subsequently applied for an examination by experts, and the investigating judge granted the application in an order of 10 February 1983. In their report of 8 June 1983, however, the three experts who were appointed felt able to state "with 80% certainty" that the voice they had analysed was indeed Mr Kruslin's.

11. Before the Indictment Division (chambre d'accusation) of the Toulouse Court of Appeal, to which the case was sent after the judicial investigation was completed, the applicant requested that the recording of the disputed conversation should be ruled inadmissible in evidence because it had been made in connection with proceedings which, he claimed, did not concern him - the Baron case. On 16 April 1985 the Indictment Division dismissed this plea in the following terms:

> "... while this telephone tapping was ordered by the investigating judge at the Saint-Gaudens tribunal de grande instance in connection with other proceedings, the fact remains that judges are not prohibited by either Article 11 [which lays down the principle that judicial investigations shall be confidential] or Articles R.155 and R.156 of the Code of Criminal Procedure from deciding to include in criminal proceedings evidence from other proceedings which may assist them and help to establish the truth, on the sole condition - which was satisfied in the instant case - that such evidence is

added under an adversarial procedure and that it has been submitted to the parties for them to comment on ..."

In so doing, the Indictment Division, it appears, took as its inspiration - and extended by analogy to the field of telephone tapping the settled case-law of the Criminal Division of the Court of Cassation, developed in respect of other investigative measures (see, for example, 11 March 1964, Bulletin (Bull.) no. 86; 13 January 1970, Bull. no. 21; 19 December 1973, Bull. no. 480; 26 May and 30 November 1976, Bull. nos. 186 and 345; 16 March and 2 October 1981, Bull. nos. 91 and 256).

In the same decision the Indictment Division committed Mr Kruslin - with four others, including Mr Terrieux and Mr Antoine - for trial at the Haute-Garonne Assize Court on charges, in his case, of aiding and abetting a murder, aggravated theft and attempted aggravated theft.

12. The applicant appealed to the Court of Cassation on points of law. In the second of his five grounds of appeal he relied on Article 8 (art. 8) of the Convention. He criticised the Indictment Division of the Toulouse Court of Appeal for having

"refused to rule that the evidence from telephone tapping in connection with other proceedings was inadmissible;

whereas interference by the public authorities with a person's private and family life, home and correspondence is not necessary in a democratic society for the prevention of crime unless it is in accordance with a law that satisfies the following two requirements: it must be of a quality such that it is sufficiently clear in its terms to give citizens an adequate indication of 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, and it must define the scope and manner of exercise of such a power clearly enough to give the individual adequate protection from arbitrary interference; these requirements are not satisfied by any provision of French law, and particularly not by Article 81 of the Code of Criminal Procedure".

In his supplementary pleadings of 11 June 1985 (pp. 5-8) counsel for Mr Kruslin relied on the case-law of the European Court of Human Rights, both in regard to telephone tapping (Klass and Others judgment of 6 September 1978 and Malone judgment of 2 August 1984, Series A nos. 28 and 82) and in other respects (Golder judgment of 21 February 1975, Sunday Times judgment of 26 April 1979 and Silver and Others judgment of 25 March 1983, Series A nos. 18, 30 and 61).

The Criminal Division of the Court of Cassation dismissed the appeal in a judgment of 23 July 1985. As regards the point in question it gave the following reasons for its decision:

"...

An examination of the evidence shows that the transcript of a tape recording of conversations in calls made on Terrieux's telephone line was included in the file of the murder investigation then being conducted by the Toulouse investigating judge

following the death of Henri Père at the hands of a person or persons unknown; this recording had been made pursuant to a warrant issued by the investigating judge at Saint-Gaudens in connection with the investigation of another murder, likewise committed by a person or persons unknown; it was because of its relevance to the investigation into Père's death that the transcription was made by senior police officers acting under a warrant issued by the investigating judge in Toulouse;

The tenor of the conversations recorded was made known to the various persons concerned, notably Kruslin, who was asked to account for them both during the inquiries made pursuant to the investigating judge's warrant and after he was charged; furthermore, an examination of the tape recording by an expert, whose report was subsequently added to the evidence, was made pursuant to a lawful decision by the investigating judge;

That being so, the Indictment Division did not lay itself open to the objection raised in the ground of appeal by refusing to rule that the evidence from telephone tapping in connection with other proceedings was inadmissible;

In the first place, there is no statutory provision prohibiting the inclusion in criminal proceedings of evidence from other proceedings which may assist the judges and help to establish the truth; the sole condition is that such evidence should be added under an adversarial procedure - which was so in this case, in which the documents were submitted to the parties for them to comment on;

In the second place, it is clear from Articles 81 and 151 of the Code of Criminal Procedure and from the general principles of criminal procedure that, among other things, firstly, telephone tapping may be ordered by an investigating judge, by means of a warrant, only where there is a presumption that a specific offence has been committed which has given rise to the investigation which the judge has been assigned to undertake, and that it cannot be directed, on the off chance, against a whole category of offences; and, secondly, that the interception ordered must be carried out under the supervision of the investigating judge, without any subterfuge or ruse being employed and in such a way that the exercise of the rights of the defence cannot be jeopardised;

These provisions governing the use of telephone tapping by an investigating judge, which have not been shown to have been infringed in the instant case, satisfy the requirements of Article 8 (art. 8) of the European Convention for the Protection of Human Rights and Fundamental Freedoms;

..." (Bull. no. 275, pp. 713-715)

13. It appears from the file that the recording of the telephone conversation of 17 June 1982 was a decisive piece of evidence in the proceedings against the applicant. These proceedings ended, on 28 November 1986, with a judgment of the Haute-Garonne Assize Court. Mr Kruslin was acquitted of murder but sentenced to fifteen years' imprisonment for armed robbery and attempted armed robbery; an appeal by him to the Court of Cassation was dismissed on 28 October 1987. He seems always to have protested his innocence.

14. In the Baron case the Indictment Division of the Toulouse Court of Appeal likewise committed the applicant, on 2 June 1987, for trial at the Haute-Garonne Assizes, together with Mr Antoine and one Charles Croce. At that trial too he alleged that the telephone tapping carried out from 15 to 17 June 1982 was inadmissible; on 4 November 1987 the Criminal Division of the Court of Cassation dismissed this plea on grounds identical, mutatis mutandis, to those in its judgment of 23 July 1985 previously cited (see paragraph 12 above - Recueil Dalloz Sirey (DS) 1988, sommaires, p. 195). On 2 December 1988 the Assize Court sentenced the applicant to life imprisonment for premeditated murder; he lodged an appeal on points of law, but this was dismissed by the Criminal Division of the Court of Cassation on 6 November 1989.

The complaints he made to the Commission, however, related solely to the telephone tapping whose results were used in the Gerbe d'Or case.

II. THE RELEVANT LEGISLATION AND CASE-LAW

15. French criminal law adopts the principle that any kind of evidence is admissible: "unless otherwise provided by statute, any type of evidence shall be admissible to substantiate a criminal charge ..." (Article 427 of the Code of Criminal Procedure).

There is no statutory provision which expressly empowers investigating judges to carry out or order telephone tapping, or indeed to carry out or order various measures which are nonetheless in common use, such as the taking of photographs or fingerprints, shadowing, surveillance, requisitions, confrontations of witnesses and reconstructions of crimes. On the other hand, the Code of Criminal Procedure does expressly confer power on them to take several other measures, which it regulates in detail, such as pre-trial detention, seizure of property and searches.

16. Under the old Code of Criminal Procedure the Court of Cassation had condemned the use of telephone tapping by investigating judges, at least in circumstances which it regarded as disclosing, on the part of a judge or the police, a lack of "fairness" incompatible with the rules of criminal procedure and the safeguards essential to the rights of the defence (combined divisions, 31 January 1888, ministère public c. Vigneau, Dalloz 1888, jurisprudence, pp. 73-74; Criminal Division, 12 June 1952, Imbert, Bull. no. 153, pp. 258-260; Civil Division, second section, 18 March 1955, époux Jolivot c. époux Lubrano et autres, DS 1955, jurisprudence, pp. 573-574, and Gazette du Palais (GP) 1955, jurisprudence, p. 249). Some trial courts and courts of appeal which had to deal with the issue, on the other hand, showed some willingness to hold that such telephone tapping was lawful if there had been neither "entrapment" nor "provocation"; this view was based on Article 90 of the former Code (Seine Criminal Court, Tenth

Division, 13 February 1957, ministère public contre X, GP 1957, jurisprudence, pp. 309-310).

17. Since the 1958 Code of Criminal Procedure came into force, the courts have had regard in this respect to, among others, Articles 81, 151 and 152, which provide:

Article 81

(first, fourth and fifth paragraphs)

"The investigating judge shall, in accordance with the law, take all the investigative measures which he deems useful for establishing the truth.

...

If the investigating judge is unable to take all the investigative measures himself, he may issue warrants to senior police officers (officiers de police judiciaire) in order to have them carry out all the necessary investigative measures on the conditions and subject to the reservations provided for in Articles 151 and 152.

The investigating judge must verify the information thus gathered.

..."

Article 151

(as worded at the material time)

"An investigating judge may issue a warrant requiring any judge of his court, any district-court judge within the territorial jurisdiction of that court, any senior police officer (officier de police judiciaire) with authority in that jurisdiction or any investigating judge to undertake any investigative measures he considers necessary in places coming under their respective jurisdictions.

The warrant shall indicate the nature of the offence to which the proceedings relate. It shall be dated and signed by the issuing judge and shall bear his seal.

It may only order investigative measures directly connected with the prosecution of the offence to which the proceedings relate.

..."

Article 152

"The judges or senior police officers instructed to act shall exercise, within the limits of the warrant, all the powers of the investigating judge.

..."

18. An Act of 17 July 1970 added to the Civil Code an Article 9 guaranteeing to everyone "the right to respect for his private life". It also added to the Criminal Code an Article 368, whereby:

> "Anyone who wilfully intrudes on the privacy of others:
>
> 1. By listening to, recording or transmitting by means of any device, words spoken by a person in a private place, without that person's consent;
>
> 2. ...
>
> shall be liable to imprisonment for not less than two months and not more than one year and a fine ... or to only one of these two penalties."

During the preparatory work, one of the vice-chairmen of the National Assembly's Statutes Committee, Mr Zimmermann, sought "certain assurances" that this enactment "[would] not prevent the investigating judge from issuing strictly within the provisions of the law warrants to have telephones tapped, obviously without making use of any form of inducement and in compliance with all the legal procedures" (Journal officiel, National Assembly, 1970 proceedings, p. 2074). The Minister of Justice, Mr René Pleven, replied: "... there is no question of interfering with the powers of investigating judges, who are indeed empowered, in the circumstances laid down by law, to order tapping"; he added a little later: "When an official taps a telephone, he can only do so lawfully if he has a warrant from a judicial authority or is acting on the instructions of a minister" (ibid., p. 2075). Both Houses of Parliament thereupon passed the Bill without amending it on this point.

19. Article 41 of the Post and Telecommunications Code provides that any public servant or anyone authorised to assist with the performance of relevant official duties who breaches the secrecy of correspondence entrusted to the telecommunications service shall be liable to the penalties provided for in Article 187 of the Criminal Code - a fine, imprisonment and temporary disqualification from any public office or employment. Article 42 provides that anyone who, without permission from the sender or the addressee, divulges, publishes or uses the content of correspondence transmitted over the air or by telephone shall be liable to the penalties provided for in Article 378 of the Criminal Code (on professional confidentiality) - a fine or imprisonment.

General Instruction no. 500-78 on the telephone service - intended for Post and Telecommunications Authority officials - contains the following provisions, however, given here in the amended version of 1964 (Article 24 of Part III):

> "Postmasters and sub-postmasters are required to comply with any requests that ... calls to or from a specified telephone should be monitored by the relevant authority, made by:

1. An investigating judge (Articles 81, 92 and 94 of the Code of Criminal Procedure) or any judge or senior police officer (officier de police judiciaire) to whom a judicial warrant has been issued (Art. 152);

..."

The General Instruction was published in the official bulletin of the Ministry of Post and Telecommunications and was described by the Government as an "implementing regulation".

20. The striking development of various forms of serious crime - large-scale thefts and robberies, terrorism, drug-trafficking - appears in France to have led to a marked increase in the frequency with which investigating judges resort to telephone tapping. The courts have as a result given many more decisions on the subject than formerly; telephone tapping has not been held to be unlawful in itself, although the courts have occasionally shown some distaste for it (Paris Court of Appeal, Ninth Criminal Division, 28 March 1960, Cany et Rozenbaum, GP 1960, jurisprudence, pp. 253-254).

The decisions cited to the Court by the Government, the Commission and the applicant, or of which the Court has had cognisance by its own means, are mostly of later date than the facts of the instant case (June 1982) and have gradually provided a number of clarifications. These do not all stem from judgments of the Court of Cassation, and do not for the time being constitute a uniform body of case-law, because the decisions or reasons given in some of the cases have remained unique. They may be summarised as follows.

(a) Articles 81 and 151 of the Code of Criminal Procedure (see paragraph 17 above) empower investigating judges - and them alone, as far as judicial investigations are concerned - to carry out telephone tapping or, much more commonly in practice, to issue a warrant to that effect to a senior police officer (officier de police judiciaire) within the meaning of Article 16 (see, in particular, Court of Cassation, Criminal Division, 9 October 1980, Tournet, Bull. no. 255, pp. 662-664; 24 April 1984, Peureux, Huvig et autre, DS 1986, jurisprudence, pp. 125-128; 23 July 1985 - see paragraph 12 above; 4 November 1987 - see paragraph 14 above; 15 February 1988, Schroeder, and 15 March 1988, Arfi, Bull. no. 128, pp. 327-335). Telephone tapping is an "investigative measure" which may sometimes be "useful for establishing the truth". It is comparable to the seizure of letters or telegrams (see, among other authorities, Poitiers Court of Appeal, Criminal Division, 7 January 1960, Manchet, Juris-Classeur périodique (JCP) 1960, jurisprudence, no. 11599, and Paris Court of Appeal, Indictment Division, 27 June 1984, F. et autre, DS 1985, jurisprudence, pp. 93-96) and it similarly does not offend the provisions of Article 368 of the Criminal Code, having regard to the legislative history and to the principle that any kind of evidence is admissible (see paragraphs 15 and 18 above and Strasbourg tribunal de grande instance, 15 February 1983, S. et autres,

unreported; Colmar Court of Appeal, 9 March 1984, Chalvignac et autre, unreported but cited by the Government at the Commission hearing on 6 May 1988; Paris Court of Appeal, Indictment Division, judgment of 27 June 1984 previously cited and judgment of 31 October 1984, Li Siu Lung et autres, GP 1985, sommaires, pp. 94-95).

(b) The investigating judge can only issue such a warrant "where there is a presumption that a specific offence has been committed which has given rise to the investigation" which he is responsible for conducting and not in respect of a whole category of offences "on the off chance"; this is clear not only from Articles 81 and 151 (second and third paragraphs) of the Code of Criminal Procedure but also "from the general principles of criminal procedure" (see, among other authorities, Court of Cassation, Criminal Division, judgments of 23 July 1985, 4 November 1987 and 15 March 1988 previously cited).

The French courts do not seem ever to have held that telephone tapping is lawful only where the offences being investigated are of some seriousness or if the investigating judge has specified a maximum duration for it.

(c) "Within the limits of the warrant" that has been issued to him - if need be by fax (Limoges Court of Appeal, Criminal Division, 18 November 1988, Lecesne et autres, DS 1989, sommaires, p. 394) - the senior police officer exercises "all the powers of the investigating judge" (Article 152 of the Code of Criminal Procedure). He exercises these under the supervision of the investigating judge, who by the fifth paragraph of Article 81 is bound to "verify the information ... gathered" (see, among other authorities, Court of Cassation, Criminal Division, judgments of 9 October 1980, 24 April 1984, 23 July 1985, 4 November 1987 and 15 March 1988 previously cited).

The warrant apparently sometimes takes the form of a general delegation of powers, including - without its being expressly mentioned - the power to tap telephones (Court of Cassation, Civil Division, second section, judgment of 18 March 1955 previously cited, and Paris Court of Appeal, judgment of 28 March 1960 previously cited).

(d) In no case may a police officer tap telephones on his own initiative without a warrant, for example during the preliminary investigation preceding the opening of the judicial investigation (see, among other authorities, Court of Cassation, Criminal Division, 13 June 1989, Derrien, and 19 June 1989, Grayo, Bull. no. 254, pp. 635-637, and no. 261, pp. 648-651; full court, 24 November 1989, Derrien, DS 1990, p. 34, and JCP 1990, jurisprudence, no. 21418, with the submissions of Mr Advocate-General Emile Robert).

(e) Telephone tapping must not be accompanied by "any subterfuge or ruse" (see, among other authorities, Court of Cassation, Criminal Division, judgment of 9 October 1980, 24 April 1984, 23 July 1985, 4 November 1987, 15 February 1988 and 15 March 1988 previously cited) failing which

the information gathered by means of it must be either deleted or removed from the case file (Court of Cassation, Criminal Division, judgments of 13 and 19 June 1989 previously cited).

(f) The telephone tapping must also be carried out "in such a way that the exercise of the rights of the defence cannot be jeopardised" (see, among other authorities, Court of Cassation, Criminal Division, judgments of 9 October 1980, 24 April 1984, 23 July 1985, 4 November 1987, 15 February 1988, 15 March 1988 and 19 June 1989 previously cited). In particular, the confidentiality of the relations between suspect or person accused and lawyer must be respected, as must, more generally, a lawyer's duty of professional confidentiality, at least when he is not acting in any other capacity (Aix-en-Provence Court of Appeal, Indictment Division, 16 June 1982 and 2 February 1983, Sadji Hamou et autres, GP 1982, jurisprudence, pp. 645-649, and GP 1983, jurisprudence, pp. 313-315; Paris Court of Appeal, Indictment Division, judgment of 27 June 1984 previously cited).

(g) With this reservation, it is permissible to tap telephone calls to or from a charged person (Court of Cassation, Criminal Division, judgments of 9 October 1980 and 24 April 1984 previously cited) or a mere suspect, such as Mr Terrieux in the instant case (see paragraph 9 above and also the previously cited judgments of the Strasbourg tribunal de grande instance, 15 February 1983, the Colmar Court of Appeal, 9 March 1984, and the Indictment Division of the Paris Court of Appeal, 27 June 1984) or even a third party, such as a witness, whom there is reason to believe to be in possession of information about the perpetrators or circumstances of the offence (see, among other authorities, Aix-en-Provence Court of Appeal, judgment of 16 June 1982 previously cited).

(h) A public telephone-box may be tapped (Seine Criminal Court, Tenth Division, 30 October 1964, Trésor public et Société de courses c. L. et autres, DS 1965, jurisprudence, pp. 423-424) just like a private line, irrespective of whether current is diverted to a listening station (Court of Cassation, Criminal Division, 13 June 1989, and full court, 24 November 1989, previously cited).

(i) The senior police officer supervises the tape or cassette recording of the conversations and their transcription, where he does not carry out these operations himself; when it comes to choosing extracts to submit "for examination by the court", it is for him to determine "what words may render the speaker liable to criminal proceedings". He performs these duties "on his own responsibility and under the supervision of the investigating judge" (Strasbourg tribunal de grande instance, judgment of 15 February 1983 previously cited, upheld by the Colmar Court of Appeal on 9 March 1984; Paris Court of Appeal, judgment of 27 June 1984 previously cited).

(j) The original tapes - which in the instant case were sealed (see paragraphs 8-9 above) - are "exhibits", not "investigation documents", but have only the weight of circumstantial evidence; their contents are

transcribed in reports in order to give them a physical form so that they can be inspected (Court of Cassation, Criminal Division, 28 April 1987, Allieis, Bull. no. 173, pp. 462-467).

(k) If transcription raises a problem of translation into French, Articles 156 et seq. of the Code of Criminal Procedure, which deal with expert opinions, do not apply to the appointment and work of the translator (Court of Cassation, Criminal Division, 6 September 1988, Fekari, Bull. no. 317, pp. 861-862 (extracts), and 18 December 1989, M. et autres, not yet reported).

(l) There is no statutory provision prohibiting the inclusion in the file on a criminal case of evidence from other proceedings, such as tapes and reports containing transcriptions, if they may "assist the judges and help to establish the truth", provided that such evidence is added under an adversarial procedure (Toulouse Court of Appeal, Indictment Division, 16 April 1985 - see paragraph 11 above; Court of Cassation, Criminal Division, 23 July 1985 - see paragraph 12 above - and 6 September 1988 previously cited).

(m) The defence must be able to inspect the reports containing transcriptions, to hear the original tape recordings, to challenge their authenticity during the judicial investigation and subsequent trial and to apply for any necessary investigative measures - such as an expert opinion, as in the instant case (see paragraph 10 in fine) - relating to their contents and the circumstances in which they were made (see, among other authorities, Court of Cassation, Criminal Division, 23 July 1985 - see paragraph 12 above; 16 July 1986, Illouz, unreported; and 28 April 1987, Allieis, previously cited).

(n) Just as the investigating judge supervises the senior police officer, he is himself supervised by the Indictment Division, to which he - exactly like the public prosecutor - may apply under Article 171 of the Code of Criminal Procedure.

Trial courts, courts of appeal and the Court of Cassation may have to deal with objections or grounds of appeal as the case may be - particularly by defendants but also, on occasion, by the prosecution (Court of Cassation, judgments of 19 June and 24 November 1989 previously cited) - based on a failure to comply with the requirements summarised above or with other rules which the parties concerned claim are applicable. A failure of this kind, however, would not automatically nullify the proceedings such that a court of appeal could be held to have erred if it had not dealt with them of its own motion; they affect only defence rights (Court of Cassation, Criminal Division, 11 December 1989, Takrouni, not yet reported).

21. Since at least 1981, parties have increasingly often relied on Article 8 (art. 8) of the Convention - and, much less frequently, on Article 6 (art. 6) (Court of Cassation, Criminal Division, 23 April 1981, Pellegrin et autres, Bull. no. 117, pp. 328-335, and 21 November 1988, S. et autres) - in support

of their complaints about telephone tapping; they have sometimes as in the instant case (see paragraph 12 above) - cited the case-law of the European Court of Human Rights.

Hitherto only telephone tapping carried out without a warrant, during the police investigation (see, among other authorities, Court of Cassation, judgments of 13 June and 24 November 1989 previously cited), or in unexplained circumstances (see, among other authorities, Court of Cassation, judgment of 19 June 1989 previously cited) or in violation of defence rights (Paris Court of Appeal, Indictment Division, judgment of 31 October 1984, previously cited) has been held by the French courts to be contrary to Article 8 § 2 (art. 8-2) ("in accordance with the law") or to domestic law in the strict sense. In all other cases the courts have either found no violation (Court of Cassation, Criminal Division, judgments of 24 April 1984, 23 July 1985, 16 July 1986, 28 April 1987, 4 November 1987, 15 February 1988, 15 March 1988, 6 September 1988 and 18 December 1989 previously cited, and 16 November 1988, S. et autre, unreported, and the judgments of 15 February 1983 (Strasbourg), 9 March 1984 (Colmar) and 27 June 1984 (Paris) previously cited) or else ruled the plea inadmissible for various reasons (Court of Cassation, Criminal Division, judgments of 23 April 1981, 21 November 1988 and 11 December 1989 previously cited and the unreported judgments of 24 May 1983, S. et autres; 23 May 1985, Y. H. W.; 17 February 1986, H.; 4 November 1986, J.; and 5 February 1990, B. et autres).

22. While academic opinion is divided as to the compatibility of telephone tapping as carried out in France - on the orders of investigating judges or others - with the national and international legal rules in force in the country, there seems to be unanimous agreement that it is desirable and even necessary for Parliament to try to solve the problem by following the example set by many foreign States (see in particular Gaëtan di Marino, comments on the Tournet judgment of 9 October 1980 (Court of Cassation), JCP 1981, jurisprudence, no. 19578; Albert Chavanne, ‘Les résultats de l’audio-surveillance comme preuve pénale’, Revue internationale de droit comparé, 1986, pp. 752-753 and 755; Gérard Cohen-Jonathan, ‘Les écoutes téléphoniques’, Studies in honour of Gérard J. Wiarda, 1988, p. 104; Jean Pradel, ‘Écoutes téléphoniques et Convention européenne des Droits de l’Homme’, DS 1990, chronique, pp. 17-20). In July 1981 the Government set up a study group chaired by Mr Robert Schmelck, who was then President of the Court of Cassation, and consisting of senators and MPs of various political persuasions, judges, university professors, senior civil servants, judges and a barrister. The group submitted a report on 25 June 1982, but this has remained confidential and has not yet led to a bill being tabled.

PROCEEDINGS BEFORE THE COMMISSION

23. Before the Commission, to which he applied on 16 October 1985 (application no. 11801/85), Mr Kruslin put forward a single ground of complaint: he argued that the interception and recording of his telephone conversation on 17 June 1982 had infringed Article 8 (art. 8) of the Convention.

The Commission declared the application admissible on 6 May 1988. In its report of 14 December 1988 (made under Article 31) (art. 31) it expressed the opinion by ten votes to two that there had indeed been a breach of that Article (art. 8). The full text of the Commission's opinion and of the separate opinion contained in the report is reproduced as an annex to this judgment[*].

FINAL SUBMISSIONS TO THE COURT

24. At the hearing the Court was requested:

(a) by the Agent of the Government to "hold that there ha[d] been no breach of Article 8 (art. 8) of the Convention in the instant case";

(b) by the Delegate of the Commission to "conclude that in the instant case there ha[d] been a breach of Article 8 (art. 8)"; and

(c) by counsel for the applicant to "find the French Government in breach in this case".

AS TO THE LAW

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

25. Mr Kruslin claimed that in the instant case there had been a breach of Article 8 (art. 8), 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

[*] Note by the Registrar: For practical reasons this annex will appear only with the printed version of the judgment (volume 176-A of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

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 Government disputed that submission, while the Commission agreed with it in substance.

26. Although it was Mr Terrieux's line that they were tapping, the police in consequence intercepted and recorded several of the applicant's conversations, and one of these led to proceedings being taken against him (see paragraphs 9-10 above). The telephone tapping therefore amounted to an "interference by a public authority" with the exercise of the applicant's right to respect for his "correspondence" and his "private life" (see the Klass and Others judgment of 8 September 1978, Series A no. 28, p. 21, § 41, and the Malone judgment of 2 August 1984, Series A no. 82, p. 30, § 64). The Government did not dispute this.

Such an interference contravenes Article 8 (art. 8) unless it is "in accordance with the law", pursues one or more of the legitimate aims referred to in paragraph 2 (art. 8-2) and furthermore is "necessary in a democratic society" in order to achieve them.

A. "In accordance with the law"

27. The expression "in accordance with the law", within the meaning of Article 8 § 2 (art. 8-2), requires firstly that the impugned measure should have some basis in domestic law; it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and compatible with the rule of law.

1. Whether there was a legal basis in French law

28. It was a matter of dispute before the Commission and the Court whether the first condition was satisfied in the instant case.

The applicant said it was not. Article 368 of the Criminal Code, he claimed, prohibited telephone tapping in principle (see paragraph 18 above). It took precedence over Article 81 of the Code of Criminal Procedure, which did not expressly authorise telephone tapping and required the investigating judge to behave "in accordance with the law" - and therefore in accordance, inter alia, with Article 368 of the Criminal Code - when ordering any steps "useful for establishing the truth" (see paragraph 17 above). Articles 151 and 152 (ibid.) made no difference, he added, as investigating judges could not delegate to senior police officers powers which they did not have themselves. The Delegate of the Commission agreed as to the latter point.

In the Government's submission, there was no contradiction between Article 368 of the Criminal Code and Article 81 of the Code of Criminal

Procedure, at least not if regard was had to the drafting history of the former (see paragraph 18 above). The Code of Criminal Procedure, they argued, did not give an exhaustive list of the investigative means available to the investigating judge - measures as common as the taking of photographs or fingerprints, shadowing, surveillance, requisitions, confrontations between witnesses, and reconstructions of crimes, for example, were not mentioned in it either (see paragraph 15 above). The provisions added to Article 81 by Articles 151 and 152 were supplemented in national case-law (see paragraphs 17 and 20-21 above). By "law" as referred to in Article 8 § 2 (art. 8-2) of the Convention was meant the law in force in a given legal system, in this instance a combination of the written law - essentially Articles 81, 151 and 152 of the Code of Criminal Procedure - and the case-law interpreting it.

The Delegate of the Commission considered that in the case of the Continental countries, including France, only a substantive enactment of general application - whether or not passed by Parliament - could amount to a "law" for the purposes of Article 8 § 2 (art. 8-2) of the Convention. Admittedly the Court had held that "the word ‘law’ in the expression ‘prescribed by law’ cover[ed] not only statute but also unwritten law" (see the Sunday Times judgment of 26 April 1979, Series A no. 30, p. 30, § 47, the Dudgeon judgment of 22 October 1981, Series A no. 45, p. 19, § 44, and the Chappell judgment of 30 March 1989, Series A no. 152, p. 22, § 52), but in those instances the Court was, so the Delegate maintained, thinking only of the common-law system. That system, however, was radically different from, in particular, the French system. In the latter, case-law was undoubtedly a very important source of law, but a secondary one, whereas by "law" the Convention meant a primary source.

29. Like the Government and the Delegate, the Court points out, firstly, that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law (see, among many other authorities, the Malone judgment previously cited, Series A no. 82, p. 36, § 79, and the Eriksson judgment of 22 June 1989, Series A no. 156, p. 25, § 62). It is therefore not for the Court to express an opinion contrary to theirs on whether telephone tapping ordered by investigating judges is compatible with Article 368 of the Criminal Code. For many years now, the courts - and in particular the Court of Cassation - have regarded Articles 81, 151 and 152 of the Code of Criminal Procedure as providing a legal basis for telephone tapping carried out by a senior police officer (officier de police judiciaire) under a warrant issued by an investigating judge.

Settled case-law of this kind cannot be disregarded. In relation to paragraph 2 of Article 8 (art. 8-2) of the Convention and other similar clauses, the Court has always understood the term "law" in its "substantive" sense, not its "formal" one; it has included both enactments of lower rank than statutes (see, in particular, the De Wilde, Ooms and Versyp judgment

of 18 June 1971, Series A no. 12, p. 45, § 93) and unwritten law. The Sunday Times, Dudgeon and Chappell judgments admittedly concerned the United Kingdom, but it would be wrong to exaggerate the distinction between common-law countries and Continental countries, as the Government rightly pointed out. Statute law is, of course, also of importance in common-law countries. Conversely, case-law has traditionally played a major role in Continental countries, to such an extent that whole branches of positive law are largely the outcome of decisions by the courts. The Court has indeed taken account of case-law in such countries on more than one occasion (see, in particular, the Müller and Others judgment of 24 May 1988, Series A no. 133, p. 20, § 29, the Salabiaku judgment of 7 October 1988, Series A no. 141, pp. 16-17, § 29, and the Markt Intern Verlag GmbH and Klaus Beermann judgment of 20 November 1989, Series A no. 165, pp. 18-19, § 30). Were it to overlook case-law, the Court would undermine the legal system of the Continental States almost as much as the Sunday Times judgment of 26 April 1979 would have "struck at the very roots" of the United Kingdom's legal system if it had excluded the common law from the concept of "law" (Series A no. 30, p. 30, § 47). In a sphere covered by the written law, the "law" is the enactment in force as the competent courts have interpreted it in the light, if necessary, of any new practical developments.

In sum, the interference complained of had a legal basis in French law.

2. "Quality of the law"

30. The second requirement which emerges from the phrase "in accordance with the law" - the accessibility of the law - does not raise any problem in the instant case.

The same is not true of the third requirement, the law's "foreseeability" as to the meaning and nature of the applicable measures. As the Court pointed out in the Malone judgment of 2 August 1984, Article 8 § 2 (art. 8-2) of the Convention "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". It

> "thus implies ... 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) ... Especially where a power of the executive is exercised in secret, the risks of arbitrariness are evident ... Undoubtedly ..., 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"

- or judicial 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.

... [In its judgment of 25 March 1983 in the case of Silver and Others 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, §§ 88-89). The degree of precision required of the 'law' in this connection will depend upon the particular subject-matter ... 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"

- or to a judge -

"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 ... to give the individual adequate protection against arbitrary interference." (Series A no. 82, pp. 32-33, §§ 67-68)

31. The Government submitted that the Court must be careful not to rule on whether French legislation conformed to the Convention in the abstract and not to give a decision based on legislative policy. The Court was therefore not concerned, they said, with matters irrelevant to Mr Kruslin's case, such as the possibility of telephone tapping in relation to minor offences or the fact that there was no requirement that an individual whose telephone had been monitored should be so informed after the event where proceedings had not in the end been taken against him. Such matters were in reality connected with the condition of "necessity in a democratic society", fulfilment of which had to be reviewed in concrete terms, in the light of the particular circumstances of each case.

32. The Court is not persuaded by this argument. Since it must ascertain whether the interference complained of was "in accordance with the law", it must inevitably assess the relevant French "law" in force at the time in relation to the requirements of the fundamental principle of the rule of law. Such a review necessarily entails some degree of abstraction. It is none the less concerned with the "quality" of the national legal rules applicable to Mr Kruslin in the instant case.

33. Tapping and other forms of interception of telephone conversations represent a serious interference with private life and correspondence and must accordingly be based on a "law" that is particularly precise. It is essential to have clear, detailed rules on the subject, especially as the technology available for use is continually becoming more sophisticated.

Before the Commission (supplementary observations of 4 July 1988, pages 4-7, summarised in paragraph 37 of the report) and, in a slightly different form, before the Court, the Government listed seventeen

safeguards which they said were provided for in French law (droit). These related either to the carrying out of telephone tapping or to the use made of the results or to the means of having any irregularities righted, and the Government claimed that the applicant had not been deprived of any of them.

34. The Court does not in any way minimise the value of several of the safeguards, in particular the need for a decision by an investigating judge, who is an independent judicial authority; the latter's supervision of senior police officers and the possible supervision of the judge himself by the Indictment Division, by trial courts and courts of appeal and, if need be, by the Court of Cassation; the exclusion of any "subterfuge" or "ruse" consisting not merely in the use of telephone tapping but in an actual trick, trap or provocation; and the duty to respect the confidentiality of relations between suspect or accused and lawyer.

It has to be noted, however, that only some of these safeguards are expressly provided for in Articles 81, 151 and 152 of the Code of Criminal Procedure. Others have been laid down piecemeal in judgments given over the years, the great majority of them after the interception complained of by Mr Kruslin (June 1982). Some have not yet been expressly laid down in the case-law at all, at least according to the information gathered by the Court; the Government appear to infer them either from general enactments or principles or else from an analogical interpretation of legislative provisions - or court decisions - concerning investigative measures different from telephone tapping, notably searches and seizure of property. Although plausible in itself, such "extrapolation" does not provide sufficient legal certainty in the present context.

35. Above all, the system does not for the time being afford adequate safeguards against various possible abuses. For example, the categories of people liable to have their telephones tapped by judicial order and the nature of the offences which may give rise to such an order are nowhere defined. Nothing obliges a judge to set a limit on the duration of telephone tapping. Similarly unspecified are the procedure for drawing up the summary reports containing intercepted conversations; the precautions to be taken in order to communicate the recordings intact and in their entirety for possible inspection by the judge (who can hardly verify the number and length of the original tapes on the spot) and by the defence; and the circumstances in which recordings may or must be erased or the tapes be destroyed, in particular where an accused has been discharged by an investigating judge or acquitted by a court. The information provided by the Government on these various points shows at best the existence of a practice, but a practice lacking the necessary regulatory control in the absence of legislation or case-law.

36. In short, French law, written and unwritten, does not indicate with reasonable clarity the scope and manner of exercise of the relevant

discretion conferred on the public authorities. This was truer still at the material time, so that Mr Kruslin did not enjoy the minimum degree of protection to which citizens are entitled under the rule of law in a democratic society (see the Malone judgment previously cited, Series A no. 82, p. 36, § 79). There has therefore been a breach of Article 8 (art. 8) of the Convention.

B. Purpose and necessity of the interference

37. Having regard to the foregoing conclusion, the Court, like the Commission (see paragraph 77 of the report), does not consider it necessary to review compliance with the other requirements of paragraph 2 of Article 8 (art. 8-2) in this case.

II. APPLICATION OF ARTICLE 50 (art. 50)

38. By Article 50 (art. 50),

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

The applicant claimed, firstly, compensation in the amount of 1,000,000 French francs (FRF) in respect of his fifteen-year prison sentence (see paragraph 13 above), which he alleged to be the direct result of the breach of Article 8 (art. 8) as the telephone tapping complained of had led to the decision to take proceedings against him. He also sought reimbursement of lawyer's fees and expenses: FRF 20,000 in order to prepare his appeal on points of law against the Indictment Division's judgment of 16 April 1985 in the Gerbe d'Or case (see paragraph 12 above) plus FRF 50,000 for his defence at the Haute-Garonne Assize Court and the Court of Cassation in the Baron case (see paragraph 14 above). He made no claim for the proceedings at Strasbourg, as the Commission and the Court had granted him legal aid.

The Government and the Delegate of the Commission expressed no opinion on the matter.

39. In the circumstances of the case the finding that there has been a breach of Article 8 (art. 8) affords Mr Kruslin sufficient just satisfaction for the alleged damage; it is accordingly unnecessary to award pecuniary compensation.

40. The costs and expenses incurred by the applicant in the Baron case cannot be taken into account by the Court; no doubt the telephone tapping was, as he pointed out, made use of in the two cases successively, but the

Commission and the Court have only been concerned with considering its compatibility with the Convention in connection with the Gerbe d'Or case (see paragraph 14 in fine above).

The sum of FRF 20,000 sought in respect of the latter case, however, is relevant and not excessive, and it should therefore be awarded to him.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a violation of Article 8 (art. 8);

2. Holds that this judgment in itself constitutes sufficient just satisfaction as to the alleged damage;

3. Holds that the respondent State is to pay the applicant 20,000 (twenty thousand) French francs in respect of costs and expenses;

4. Dismisses the remainder of the claims under Article 50 (art. 50).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 24 April 1990.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar