

**PRIVACY AND PHONE TAPPING:
THE PRICE OF JUSTICE IN THE EUROPEAN UNION ***

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I. Introduction

A. Purpose and Method

1. The purpose of this study is to essay an approach, from a European Criminal Law perspective, of the relations between individuals and public authorities, in what preventing criminality is concerned. We will try to illustrate that, although criminal law remains a "radical power" of each Member States' sovereignty, the European Integration has already produced some effects in this field, establishing, what we name as "The Price of Justice in the European Union".

This study doesn't look directly for the "consensus" about the recognized fundamental human rights in several international declarations, namely in the European Convention. Mainly because, even if a State is not a member of the European Community, but only a signatory of such a declaration (and therefore "recognizes" those rights), it doesn't mean that, in practice, that State "respects" them.

2. Thus, what we'll see is that being a Member State of the European Community doesn't imply solely "recognizing" those rights. It requires, mainly, the obligation of respecting human rights, in practice. This is a necessary consequence of the submission of each Member State to the European Criminal Law: that's a membership's inherent condition.

In fact, that respect depends on a large measure on the rules that protect individuals' rights against the interferences of public authorities, and mainly those concerning with the prosecution powers of criminal administration. Our investigation will be based upon one topic: telephone-tapping. Not only because it's probably one of the most controversial methods of criminal investigation, but also because of its growing importance and utilization in our days.

B. *Sequence*

1. In order to achieve our purpose we'll analyse the *leading cases* of the European Court of Human Rights, as far as Article 8 of European Convention on Human Rights is concerned. We will try to point out the main criteria established by the Court, taking also in to account the opinion of several authors. We'll see under which conditions telephone-tapping is considered a legal and necessary interference with the right to privacy.

Further, we'll also take a look at the other side of the same "coin": the problem of the valuation of illegally obtained evidences. In fact, although a Member State's adjective criminal law obeys to the Court's criteria, there's still the question of the value of illegally collected evidences: can the judge decide upon that evidence?

2. Through a comparative approach to the question we'll conclude that the solution to this "dilemma" is different according to the dimension of the rules about collecting evidences. And the question is not theoretical. For instance, if the valuation of such evidence by the Court is allowed, according to the "evaluation of interests" of the concrete case, we are implicitly admitting that the police may violate the procedural law because it can be, afterwards, justified by the exigencies of the case. And that, therefore, it's enough to "recognize" human rights, because only *a posteriori*, according to the concrete case, it is possible to say whether they should have been respected or not.

So, this is like the other coin that pays the price of justice. But, we'll have the chance to see how important is the Case Law of the European Court of Human Rights, establishing the general criteria and imposing the limits to the evaluation of interests.

At last, we will essay a brief conclusion, stressing the main ideas and trying to resume our argument.

II. Telephone-Tapping under Article 8 of the European Convention on Human Rights: The European Court's Case Law.

Article 8

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 crime and disorder, for the protection of health and morals, or for the protection of the rights and freedoms of others.*

A. *The Right to Privacy*

1. Article 8 and Phone-tapping

To begin with, Article 8 doesn't mention expressly telephone conversations. However, it doesn't authorize the conclusion that the Convention freely authorizes telephone-tapping. On the contrary, telephone-tapping is, in our days, one of the most serious interferences with the right protected under Article 8 (1).

Then, it is irrelevant trying to know whether phone-tapping is an interference with the exercise of the right to private life, or with the exercise of the right to correspondence. In fact, Article 8 (2) provides that "there shall be no interference (...) with the exercise of this right (...)". Or, in the French version, "il ne peut y avoir ingérence (...) dans l'exercice de ce droit". Therefore, if we take a look at the letter of n. 2, we'll easily conclude that it's a false question trying to determine in which right does phone-tapping fit. As a matter of fact, Article 8 only consecrates one single right: *the right to privacy*.

In conclusion, "it is quite clear, for example, that wire-tapping, unless it can be justified in a particular case under n. 2, is prohibited by Article 8, and it matters little whether it is considered as interference with correspondence, or with privacy, or even the home if it

(1) This problem was also dealt with in the U.S.A.: "the first and most difficult question which the Courts have had to face in interpreting the Fourth Amendment is whether it regulates only those abuses which spurred its adoption, or rather is intended to impose general restrictions on a variety of new as old police practices. (...) For example, is the Fourth Amendment called into play when, instead of entering a house, police men stationed outside use a parabolic microphone to overhear the occupant's conversation?" (John SHATTUCK, *Rights of Privacy*, 1977).

takes place there, since these notions should be considered together rather than in isolation" (2).

2. 'Definition' of the Right to Privacy

Then, the Convention doesn't provide any notion of privacy. Nevertheless, Article 8 already says that this right will include necessarily the respect for one's private and family life, home and correspondence. This provision must also be interpreted in order to include the respect for one's telecommunications.

Thus, different definitions of privacy have been essayed by several authors. For example, RIVIERO considers that "la vie privée est cette sphère de chaque existence dans laquelle nul ne peut s'imiscer sans y être convié. La liberté de la vie privée est la reconnaissance, au profit de chacun, d'une zone d'activité qui lui est propre, et qu'il est maître d'interdire à autrui" (3). Then, KOERING et JOULIEN define privacy as "tout ce réseau de droits et libertés individuels à la confluence desquels se forge ce qu'on appelle une personnalité". On the other hand, the Commission has considered, in the Bruggeman and Scheuten Case (1971), that "la vie privée cesse là où l'individu entre en contact avec la vie publique ou touche à d'autres intérêts protégés".

The definition of the right to privacy's content is not a purely theoretical question. In fact, considering that "it is this (respect for privacy) as much as in any other single characteristic that the free society differs from the totalitarian state" (4); considering that "...there must be some measure of restraint on the activities of members of a community, and in order to control people in a modern and complex society, information about them and their behavior is indispensable" (5); and considering that "in dealing with Article 8 (...) the European Court stated that the restrictive formulation used at § 2 leaves no room for the concept of implied limitations" (6), we conclude by the necessity of pointing out the objective content implied in the right to privacy.

Actually, we can't simply define it as "the right to be let alone". On the contrary, and therefore, we think it's very useful to take into account the following aspects of privacy that J. VELU has pointed out (7): a) protection of the individual's physical and mental inviolability and his moral and intellectual freedom; b) protection against attacks on an individual's honor or reputation and assimilated torts; c) protection of an individual's

(2) Francis JACOBS, *The European Convention on Human Rights*, 1975.

(3) Jean RIVIERO, *Les Libertés Publiques*, 1983.

(4) Alan BARTH, *The Price of Liberty*.

(5) VELECKY, *Privacy*, 1978 (John Young ed.).

(6) Zaim NEDJATI, *Human Rights under the European Convention*, 1978.

(7) In, Alphonse SPIELMANN and Albert WEITZEL, *La Convention Européenne des Droits de L'Homme et le Droit Luxembourgeois*, 1991.

name, identity or likeness against unauthorized use; d) protection of the individual against being spied or watched or harassed; e) protection against disclosure of information covered by the duty of professional secrecy.

The precise definition of the right to privacy in our time is also very important because we don't agree with SMITH when he says that "we didn't demand privacy in our telephone calls and we didn't expect it" (8). Although we may admit this author is being ironical, the truth is that, as we've already said before, it is quite clear that phone-tapping constitutes one of the most serious interferences with the right protected under Article 8. And after the precise definition presented by VELU, no longer serious doubts can subsist about that.

In conclusion, we could say that "il est certain, en tout cas, que les écoutes téléphoniques constituent une violation de la vie privée" (9).

3. Private Persons and Public Authorities

Thirdly, the European Convention on Human Rights, as "the most sophisticated and successful system for the international protection of human rights" (10), is conceived as an instrument for the individual rights' protection against interference by public authorities.

However, many of the dangers to privacy in the modern world result from the acts of private persons or organizations. And the question is that, although "many will consider that the right should be similarly protected against such interferences by third parties, (...) it is far from clear that such a form of protection is established by Article 8 of the European Convention on Human Rights" (11).

Nevertheless, when the Consultative Assembly of the Council of Europe adopted a Declaration On Mass Communication and Human Rights and its Recommendation 582 (1970), asked, then, at that time, for "an agreed interpretation of the right to privacy provided for in Article 8 of the Convention (...) by the conclusion of a protocol or otherwise, so as to make it clear that this right is effectively protected against interference not only by public authorities but also by private persons or the mass-media" (12). Then, "dans sa grand majorité la doctrine s'accorde à reconnaître que l'article 8 s'impose aux particuliers comme aux autorités publiques" (13) (14).

(8) Robert SMITH, *Privacy: how to protect what's left of it*, 1979.

(9) Andre ROUX, *La protection de la vie privée dans les rapports entre l'état et les particuliers*, 1983. However, although we could agree with this author when he says that "le danger découle de l'existence d'écoutes 'sauvages'; c'est-à-dire, organisées par des services policiers et effectuées non plus afin de découvrir, dans le respect des règles de procédure pénale, l'auteur d'un crime ou d'un délit, mais avec le souci essentiel de recueillir des renseignements sur de simple citoyens", we think that those criminal procedural rules must themselves be in conformity with precise criteria required by the protection of human rights.

(10) Clovis MORRISON, *The Dynamics of Development in the European Human Rights Convention System*, 1981.

(11) A. H. ROBERTSON, *Human Rights in Europe*, 1977.

(12) Cf. PINHEIRO FARIA, *Convenção Europeia dos Direitos do Homem, Anotação*, 1983.

(13) J. VELU and RUSENERGEC, *La Convention Européenne des Droits de L'Homme*, 1990.

On the other hand, the relevance of this point is that, according to Article 8, *a contrario*, only public authorities are allowed to interfere with the exercise of the right to privacy. And, therefore, that interference is always and in any case prohibited to private persons.

4. Summary.

In conclusion, the right to privacy, resulting from the general protection of human personality, is the right consecrated in Article 8. The right to privacy can be analysed in several other rights, which must be respected by public authorities and private persons. At last, phone-tapping constitutes always an interference with the exercise of the right to privacy. And that's only licit when respected certain conditions. That's what the next chapter is all about.

At this stage, with could only say that "il n'y a pas de grans hommes sans vertu; sans respect des droits il n'y a pas de grand peuple: on peut puisque dire qu'il n'y a pas de société (...)" ⁽¹⁵⁾. However, on the other hand, if the existence of society presupposes the respect for human rights, it's also true that, in order to guarantee the real protection of those rights, the individuals must pay a price, which "can be measured in terms of loss of privacy" ⁽¹⁶⁾.

It means that, efficiently preventing and punishing criminality, in order to achieve the security of each individual, requires that each individual must admit the necessary sacrifices of his privacy. In next chapter we'll see the price of justice established by the European Court of Human Rights that individuals have to pay. But, on the other hand, we'll also have the chance to see the price that each Member State is paying, due to the limitations imposed to their powers of criminal investigation by the same Court, and that are the required bill of membership quality.

B. Admissibility Conditions of Telephone-tapping: Case Law of the European Court of Human Rights

1. Generalities: Overview

Article 8 (2) of the Convention provides that there shall be no interference with the exercise of this right, except such as: a) is in accordance with the law, b) and is necessary

⁽¹⁴⁾ About this question it would be interesting to remark the decision of the German *Bundesgerichtshof* (BGH, 20.5.1958): "l'enregistrement d'une conversation sur un magnétophone, sans autorization de l'intéressé, constitue une violation des droits de l'individu garantis par (...) l'article 8 de la Convention (...) qui ne lient pas seulement l'Etat et ses autorités, ils doivent aussi Être respectés par les individus dans leurs relations mutuelles"; in, *Convention Européenne des Droits de L'Homme, Recueil des décisions de tribunaux nationaux se référant à la Convention*, 1969.

⁽¹⁵⁾ TOCQUEVILLE, *De la Démocratie en Amérique*, apud *Protection of Human Rights in Europe: Limits and Effects; Proceedings of the 5 Internat. Colloquy about the European Convention on Human Rights*, (Irene Mayer ed.), 1982.

⁽¹⁶⁾ VELECKY, *ob. cit.*

in a democratic society, in the interests of: i- national security; ii- public safety; iii- or the economic well being of the country, - for the prevention of disorder and crime; - for the protection of health and morals; - or for the protection of the rights and freedoms of others.

The first question we must answer is the following: is phone-tapping susceptible of being justified under Article 8 (2)?

In fact, phone-tapping is a very serious interference with the right to privacy. It implies the sacrifice of several fundamental rights of personality, such as the right to one's word and the right to manage one's information, in which the right to privacy can be analysed.

Nevertheless, the Court has justified phone-tapping under Article 8 (2) as a necessary interference with the exercise of the right to privacy, in order to prevent disorder and crime ⁽¹⁷⁾. For example, in the MALONE Case (1984) the Court has considered that "(...) l'existence d'une législation autorisant à intercepter des communications pour aider la police judiciaire à s'acquitter de ses tâches peut être nécessaire dans une société démocratique à la défense de l'ordre et à la prévention des infractions pénales. (...) L'augmentation de la délinquance, en particulier de la criminalité organisée, l'ingéniosité grandissante des délinquants et la facilité comme la rapidité de leurs déplacements ont, en Grande Bretagne, rendu des écoutes téléphoniques indispensables pour rechercher et combattre le crime". So, we must answer to the question saying that phone-tapping may be justified under Article 8 (2) because it's a necessary interference to prevent disorder and crime.

But, then, we have to look for the answer to a second and very important question: in which conditions can phone-tapping take place? Or, by other words, what is the criteria of admissibility of phone-tapping?

We've already seen that public authorities may be allowed to interfere with the exercise of the right to privacy in order to prevent disorder and crime. But, the problem is that phone-tapping is susceptible of sacrificing also several criminal procedural basic principles, mainly the principle *NEMO TENETUR SE IPSUM PRODERE*. It may also sacrifice the right to deny testimony that belongs to certain witnesses (v.g., the relatives of the

⁽¹⁷⁾ Article 8 (2) only refers to prevention of disorder and crime and not to its punishment. VELU and RUSENERGEC (cf. *ob. cit.*), hold that "il serait cependant erroné d'en conclure que la répression des infractions pénales ne puisse impliquer les restrictions au droits garantis à l'article 8, §1. Les nécessités liées à la protection de la surêté publique et à la défense de l'ordre fournissent à cet égard, un fondement suffisant". However, in our opinion, if we consider that the purpose of a criminal sanction "c'est la protection de biens juridiques" (ROXIN) through "la réaffirmation contrafactique des expectatives communautaires dans la validité des normes violées" (JACKOBS), and that, therefore, the purpose of a criminal sanction is the general prevention of criminality, we can justify the punishment of crimes under Article 8 (2) only by reasons of prevention disorder and crime, without having to look for other kinds of justification.

accused). Not to mention all those persons whom the accused has a special trusting relation with (his defender, his doctor, his religious minister).

At last, but not the least, these sacrifices also occur in the sphere of all those other persons who communicate by phone with the accused. And if we consider that normally each State provides criminal sanctions for the violation of the right to privacy, we necessarily have to conclude that phone-tapping implies quite a "qualified social prejudiciality", that may not be compatible with the "ethical superiority of the State".

Article 8 (2) already provides the exceptionality of any kind of interference: "there shall be no interference by a public authority with the exercise of this right except (...)". Then, this disposition consecrates a very restrictive possibility of exception, requiring the accordance of the interference with the law and imposing a proportionality principle of determination of the interference's necessity to the legitimate pursued purpose. Further, in what phone-tapping is concerned, "(...) s'agissant d'une ingérence grave dans la vie privée, les écoutes téléphoniques doivent être entourées de garanties suffisantes à l'effet de prévenir les excès" (18).

The European Court of Human Rights has already considered that the principle of proportionality may not exclude the utilization of phone-tapping to prevent disorder and crime if the conditions it established are respected. The Court has precised the criteria of "garanties adéquates et suffisantes", required by the intervention of the principles exceptionality, legality and proportionality in the field of phone-tapping (Cases KLASS and others, 1978; MALONE, 1984; KRUSLIN and HUVIG, 1990).

Through an overview of the Court's Case Law, we may try to list criteria drew out by the Court in order to control the potential of sacrifice involved in phone-tapping. The Court has interpreted Article 8 (2) as exceptionally authorizing phone-tapping under the following certain conditions.

First, the *principle of legality*, which means:

a) there will be no interference but if it's in accordance with the law;

b) "la loi doit être suffisamment claire et précise pour indiquer à tous, de manière suffisante, en quelles conditions elle habilite la personne publique à opérer une pareille atteinte au respect de la vie privée" (19). Or by other words, "normes juridiques accessibles qui indiquent suffisamment l'étendue et les modalités du pouvoir d'appréciation attribué aux autorités compétents" (20).

(18) Didier DURAND, *La Convention Européenne des Droits de L'Homme. Actes de la Journée d'étude des 16 novembre 1991 organisée à Lille (...)*, 1992.

(19) COHEN-JONATHAN, *La Convention Européenne des Droits de L'Homme*, 1989.

(20) D. DURAND, *ob. cit.*

Second, the *principles of proportionality and subsidiarity*, which mean that:

- a) the interferences are only necessary if there's "un besoin social impérieux" ⁽²¹⁾;
- b) the law must precise strictly the competent public authorities and the circumstances exclusively according to which the competent authorities may be authorized to act;
- c) phone-tapping must be only authorized to fight the most serious criminality and the prosecuted crimes must be strictly precised;
- d) the law must provide appropriate and sufficient warrants against any abuse;
- e) phone-tapping can only be used if all the other less prejudicial methods were already tried and only if it can be reasonably considered useful;
- f) this interference can only be ordered if there are grounded suspicions of the practice of a crime of the "catalogue";
- g) the order must precise the time, the place, the process of tapping and the persons involved;
- h) the defense rights must be preserved;
- i) if possible, the persons under phone-tapping must be informed about that;
- j) the phone-tapping orders must be controlled by judicial authorities;
- k) the principles of proportionality and subsidiarity impose a restrictive interpretation of the law, in which all those conditions must be precised.

These are the conditions the Court has drawn out of Article 8's principles of exceptionally, legality and necessity, in what phone-tapping, as a necessary interference with the exercise of the right to privacy, in order to prevent disorder and crime, is concerned.

We could say that the main characteristic of the Court's Case Law criteria is the optimisation of both interests in conflict without sacrificing one to the other: it only sacrifices the right to privacy to the strictly necessary extend required to prevent disorder and crime. It establishes, through the principle of practical concordance, the limits of the public authorities' power to prosecute the criminal interests.

On one hand, the individuals have to pay with privacy the necessary price required to the protection of their rights by the public authorities. On the other hand, and what's more relevant, the Court's criteria contain the imposed limits to the Member States' criminal powers. What the Court said to the Member States was: "in order to prevent crime and disorder you can not go further than this".

⁽²¹⁾ D. DURAND, *ob. cit.*; C-JONATHAN, *ob. cit.*

In fact, actually Member States are no longer free to use phone-tapping as an arbitrary power. On the contrary, their national criminal procedural laws must be in accordance with the Court's Case Law criteria, that strictly defines the conditions only according to which national laws can authorize the use of that criminal investigation's method. We'll analyze and characterize, in detail, the several leading cases.

2. Case Klass

To begin with, in the Case KLASS and others (1978) ⁽²²⁾, the Court considered that the guarantees of the "Gesetz zur Beschränkung des Brief-Post-und-Fernmeldegeheimnisses, G 10", implementing Article 10 (2) of R.F.A.'s Basic Law ⁽²³⁾, were sufficient and appropriate.

Under Article I of G10, the competent authorities may open and inspect mail and post, read telegraphic messages, listen to and record telephone conversation, where there are factual indications for suspecting a person of planning, committing, or having committed offenses (1); punishable under the Criminal Code, against the security of the State, the democratic order, external security, and the security of the allied armed forces (2); and these surveillance measures are permissible only if investigation of facts by another method is without prospect of success or is considerably more difficult (3).

However, the problem emerged because, according to the same law, an application to use them may be made by the head of one of the Agencies for the Protection of the Constitution of the Federation of Landers, the Army security office, or the Federal Intelligence Service ("Bundesnachrichtendienst"), to the supreme Land authority, the Minister of Defense, or the Minister of the Interior, according to the jurisdiction in which the case falls.

Nevertheless, considering that:

a) measures ordered by one of these authorities must be discontinued once the required conditions of their use cease to exist, and in any case after three months unless there is a fresh application;

b) the person subject to the surveillance is not to be notified of the measures affecting him; however, the Constitutional Court quashed this provision as being

⁽²²⁾ *Publications of the European Court of Human Rights*, Case Klass and others, 1978, Registry of the Court, Council of Europe, 1979.

⁽²³⁾ Article 10 of Basic Law reads: 1° Secrecy of the mail, post and telecommunications shall be inviolable. 2° Restrictions may be ordered only pursuant to a statute where such restrictions are intended to protect free democratic constitutional order or the existence or the security of the Federation or of a Land, the statute may provide that the person concerned shall not be notified of the restriction and that legal remedy through the courts shall be replaced by a system of scrutiny by agencies and auxiliary agencies appointed by the people's elected representatives.

incompatible with Article 10 (2) of the Basic Law, and ruled that the competent authority must inform the person concerned, as soon as notification can be made without jeopardizing the purpose of the restriction;

c) his surveillance system is subject to extensive administrative and judicial control:

i- in the first place, the measures ordered are supervised by an official 'qualified for judicial office', who examines the information obtained in order to decide whether its use would be compatible with the G10, and whether it is relevant to the object of the measure: he transmits to the competent authority only the information satisfying these conditions, and destroys the remainder;

ii- then, the competent Minister must provide monthly an account of the measures, which he has ordered, to the G10 Commission, and report at least once every six months to a Board composed of five members of Parliament. The G10 Commission has the task of deciding whether a person subject to surveillance is to be notified; the Minister concerned considers *ex officio* whether, on discontinuance of the surveillance, or at regular intervals thereafter, the person is to be notified, submits his decision to the G10 Commission for its approval. The G10 Commission may also decide *ex officio*, or on the application of a person believing himself to be subject to surveillance, on the legality or necessity of measures, and if the decision is negative the Minister must terminate them immediately;

iii- finally, while according to Article 9, paragraph. 5 of G10, 'there shall be no remedy before the courts in respect of the ordering and implementation of restrictive measures', a person believing himself under surveillance may challenge it before the Constitutional Court, if he can advance evidence to substantiate his complaint;

the Court held that "(...) G10 contains various provisions designed to reduce the effect of surveillance measures to an unavoidable minimum and to ensure that the surveillance is carried out in strict accordance with the law. In the absence of any evidence or indication that the actual practice is otherwise, the Court must assume that... the relevant authorities are properly applying the legislation in issue" and that legislation was justifiably enacted as being necessary in the interests of national security, and for the prevention of the disorder or crime, under Article 8 (1) ⁽²⁴⁾.

In conclusion, the Court considered that the G10 was in accordance with the conditions required in general by Article 8 (2), and in particular (phone-tapping), by the principle of proportionality. In fact, considering that "in the context of Article 8 (...) a balance must be

⁽²⁴⁾ J. FAWCETT, *The Application of the European Convention on Human Rights*, 1987.

sought between the exercise by the individual of the right guaranteed to him under paragraph 1 and the necessity under paragraph 2 to impose secret surveillance for the protection of the democratic society as a whole", the Court concluded that "the German legislature was justified to consider the interference resulting from that legislation with the exercise of the right guaranteed by Article 8 §1 as being necessary in a democratic society in the interests of national security and for the prevention of disorder and crime (Article 8 §2). Accordingly, the Court finds no breach of Article 8 of the Convention".

3. Case Malone

Then, in the MALONE Case (1984) ⁽²⁵⁾, the Court considered that, although the persecuted purpose was justifiable, there weren't appropriate and sufficient guaranties protecting individuals against abusive interferences of public authorities with the exercise of their right to privacy.

On one hand, the Court declared that "(...) l'augmentation de la delinquance, en particulier de la criminalité organisée, l'ingeniosité grandissante des délinquants et la facilité comme la rapidité de leurs déplacements ont, en Grande-Bretagne, rendu les écoutes téléphoniques indispensables pour rechercher et combattre le crime". But, on the other hand, "dans son arrêt MALONE (...) la cour européenne a affirmé le principe selon lequel la loi doit être suffisamment claire et précise pour indiquer à tous, de manière suffisante, en quelles conditions elle habilite la personne publique à opérer une pareille atteinte au respect de la vie privée" ⁽²⁶⁾.

According to FAWCETT's summary, "Malone was a British citizen arrested in 1977 and charged with offenses concerning the dishonest handling of stolen goods. Two trials, in each of which the jury failed to agree, led to acquittals in May 1979. In his application to the Commission, he complained of police surveillance, claiming that since 1971 his correspondence had been intercepted and his telephone lines taped; during the first trial it was admitted by the prosecution that one telephone conversation, to which he was a party, had been interrupted. After this first trial, the applicant instituted proceedings against the Metropolitan Police Commissioner; he sought declarations that the interception, monitoring, or recording conversations on his telephone lines were unlawful, even if done pursuant to a warrant issued by the Home Secretary. His action was dismissed by the vice-chancellor, Sir Robert Megarry, on 28.2.1979. He held that: a) since the tapping was effected from wires outside the subscribers premises, no issue of trespass on the premises arose; b) there was no general right of privacy in English Law and no particular right to

⁽²⁵⁾ *Publications of the European Court of Human Rights*, 1984, Registry of the Court, Council of Europe, 1984.

⁽²⁶⁾ D. DURAND, *ob. cit.*

hold a telephone conversation in the privacy of one's home without molestation; c) while there was no specific power in law to tap telephones, there was no rule of law making it unlawful. Sir Robert Megarry suggested that tapping 'cries out legislation'. In its Report the Commission considered that the interception measures, authorized by recognized rules of common law going back at least to 1710, which did not lay down with reasonable certainty the principle conditions and procedures for the issue of warrants. The issue of back warrants authorizing interruptions by police was regulated solely by administrative justice; and such interceptions were therefore not carried out 'in accordance with the law' under Article 8 (2) ⁽²⁷⁾.

In this Case, limited to interceptions and metering effected by or on behalf of the police within the general context of criminal investigation, the Court admitted that the existence of laws and practices permitting and establishing a system for secret surveillance of communications amounted in it self an interference with the right to privacy of that class of persons against whom measures of interception were liable to be employed. Then, the Court recalled the general principles already stated in its case-law, according to which to be in accordance with the law the "interferences must have some basis in domestic law but the latter must itself be compatible with the rule of law; hence law must be 'adequately accessible' and consequences of given action must be 'reasonably foreseeable'".

Furthermore the Court considered that "these requirements, notably in regard to foreseeability, cannot be exactly the same in special context of interception of communications as where object of law is to place restrictions on conduct of individual". At least, "'law' itself, as opposed to accompanying administrative practice, must indicate scope and manner of exercise of discretion to intercept with sufficient clarity to give individuals adequate protection against arbitrary interference".

In conclusion, the review of the particular facts of the case in the light of these principles, lead the Court to conclude that, "in its present state, the relevant domestic law lacks required clarity". Nevertheless, the interferences can be considered necessary in a democratic society for the recognized purpose. In fact, according to the general principles, the existence of some law granting powers of interception of communications to aid the police may be necessary for prevention of disorder or crime.

However, the Court recalled that, "in a democratic society the adopted system of surveillance must contain adequate guarantees against abuse". Therefore, the interference could not be considered to have being effected in accordance with the law because, although the simple absence of a prohibition, there were no legal rules concerning the scope and the manner of exercise of the authorities' discretion. Consequently, the Court

⁽²⁷⁾ J. FAWCETT, *ob. cit.*

considered that there was no need to determine whether the interference was "necessary in a democratic society" for a recognized purpose.

4. Cases Kruslin and Huvig

At last, in the KRUSLIN and HUVIG Cases (1990) ⁽²⁸⁾, France was condemned by the European Court of Human Rights due to violation of Article 8.

According to DURAND's rapport ⁽²⁹⁾, "dans les deux affaires, des écoutes téléphoniques avaient été ordonnées par un magistrat instructeur agissant les procédures, l'une criminelle et l'autre correctionnelle. (...) La Cour a considéré que si la loi était effectivement accessible au citoyen, elle n'était pas suffisamment prévisible quant au sens et à la nature des mesures applicables".

The Court considered that "law" had to be understood in its "substantive" sense, not its "formal" one, including both enactment's of lower rank than statutes and "unwritten law": the law was the enactment in force as interpreted by courts. Therefore, the interference had a legal basis in the French Law (Articles 81, 151 and 152 of the French Code of Criminal Procedure), which was also "accessible".

However, the question arose about the foreseeability of the law in what the meaning and the nature of the applicable measures was concerned. Referring to the Court's case-law concerning the "quality of the law", the Court considered that the review, in relation to requirements of the fundamental principle of the rule of law, of the relevant French "law" in force at the time, necessarily entailed some degree of abstraction, but was, nonetheless, concerned with the "quality of national rules applicable to the applicant and was distinct from the review of the "necessity" of the disputed measures "in a democratic society".

In fact, telephone tapping as a serious interference with private life and correspondence had to be based on a "law" that was particularly precise, especially because the technology available for use was continually becoming more sophisticated. Consequently, the Court considered that the safeguards afforded in the French law were not without value. However, they were not all expressly provided for in the Code of Criminal Procedure: some of them laid down piecemeal in judgments given over the years, the great majority of them had occurred after the events of the instant case. Therefore, the Court concluded that the "system did not provide sufficient legal certainty or, for time being, afford adequate safeguards against possible abuses". Exemplifying the Court noted that the French law didn't precise: the "categories of people liable to have their telephones tapped" (1); and the "nature of offenses which might give rise to such an order were

⁽²⁸⁾ *Publications of the European Court of Human Rights*, HUVIG and KRUSLIN Cases, 1990, Registry of the Court, Council of Europe, 1990.

⁽²⁹⁾ D. DURAND, *ob. cit.*

nowhere defined" (2); "nor were there any rules obliging a judge to set a limit on duration of tapping" (3); "or specifying procedure for drawing up summary reports relating to intercepted conversations" (4); "the precautions to be taken in order to communicate recordings intact and in their entirety" (5); "or the circumstances in which recordings might or had to be erased or tapes be destroyed, etc." (6). Consequently, the Court has concluded that the applicant "did not enjoy minimum degree of protection required under the rule of law in a democratic society".

Once again, the Court reaffirmed the principle according to which phone-tapping is not an arbitrary administrative power. On the contrary, the power to order and use phone-tapping is a strictly entailed power to the restrictive conditions required by the principles of exceptionality, legality and necessity and detailed in a law that respects the criteria of proportionality.

5. Summary

We've seen that the Court's case law criteria are not compatible with a phone-tapping arbitrary administrative power. On the contrary, like any other interference with the exercise of the right to privacy, phone-tapping is only admitted in exceptional cases, and solely if in accordance with a law that defines the strict conditions only according to which it is considered a necessary interference to prevent disorder and crime. And we've seen that, because phone-tapping is a very serious interference, the law must respect the principle of proportionality which imposes its subsidiary (*ultima ratio*) but useful utilization (adequate), only to prosecute the most serious criminality, providing that the law expressly preserves sufficient and appropriate guaranties to protect individuals against abusive interferences (the law must precise the competent authorities; the prosecuted crimes; the existence of grounded suspicions of practice of a "catalogue" crime; the conditions of time, place, process of recording and involved persons; the law must preserve the defense rights and provide the control by judicial authorities; the law must be strictly interpreted).

On the other hand, we've already said that the Court's case law criteria imply a harmonization of Member States' Criminal Procedural Law, in what phone-tapping, as a necessary instrument of crime and disorder prevention, is concerned. And, although "such unification and harmonization might come about as an indirect result of the Court's decisions, but it should not be their objective" (30), the truth is that the Court's decisions are largely compromising the Member States' last fortification of sovereignty. For instance,

(30) Heribert GOLSONG, "The European Convention on Human Rights and The National Law-Maker: Some General Reflections", in, *Protection of Human Rights: the European Dimension, Studies in Honour of Gérard WIARDA* (F. MATSCHER/H. PETZOLD eds.), 1988.

commenting France's condemnation in the KRUSLIN and HUVIG Cases, DURAND says that "cette censure que d'aucuns annonçaient depuis longtemps était si prévisible que le législateur français devait par la suite préparer et faire voter un texte réglementant les écoutes téléphoniques en s'inspirant des motivations des arrêts HUVIG et KRUSLIN (loi 91-646 du 10 juillet 1991 (...) créant les articles 100 à 100-7 du Code de procédure pénale)" ⁽³¹⁾.

Thus, considering that "the Commission has established the general principle of its competence to examine the conformity of each Government limitation to the conditions of Article 8" ⁽³²⁾, and considering that, in the KLASS case, the Court "concluded that under certain conditions an individual may claim to be the victim of a violation occasioned by the mere existence of legislation providing for secret surveillance" ⁽³³⁾, we may conclude that the Court's decisions provide the criteria that each Member State has adopted or has to adopt in its national criminal procedural law.

In fact, the membership quality requires the respect for human rights. If we consider that the human right to privacy is only respected when the Court's case law criteria is followed, we are saying, by other words, that the quality of membership requires the acceptance of the Court's case law criteria by each Member State. And therefore the submission to the rules of a supra-national authority.

In conclusion, Criminal Law seems to be no longer the last unattainable fortification of Member States' sovereignty.

However, there's still the other side of the same coin to be considered. The question is whether a judge can decide upon an evidence collected through an illegal phone-tapping. And it's quite important. From its answer depends the effectiveness of the Court's criteria and, consequently, the respect for the right to privacy. In fact, if we consider that the valuation of an illegally obtained evidence depends exclusively on the evaluation of interests of the concrete case, we are saying by others words, that there are no real limits

⁽³¹⁾ D. DURAND, *ob. cit.*

⁽³²⁾ François MONCONDUIT, *La Convention Européenne des Droits de L'Homme*, 1965. According to the Commission words: "considerant qu'il rentre certainement dans la compétence de la Commission de déterminer, dans chaque cas qui lui est soumis, si l'ingérence de l'autorité publique dans l'exercice du droit protégé par l'article 8 lorsqu'elle s'exerce, répond aux conditions définies au paragraphe 2 dudit article".

⁽³³⁾ J. G. MERRILLS, *The Development of International Law by the European Convention of Human Rights*, 1988. According to the Court's words: "the question arises in the present proceedings whether an individual is to be deprived of the opportunity of lodging an application with the Commission because, owing to the secrecy of the measures objected to, he cannot point to any concrete measure specifically affecting him. In the Court's view, the effectiveness (*l'effet utile*) of the Convention implies in such circumstances some possibility of having access to the Commission. If this were not so, the efficiency of the Convention's enforcement machinery would be materially weakened. The procedural provision of the Convention must, in view of the fact that the Convention and its institutions were set up to protect the individual, be applied in a manner which serves to make the system of individual applications efficacious".

to the interferences because, in the end, they can always be justified by the interests of each concrete case.

In order to look for the answer to this question we'll make a brief comparative analysis between the American exclusionary rules and the Germans *Beweisverbote*. In the end we will point out and characterize the European Court's criteria in this matter.

III. Illegally Collected Evidence: The European Court's Criteria *vis-à-vis* the American Exclusionary Rules and the German Experience ("*Beweisverbote*")

A. Exclusionary Rules vs. "*Beweisverbote*" (34)

1. Miranda's Rights Doctrine

In the U.S.A., a common law country, characterized by the role-law of precedent and by a pure accusatory process (passive judge, cross examination), the exclusionary rules have mainly a procedural dimension. These rules are aimed at the discipline of police's practice and action. In consequence, the evidence that was illegally collected has got no value at all. For example, the V Amendment provides the privilege against self-incrimination: "no person shall (...) be compelled in any criminal case to be a witness against himself (...) without due process of law".

It means that, for example, the police has the duty to clear and inform the accused of his judicial rights. Otherwise, any declaration of the accused (even his confession) is not valued if that duty was not properly accomplished (Miranda Rights' Doctrine) (35).

2. The BGH Evaluation of Interests Criteria: The Doctrine of the "Three Spheres of Privacy".

In Germany, where the criminal procedure is an accusatory process integrated by an investigation principle (active judge), the *Beweisverbote* have mainly a substantive or material dimension. They're aimed at the protection of the Basic Right of personality in general, and the right to privacy, in particular (Basic Law, Articles 1 and 10: inviolability of human person's dignity and inviolability of telecommunications). According to HERMANN's expression, they are "protection means of substantive rights".

(34) The comparative analysis is based upon the following studies of Professor COSTA ANDRADE: *Sobre as Proibições de Prova em Processo Penal*, Coimbra, 1992; "As Proibições de Prova no Direito Processual Penal da República Federal da Alemanha", in *Revista Portuguesa de Ciência Criminal* (Dir. Professor FIGUEIREDO DIAS), Coimbra, 1992.

(35) Cfr. COSTA ANDRADE, *Sobre as Proibições de Prova em Processo Penal*, Coimbra, 1992.

For instance, the Constitutional Court of Germany has established the theory of the "three spheres of privacy". First, *the intimacy sphere or the unattainable nuclear sphere*, which is absolutely protected: a illegally collected evidence that contends with this sphere cannot be valued. Second, *the private sphere* that contends with the rights to image and to word (the sphere of personal social relations): the evaluation of interests in each concrete case may require the valuation of a illegally collected evidence that affects this sphere. Third, *the commercial sphere* (the sphere of commercial social relations): the interests of criminal prosecution always prevail over the interests of the individual and, therefore, the illegally obtained evidences that contend with this right are always valued.

In what phone-tapping is concerned, the BGH has considered in 1989 that it doesn't concern with the unattainable nuclear sphere, but only with the private or the commercial sphere according with the concrete situation. So, even if it concerns with the private sphere, the evaluation of interests may require the valuation of the illegally obtained evidence if the concrete case is about fighting the most serious criminality (a crime that belongs to the catalogue) ⁽³⁶⁾. Another example of the German comprehension of the problem is the following: according to the §136 a) StPO, although there was a violation of the duties to clear and inform the accused of his rights, the declarations of the accused are used and valued as evidence because that's considered a formal irregularity: the evidence can't only be valued when its collection implied a limitation of the accused's freedom ⁽³⁷⁾.

3. The US Supreme Court "Fruit of the Poisonous Tree" Doctrine and the BGH *Fernwirkung* Criteria

The second question we've selected for this comparative analysis is knowing what is the value of a secondary evidence collected through an illegal telephone-tapping.

In the U.S.A. the Supreme Court has established "the fruit of the poisonous tree doctrine" (Case *Nardonne vs. United States*, 1939): "to forbid the direct use of methods (...) but to put no curb on their full indirect use would only invite the very methods deemed inconsistent with ethical standards and destructive personal liberty" ⁽³⁸⁾.

So, in principle, all the evidences collected through illegal wire-tapping should not be valued. However, "the complete exclusion — in all situations and for all purposes — of second and subsequent generation's 'fruits' of illegally obtained evidence seems logical

⁽³⁶⁾ Cfr. COSTA ANDRADE, "As Proibições de Prova no Direito Processual Penal da República Federal da Alemanha", in *Revista Portuguesa de Ciência Criminal* (Dir. Professor FIGUEIREDO DIAS), 1992

⁽³⁷⁾ COSTA ANDRADE, *ob. cit.*

⁽³⁸⁾ *Idem, ibidem.*

and warranted, unless there are competing considerations to restrict the radiation of the exclusionary rule" (39).

In conformity, §150.4 of the Model Penal Code of Pre-Arrangement Procedure Proposal (1974) provides the suppression of the illegally obtained evidence, "unless the prosecution establishes that such evidence would probably have been discovered by law enforcement authorities irrespective of such (illegalities) and the Court finds that exclusion of such evidence is not necessary to deter violation of this Code" (40).

In Germany, the existence of *Fernwirkung* is a very controversial question. Some deny the *Fernwirkung*, arguing that, otherwise, it would jeopardize the efficiency of the criminal administration. Others maintain the *Makei*-theory (the German version of the fruit of the poisonous tree doctrine). Nevertheless, the doctrine tends to accept that the secondary evidence must be used and valuated:

a) when between the secondary collected evidence and the violation of the law there's no real link of causality;

b) when the authorities would, certainly, collect that evidence without breaking the law (hypothetical investigation procedure);

c) when the causality link is interrupted by free decision of the accused (v.g., his confession).

Then, the doctrine also tends to accept that the principle of evaluation of interests may always require, in the concrete case, the valuation of a secondary evidence, in order to fight the most serious criminality. However, the principle of proportionality requires that the evidence is not valuated when its collection implied a rough disrespect for the law. And, both the jurisprudence (BGH, Case *Traube* 18/4/80) and the doctrine (v.g., WOLTER) consider that the secondary evidences collected through an illegal phone-tapping cannot be valuated, because that's a case of rough disrespect for the law, contrary to the principle of proportionality (41).

(39) PITLER, *California*, 1968, *apud* COSTA ANDRADE, *ob. cit.*. In the same ligne R. PENNER says that: "I would agree however that 'no careful student of the subject would suggest that the claim of privacy ought to prevail over every other societal claim whatever the fact situation'. This latter position leads me, finally, to argue the case for a broad exclusionary discretion rather than a strict exclusionary rule, on the ground, amongst others, that it provides a better balancing mechanism"; Roland PENNER in, *Aspects of Privacy. Essays in honour of John M. SKARP* (Dale GIBSON ed.), 1980.

(40) Cfr. COSTA ANDRADE, *ob. cit.* In the *Nardone* Case the Supreme Court had already established some limits to the general principle considering that the secondary evidence will be valuated when "the casual connection (...) may have become so attenuated as to dissipate the taint" (*doctrine of attenuation*). On the other hand, the doctrine of the independent source maintains that the secondary evidence is considered legal and independently collected when, in concrete, it is "imminent, but in fact unrealised source of evidence" (*inevitable discovery exception*).

(41) Cfr. COSTA ANDRADE, *ob. cit.*

4. These brief notes about the value of illegally collected evidences only want to serve the purpose of knowing whether the restrictive conditions established by the European Court of Human Rights for the admission of phone-tapping are not permeable to a criminal prosecution interest, requiring the valuation of evidences obtained through illegal phone-tapping.

What we want to stress is whether the freedom of appreciation of those evidences by each Member State's Courts doesn't jeopardize the European Court's criteria, even after every Member State's criminal law has adopted that criteria. Mainly due to reasons that the Member States' criminal administration may feel tempted to use arbitrarily phone-tapping, because, in the end, the interests of the concrete case may require the valuation of the illegally collected evidences. And we've already seen that, in Germany, the Supreme Court accepts the valuation of a evidence collected by illegal phone-tapping, arguing that's required by the principle of evaluation of interests, if the evidence doesn't contend with the unattainable nuclear sphere of the individuals' privacy.

The question is whether these exceptions won't lead to an abusive utilization of this method and, therefore, to the frustration of the Court's criteria, established in order to guarantee the effective respect for one's right to privacy. As a matter of fact, we could conclude that the acceptance of the Court's criteria by each Member State is quite irrelevant since they will justify its disrespect by reasons of fighting the most serious criminality. And, therefore, that acceptance is nothing else than just another formal declaration of principles and recognition of individuals' rights. In the end, each Member State keeps its arbitrary power of "making justice" fully untouched or intact, respecting the right to privacy only according to its will.

B. The Criteria of the European Court of Human Rights

1. Case Schenk

However, we can't jump at conclusions just like that. Mainly, because of two different reasons.

Firstly, no State "sees with good eyes" being systematically condemned by the European Court of Human Rights. Secondly, because the Court has considered in the Case SCHENK (12.7.88) ⁽⁴²⁾, about the use in evidence, in a criminal trial, of an unlawfully obtained recording of a telephone conversation, that:

⁽⁴²⁾ *Publications of the European Court of Human Rights*, vol. 140, SCHENK case, 12 July 1988, Registry of the Court, Council of Europe, 1988.

a) although it is "primarily a matter for regulation under national law" the Court had "jurisdiction to deal with errors of fact or of law allegedly committed by a national court" because they "may have infringed rights and freedoms protected by the Convention";

b) it is "impossible to exclude as a matter of principle and in the abstract that unlawfully obtained evidence of the present kind (recording of a telephone conversation) may be admissible",

i- if the "defense rights were respected";

ii- and if "the recording was not the only evidence on which the conviction was based".

Then, although the complaint that the right to confidentiality of telephone communications had been violated was declared by the Commission solely as regards of making of recording, that didn't prevent the Court from considering of use. In fact, although the Court has decided the Case only from the point of view of the claimed violation of the right to a fair trial (Article 6 of the Convention) and although the Court has subsumed the issue of the abusive interference with the right to privacy (Article 8) under the question already dealt under Article 8 (considering that it was not necessary to examine this last complaint), the truth is that, against the opinion of the Commission, the Court has left the door open when it stated that "nothing would prevent the Court from considering the question of use". And, then, subsuming that issue "under the question already dealt with under Article 6", the Court said nothing else than that the criteria it had established for Article 6 must also be followed in dealing with Article 8.

In short, the Court's criteria is the following:

1.º Although the Court recognizes that the use in evidence, in a criminal trial, of an unlawfully obtained recording of a telephone conversation is primarily a matter for regulation under national law, the Court has jurisdiction to deal with errors of fact or of law allegedly committed by a national court as far as they are susceptible of infringing rights and freedoms protected by the Convention;

2.º The Court accepts the use as evidence, by the national courts, of an unlawfully recording of a telephone conversation, as long as: the defense rights are respected (1) and the recording is not the only evidence on which the conviction is based (2).

2. Comparison with the American and German Experiences

Comparing the Court's criteria with the Americans exclusionary rules and with the Germans *Beweisverbote*, we could remark two main ideas.

Firstly, the Court didn't follow the Americans exclusionary rules, which procedural dimension implies the uselessness of any evidence illegally collected. On the contrary, the Court connected the rules of collecting evidences with the protection of individuals' rights, basing upon that the link of its jurisdiction to deal with errors of fact or of law allegedly committed by a national court. And then the Court established the principle according to which the Court may accept the valuation of such a illegally collected evidence, if the defense rights were preserved and if that evidence is not the only one on which the conviction is based. It means that, contrary to the Americans exclusionary rules, the Court accepts the evaluation of interests of the concrete case.

Secondly, and contrary to the Germans *Beweisverbote*, that evaluation of interests is only admitted to the extent that it doesn't imply the preclusion of the rights of the accused and the base of the conviction is exclusively that evidence. For example, what the Court says, by other words, is that in any case an unlawful recording of a telephone conversation can be used as evidence if that implies the violation of the principle *NEMO TENETUR SE IPSUM PRODERE* or the secrecy of the communications between the accused and his defender.

Then, the Court also says that, although all the rights of the accused have been respected, the judge of the national's courts can't rely their decisions exclusively upon that evidence. Why? Because the Court considers that the national criminal administrations can't prevent and punish criminality, committing crimes, or that they can't make justice with "dirty hands". It means that a recording of a telephone conversation that was not obtained according to the Court's case law criteria cannot be used if that's the only evidence upon which the national courts base their convictions, although all the defense rights were respected, and the case is about punishing the most serious criminality. These are the conditions the Court has established to accept the evaluation of interests of the concrete case and at the same time the limits to that evaluation.

Therefore, we may conclude that, when the Court established the price each individual has to pay in the European Union, by defining the precise conditions only according to which public authorities are exceptionally admitted to interfere with the exercise of the individuals' right to privacy, it also established, at the same time, the price each State had to pay, by imposing those limits to their criminal prosecution powers.

Then the Court reaffirmed the exigency of respecting human rights, in practice, by declaring that in any case a recording of a phone conversation can be used as evidence as long as defense rights are not respected and that's the only evidence the national courts have to base their conviction. And, considering that the Court also established the principle of its jurisdiction to deal with errors or facts of law allegedly committed by a

national court as far as they are susceptible of having infringed rights and freedoms protected by the Convention, we may also say that the States (at last the Member States of the European Community) will have more motifs to resist against the temptation of "making justice for any price".

At last, in our opinion, the criteria the Court has established in the SCHENK case was the last and necessary step in order to ensure the effectiveness and to avoid the jeopardize of the criteria it had established in the cases KLASS and others, MALONE, KRUSLIN and HUVIG, for the respect of the right to privacy.

Now we think our argument is clarified. Once again the conclusion imposes itself without leaving room for serious doubts: criminal law is no longer an exclusive power of Member States, since it involves the respect for human rights. But, we reserved the final conclusion for last chapter.

IV. Conclusions: Towards a Uniform Criminal Law?

A conclusion is always, in one way or another, a repetition of what was previously said (explicitly or implicitly). But, more than that, a conclusion must be a concise and clear summary of the argument's reasoning. Therefore, we will try to avoid the boring repetition, essaying to draw out the eventual juice of this study.

1.º Considering that telephone-tapping always implies an interference with the right to privacy, protected under Article 8 of the European Convention on Human Rights;

2.º Considering that telephone-tapping may be exceptionally a necessary method in a democratic society in order to prevent disorder and crime;

3.º Considering that, because telephone-tapping is a very serious interference with the individuals' right to privacy, public authorities, and only them, may be authorized to use it, if there's an accessible law that, according to the principle of proportionality, expressly foresees strict conditions for its utilization;

4.º Considering that, in any case, telephone-tapping can only be authorized solely to prevent and fight the most serious criminality (organized crime, terrorism,...), and as long as the authorizing law preserves the defense rights and appropriate and

sufficient warrants against abuses, specially providing it's subsidiary but useful utilization, it's control by judicial authorities, the competent authorities and the circumstances only according to which they may be allowed to act (*v.g.*, existence of grounded suspicions of the practice of a "catalogue" crime, the conditions of time, place, process of transcription and persons involved, and, if possible, their "notification"); and taking into account the principle of restrictive interpretation of that law;

5.º Considering that the Court established the principle according to which, under certain conditions, an individual may claim to be the victim of a violation occasioned by the mere existence of legislation providing for secret surveillance;

6.º Considering that, although the use as evidence, in a criminal trial, of an unlawfully obtained recording of a telephone conversation is primarily a matter for regulation under national law, the Court has jurisdiction to deal with errors of fact or of law allegedly committed by a national court as far as they are susceptible of infringing rights and freedoms protected by the Convention;

7.º Considering that the Court solely accepts the use as evidence, by the national courts, of an unlawfully recording of a telephone conversation, as long as the defense rights are respected and the recording is not the only evidence upon which the conviction is based;

8.º Considering that the considerations remaining behind resume the required respect for the right to privacy; and

9.º Considering that the respect for human rights is an inherent condition of the European Community's membership;

We cannot conclude but that criminal law is no longer the unattainable fortification of Member States absolute and unlimited sovereignty. In fact, each Member State has to resign it self to the Court's criteria and fully accept them. To deny that it doesn't mean the submission to a supra-national authority's law (the Case Law of the European Court of Human Rights) is doubtful. Without having a uniform European Criminal Code, the European Community has actually already a European Criminal Law, from which "many

important aspects of adjective law already are covered by the Rome Convention for Human Rights" (43).

For now, we think the European Court of Human Rights has already established the price of justice in the European Union, for both individuals and States (44).

References

- ANDRADE, M. Costa, *Sobre as Proibições de Prova em Processo Penal*, 1992
- , "As Proibições de Prova no Direito Processual Penal da República Federal da Alemanha", *Revista Portuguesa de Ciência Criminal* (Dir. Prof. FIGUEIREDO DIAS)
- BARTH, Alan, *The Price of Privacy*, s/d
- COHEN-JONATHAN, *La Convention Européenne des Droits de l'Homme*, 1989
- Convention Européenne des Droits de l'Homme, Recueil des décisions des tribunaux nationaux se référant à la Convention*, 1969
- DURAND, Didier, *La Convention Européenne des Droits de l'Homme*, in *Actes de la Journée d'étude des 16 novembre 1991 organisée À Lille (...)*, 1992
- ENSCHEDÉ, Ch. J., *Een Uniform Europees Strafrecht?*, 1980
- FARIA, Pinheiro, *Convenção Europeia dos Direitos do Homem, Anotação*, 1983
- FAWCETT, J., *The Application of the European Convention on Human Rights*, 1987
- GIBSON, Dale (ed.), *Aspects of Privacy. Essays in Honour of John M. SKARP*, 1980
- GOLSON, Herbert, *The European Convention on Human Rights and the National Law-Maker: Some General Reflections*, in *Protection of Human Rights* (Matscher/Petzold eds.)
- JACOBS, Francis, *The European Convention on Human Rights*, 1975
- YOUNG, John (ed.), *Privacy*, 1978
- MAYER, Irene (ed.), *Protection of Human Rights in Europe: Limits and Effects (Proceedings of the 5 Internat. Colloquy about the European Convention on Human Rights)*, 1982
- MATSCHER, F./PETZOLD, H. (eds.), *Protection of Human Rights: The European Dimension, Studies in Honour of Gérard WIARDA*, 1988
- MERRILLS, J. G., *The Development of International Law by the European Convention of Human Rights*, 1988

(43) Ch. J. ENSCHEDÉ, *Een Uniform Europees Strafrecht?*, 1990.

(44) The Union itself "shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the Constitutional traditions common to the Member States, as general principles of community law": Article F (II) of the Treaty on the European Union.

- MONCONDUIT, François, *La Convention Européenne des Droits de l'Homme*, 1965
- MORRISON, Clovis, *The Dynamics of Development in the European Human Rights Convention System*, 1981
- NEDJATI, Zaim, *Human Rights under the European Convention*, 1978
- PENNER, Roland, *in Aspects of Privacy* (Gibson ed.)
Publications of the European Court of Human Rights, [Registry of the Court, Council of Europe — 1978, "Klass"; 1984, "Malone"; 1988, "Schenk"; 1990, "Kruslin and Huvig"]
- RIVIERO, Jean, *Les Libertés Publiques*, 1983
- ROBERTSON, A. H., *Human Rights in Europe*, 1977
- ROUX, Andre, *La protection de la vie privée dans les rapports entre l'État et les particuliers*, 1983
- SHATTUCK, John, *Rights of Privacy*, 1977
- SMITH, Robert, *Privacy: How to Protect What's Left of It ?*, 1979
- SPIELMANN, Alphonse/WEITZEL, Albert, *La Convention Européenne des Droits de l'Homme et le Droit Luxembourgeois*, 1991
- VELU, J./RUSENERGEC, H., *La Convention Européenne des Droits de l'Homme*, 1990

Abstract - Phone tapping has been an evolving issue concerning the protection of the right of privacy under Article 8 of the European Convention on Human Rights. In several cases, namely *Klass*, *Malone* and *Kruslin&Huvig*, the European Court of Human Rights did set up a number of requirements that national legislations must comply with concerning the admissibility of telephone-tapping as an important tool of criminal procedure, since it is understood as an infringement of the right of privacy provided by Article 8 of the ECHR, despite its wording. Moreover, the Court did also establish the requirements for the use illegally collected evidence (i.e. evidence collected without compliance of phone-tapping requirements), which are different from the American exclusionary rules ("Miranda's Rights" Doctrine) and the German «*Beweisverbote*» (the BGH «evaluation of interests» Criteria and the Doctrine of the "three spheres of privacy"). At the same time, in case *Schenk*, the European Court of Human Rights (ECHR) seemed to reject a strict application of the doctrine of the "fruit of the poisonous tree" (US Supreme Court) and the BGH "*Fernwirkung*" criteria. In this paper, originally written in the course of European Criminal Law at the Catholic University of Leuven as Erasmus student, questions whether the impact of the ECHR's case-law on national legislation of Member States is not leading towards a Uniform European Criminal Law.