CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

CASE OF CRAXI (No. 2) v. ITALY

(Application no. 25337/94)

JUDGMENT

STRASBOURG

17 July 2003

FINAL

17/10/2003

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Craxi (No. 2) v. Italy,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Mr C.L. ROZAKIS, *President*,
Mr P. LORENZEN,
Mr G. BONELLO,
Mrs N. VAJIĆ,
Mrs S. BOTOUCHAROVA,
Mr V. ZAGREBELSKY,
Mrs E. STEINER, *judges*,
and Mr S. NIELSEN, *Deputy Section Registrar*,

Having deliberated in private on 10 October 2002 and on 26 June 2003,

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

PROCEDURE

1. The case originated in an application (no. 25337/94) against the Italian Republic lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Italian national, Mr Benedetto Craxi ("the applicant"), on 16 June 1994.

2. The applicant was represented before the Court by Mr G. Guiso and Mr A. Lo Giudice, two lawyers practising in Milan. The Italian Government ("the Government") were represented by Mr U. Leanza, Agent, and by Mr F. Crisafulli, Coagent.

3. The applicant alleged, in particular, that the release into the public domain of telephone interceptions of a private nature amounted to a breach of Articles 8, 14 and 18 of the Convention.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court.

6. By a decision of 7 December 2000 the Court declared the application partly admissible.

7. The applicant died on 19 January 2000. On 7 April 2000, his widow, Mrs Anna Maria Moncini Craxi, his daughter, Mrs Stefania Craxi and his son, Mr Vittorio Craxi, informed the Court that they wished to continue the proceedings. In its decision of 7 December 2000 on the admissibility of the

application the Court considered that they had standing to continue the present proceedings in the applicant's stead.

8. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 2 *in fine*), the parties replied in writing to each other's observations.

9. Following the general restructuring of the Court's Sections as from 1 November 2001 (Rule 25 § 1 of the Rules of Court), the application was assigned to the newly composed First Section of the Court (Rule 52 § 1).

THE FACTS

10. The applicant, an Italian national born in 1934, was the general secretary of the Italian Socialist Party (PSI) from 1976 to 1993. From 1983 to 1987 he was Prime Minister of Italy. As of April 1994 (according to the applicant) or May 1994 (according to the Italian authorities), he lived in Hammamet (Tunisia).

A. The background

11. The proceedings to which this application relates were part of the criminal proceedings brought by the Milan Public Prosecutor's Office during the so-called “clean hands” (*mani pulite*) campaign.

12. Between January and October 1993, the Milan Public Prosecutor issued twenty-six notices of prosecution (*avvisi di garanzia*) in respect of the applicant, in particular for corruption, dishonest receipt of money by a public officer, concealment of dishonest gain and offences against the legislation on the financing of political parties.

13. On 10 May, 10 September 1993 and 7 May 1994 the Rome Public Prosecutor also issued notices of prosecution in respect of the applicant for dishonest receipt of money by a public officer, offences against the legislation on the financing of political parties, corruption and misuse of public office.

14. The prosecutions against the applicant and other figures in politics, business and public institutions received attention from the media.

B. The telephone interceptions

1. The Metropolitana Milanese trial and the order for the interceptions

15. Amongst the cases against the applicant was that of *Metropolitana Milanese*, which concerned payments of large sums of money made

between 1983 and 1992 by a number of firms to the representatives of political parties and the influence the latter exerted on the board of directors of the *Metropolitana Milanese* company with a view to awarding contracts to those firms in connection with works on the Milan underground system.

16. On 8 June 1994 the investigating judge committed the applicant and twenty-nine co-defendants for trial before the Milan District Court. The applicant was charged, in particular, with interference with freedom of contract and corruption.

17. The first trial hearing took place on 20 September 1994. The applicant was not present and the District Court accordingly declared him absent (*contumace*). Some of the accused requested and obtained a plea bargain, while the position of some other accused persons was separated from that of the applicant. The trial before the Milan District Court thus continued only against the applicant and five co-defendants. The *Metropolitana Milanese* company joined the proceedings as a civil party.

18. In a decision of 7 July 1995 the Milan District Court remanded the applicant in custody. On 12 July 1995 counsel for the applicant informed the Milan District Court that he had learned of that decision through the press and asked for a copy of it. On 20 July 1995 the Milan District Court declared the applicant to be *latitante*, that is, to be deliberately evading the court's jurisdiction.

19. The applicant appealed against the decision of 7 July 1995. In an order of 25 September 1995, the Milan District Court dismissed the applicant's appeal. The court held that once the preliminary investigation was completed it was for the trial court to consider whether there were substantial indications of guilt and whether in particular there was still a danger that the applicant would abscond. In this respect the court noted that since 5 May 1994 it had been impossible to find the applicant in Italy and that in the various proceedings brought against him a number of coercive measures had been ordered that could not be enforced. Moreover, in judgments of 29 July 1994 and 7 December 1994 the applicant had been sentenced to terms of imprisonment. In the District Court's view, the applicant's lengthy stay abroad demonstrated his determination to evade the coercive measures ordered against him in 1994.

20. On 17 and 19 July 1995 the Public Prosecutor sought an order for the interception of the applicant's telephone calls between Italy and his home in Hammamet. The interceptions were aimed at gathering information with a view to arresting the applicant.

21. In a decision of 21 July 1995 the Milan District Court allowed those applications with a view to facilitating the arrest of the applicant. The court noted that the interceptions had a legal basis and were essential to supervise the applicant's movements and his personal and international relations which had allowed him to continue absconding. The interceptions, carried out by a specialist branch of the Italian police, began on 20 July 1995 and were concluded on 30 September 1995.

22. At the same time, the Public Prosecutor sought an order for the interception of the applicant's telephone calls between Italy and his home in Hammamet in the context of a set of criminal proceedings for defamation which were pending against the applicant. The Milan investigating judge allowed the interceptions with a view to gathering evidence against the applicant and to identifying the accomplices. The interceptions, carried out by a specialist branch of the Italian police, began on 1 August 1995. The prosecution applied for four extensions of the duration of the interceptions, which were allowed by the investigating judge on 4 and 12 August, and on 1 and 14 September 1995. A request for a further extension was refused on 30 September 1995. The interceptions were thus concluded on 3 October 1995.

2. The speech made at the trial hearing by Mr Paolo Ielo

23. At the hearing on 29 September 1995 in the case of *Metropolitana Milanese*, the Public Prosecutor in charge of the applicant's case, Mr Paolo Ielo, filed the transcripts of the telephone interceptions with the registry and asked that they be admitted as evidence against the applicant. The prosecution argued that they were necessary to assess the applicant's personality in order to determine the sentence if he were convicted, and that they could support the prosecution's allegation that the applicant intended to continue to abscond. The prosecution subsequently read out in court certain extracts of interceptions with a view to proving: a) that the applicant could leave Hammamet; b) that the applicant had started or influenced two virulent press campaigns against a magistrate of the Milan District Court and against an Italian political party; c) that the applicant was collecting information concerning certain politicians and magistrates, with a view to damaging their reputation; d) that the applicant continued to show aggressiveness towards the magistrates who were investigating him. The Public Prosecutor compared the applicant's conduct to that of a "certified criminal" (*criminale matricolato*) who attacked all those who had done their job and had tried to do it well. The Public Prosecutor declared that the transcripts of the telephone conversations were at the disposal of the District Court and of the defendants.

24. The transcript of the speech given by Mr Ielo at the hearing of 29 September 1995 reads as follows:

> "I am submitting these further pleas under Article 507. I have already explained why I intend to submit these documents, which consist, firstly, of assessments of Craxi's criminal potential, within the meaning of Article 133, with reference in particular to his conduct after the offence was committed, and, secondly, of assessments as to whether the measure affecting his personal freedom should be maintained for the reasons for which it was decided on, and whether it should be extended for other reasons. I shall try to be extremely brief, although what I have to say will take a little time. I have tried to divide the documents submitted according to subject-matter, and have put together the telephone transcripts - the documents include

the measures authorising the telephone tapping and the confiscation orders, which were moreover confirmed by the *tribunale della libertà* [the court responsible for deciding on the justification for measures restricting personal freedom or property rights]. The first set consists of telephone transcripts and clearly shows that Craxi can move about in Hammamet. This seems self-evident, yet Craxi is someone who, during the proceedings - all the proceedings taking place in Milan - said he had a legitimate reason for not attending and sent doctors' certificates. First he complained that the trials were not taking place, and now that the trials are taking place he wants them postponed on the grounds that he has a legitimate reason for being unable to attend. It is absolutely clear from these telephone transcripts that Craxi is someone who is able to move from the address of the subscription to the telephone line on which he receives calls. Why is this important? The reason is clear: Craxi is such a liar that he continues to lie even before the courts, saying things that are untrue and belied by documentary evidence.

The second point concerns Craxi as a danger to the community, in particular his capacity to operate in the current situation, and become involved in the processes whereby public opinion is shaped and in other processes, which I shall discuss. In my opinion, two operations are particularly important - two press campaigns which were co-ordinated ... or at any rate two press campaigns in which Craxi clearly played an important role. The first is a recent one: I am referring to the telephone calls on 14 September 1995 - I apologise for the vulgarity, but I am reporting the speech of others and am not responsible.

Subscriber Craxi, talking to Luca Iosi, says, 'the son of the hero' - the reference to Di Pietro is clear. An incomprehensible sentence 'He contributes to the tune of 2,400,000 a year, no less, when it all comes out.' Luca Iosi says, 'Now we take the wraps off the case and then we shoot him in the balls.' A week later the front page news is: 'Di Pietro too, has a house in the centre for 240,000.'

The second press campaign was co-ordinated directly from Hammamet. It is the press campaign that was waged in *Italia Settimanale*, whose editor is Alessandro Caprettini. What happened? In a nutshell, Craxi sent Alessandro Caprettini a file on the [Northern] League, concerning alleged arms dealings by the League, and Alessandro Caprettini willingly received and published it. What is particularly important is that, in my opinion, the file came from Craxi himself: it was found on Craxi's computer or, rather, on the computer in Craxi's office in via Boezio in Rome and, in particular, was referred to in the conversation between Caprettini and Craxi, in two respects. Firstly, the subscriber - when I say subscriber, I mean Craxi - says, word for word, 'In any case we can do more with them - we can investigate but we can also raise questions.' What he means is that they can be used to raise questions about the Northern League, an Italian political party receiving special attention from a fugitive from justice, who agrees with the editor of a weekly to launch a campaign of this type. The second important thing is: 'Of course I publish the article, and then I go to a prosecutor who is a friend of mine and say, “Hey, look into this affair, will you?” - but this is the sort of thing one does nothing about'. Further evidence that Craxi is a liar comes from an article in the *Indipendente*, which published the news that Craxi had denied being the author of the material sent to *Italia Settimanale*. I am producing this evidence to make it clear that when we talk of Craxi it is not like shooting at the Red Cross: we are talking of someone who is fully active and has a great capacity to influence the media. In this connection, there is a set of telephone transcripts which show that Craxi was in constant contact with journalists in a wide variety of areas.

Let us now move on to the last three points which, I believe, deserve a minimum of attention.

There is documentary proof, and proof from the telephone transcripts, that Craxi is mounting dossiers in Hammamet against some political activists. I am referring - with particular regard to the evidence that has been found - to dossiers against D'Alema. He is engaging in “dossierism” ...

The President: What does the neologism mean? Compiling information or a dossier?

The Public Prosecutor: Compiling information in order to attack someone's reputation. This is an activity that was also to be pursued against judges, including myself, but we shall discuss that later.

I said “dossierism”, which consists in compiling information that can damage people's reputation. This is documented by the telephone transcripts. One alarming aspect, in my view, is that it provides further evidence of Bettino Craxi's criminal potential.

I am talking about compiling dossiers of information designed to damage the reputation of certain eminent people, and I am thinking of D'Alema, Prodi and Del Turco, about whom I shall talk in connection with a specific note that was found in Craxi's office. The dossiers were mounted with a certain Tina Soncini Massari from Bologna, who is an old friend of Craxi's - by friend I mean someone with whom he had relations which were, I imagine, of a political nature - to the extent that Tina Soncini Massari appears on a list of presents that Craxi gave. She is a leading supporter of Gelli, and is known to the judicial authorities for having arranged to put the Bologna judicial authorities off the track when they were investigating the massacres, by bribing witnesses. In this connection, I can produce evidence that identifies Tina Soncini Massari: the order from the Bologna investigating judge, Dr Grassi if I am not mistaken, which shows that the most recent contact between Gelli and Tina Soncini Massari dates back to 1993, and which makes it clear that she attempted to put the investigators off track and bribed witnesses in the course of the proceedings. These are the sort of people Bettino Craxi, a fugitive from justice who is the subject of pre-trial detention orders, uses in order to hinder investigations. You will be able to see for yourselves what these documents contain, and I shall not dwell on them. What is significant is another note on Del Turco also found in Craxi's office. I shall read you out the beginning so you can understand what all this is about. The Italian Socialist Party administration has always helped to support the Socialist current of the CGIL [Federation of Italian Trade Unions]. Del Turco took over from Marianetti, and the flow of money never stopped. 'On average, Del Turco received 20 to 30 million a month from Balzamo. On the occasion of every election or conference, there were extraordinary payments for instance, and so it went on', and the note continues with information about the politician.

There are also telephone transcripts of statements by Bitetto in which he appears to be talking about D'Alema ... These are statements that have been filed and can be seen by anyone: it is clear to all why they are important from a criminal point of view.

Then there are documents that show that Bettino Craxi has, or at any rate had, relations with important members of the Italian institutions. I am referring in particular to the telephone transcript of 2 September 1995, during which the subscriber, Craxi,

talks to Margherita - she is not identified, who says: 'Alberto told me that he attended a meeting between Arafat and Silvio, and they spent ten minutes talking about you alone. Arafat came to Tunisia to see you and told Silvio Berlusconi to tell you that he too would be happy to have you as his guest in Palestine.' Again in connection with the capacity for communication of the accused, Bettino Craxi, who I repeat is a fugitive from justice and the subject of an arrest warrant for corruption with aggravating circumstances, there is a letter which the State Under-Secretary to the Prime Minister's office sent to Craxi's secretary on 25 June, in which the State Under-Secretary to the Prime Minister's office writes: “Dear Serenella, what you feared has happened, although both Giachieri and Carbonoli promise their good offices and will put things right'.

Basically, this concerns a recommendation addressed to the State Under-Secretary, who hastens to reply, saying ... Serenella is Serenella Carloni. And let it be clear that Serenella Carloni is nobody in her own right, and yet as Bettino Craxi's secretary she was still able, on 22 June 1995, to make recommendations concerning the allocation of service areas in Perugia.

The last point on which I intend to dwell is the constant attacks by Bettino Craxi on those who investigated him. The right to defend oneself is sacred and culminates in a fair trial, but when it is exercised by attacking those involved in the proceedings, those who carried out the investigations, it is, in my view, proof of a very highly developed potential for crime.

A note found in Craxi's office - Craxi's own office - you may, if you wish, in this connection hear Simonetta Carloni, who, I repeat, confirmed this - contained, among other pleasantries, a very precise reference in time in the form of Dell'Utri's release from prison - it is dated after Dell'Utri's release. Among the pleasantries, the note says: 'The Di Pietro case must become an exemplary case: we must get to the bottom of things because all the conditions are right. The usual logic of hitting one person in order to teach a hundred others a lesson. Forza Italia must regain its independence and this means it must not be subjected to the requirements of allies and exposed to dangers and uncertainty. There are key targets, particularly the Milan Pool [a group of Milan public prosecutors waging war on corruption]. We need to have the courage to call for its arrest before they do. We need to denounce the damage caused by the revolt. We must begin by using people as examples and waging war. We need to use parliamentary force in every way possible. This includes calling for enquiries with a lot of publicity and denouncing abuses of authority - by Craxi. There is the seizure of the parliamentary question from Maiolo, faxed by the Forza Italia parliamentary group ... Luca Mantovani, who sent it for information to Bettino Craxi two days later with a covering letter which says: 'I would point out, inter alia, that Maiolo has in the last few hours been collecting more documentation with a view to asking further questions in the near future about the management of the Milan Public Prosecutor's Office.' There are telephone transcripts in which we read: 'We need to bombard them in the press'. There are also attacks connected with what was published in *Il Mattino*. There is something for everyone - not just for the Milan Public Prosecutor's Office. There are attacks on other colleagues and references to other colleagues. A woman talking to Craxi says, 'He's bewildered too' and says that the person in question was used by the Milan group as a killer; she says she has heard from Biondi that the person coming down to speak is virtually in the service of Caselli. I will spare you all the rest because you can read it for yourself. I shall just read you one extract, partly because it concerns me and partly because it concerns these proceedings. 'So why doesn't someone else come?', with reference to Salamone, who is clearly involved ... he knows the truth of

the matter. 'I think Milan stopped him.' 'I am about' - here it is the subscriber, Bettino Craxi, speaking - 'to denounce this Ielo. Both Borelli's statements against Mancuso and the statements by Ielo come under Article 289 [of the Criminal Code]'.

He is speaking to a certain Salvatore, who has not yet been identified, but I hope very soon to identify him, who repeats, 'Yes, but he's dealing with it.' Craxi replies, 'He has nothing to do with this.' The person to whom he is speaking says, 'No, of course not. The minister's dealing with it.'

The President: The public prosecutor is requested to bring the charges without making allusions or taking stands, or making comments of a personal nature.

The public prosecutor: President, the charge is based on the premise that these telephone transcripts show, within the meaning of Article 133, behaviour - and this is where the accused, Bettino Craxi, has committed an offence - worthy of a certified criminal - it is the behaviour of someone who attacks all those who have simply done their job, because that is what they are paid to do and that is what they have chosen to do, and have sought to do it properly, but he doesn't care, he has to attack them and ...

President: We have understood why the public prosecutor has asked for these documents to be produced.

Public Prosecutor: The evidence submitted has been greatly summarised, President, because there is further material and I am at the disposal of defence counsel and the court. Ah, wait a minute - there are all the measures authorising the requests for telephone tapping and seizures; they are all appended.

The President: Appended to the individual sets of evidence ... these pleas from the public prosecutor ... Let us begin to hear Craxi's defence counsel, who is the person most directly concerned, and then if the others want to intervene ...”

25. The applicant's lawyer requested to be granted access to the decisions authorising the interceptions and to all the documents to which the Public Prosecutor had made reference. He declared that he would have commented on them at a later stage, observing, anyway, that some of the facts imputed to his client could not be described as aggressive behaviours, being rather simple statements of the truth.

26. The District Court reserved its decision on the prosecution's request of admittance of evidence until the hearing of 19 October 1995. The transcripts of the telephone conversations intercepted on the applicant's line were made available to the parties immediately after the hearing of 29 September 1995. Mr Guiso, the applicant's lawyer, was provided with the file including all the transcripts and afforded the possibility of making written submissions.

27. Respectively on 2 and 9 October 1995, the two applicant's counsels (Mr Lo Giudice and Mr Guiso) were informed that the telephone interceptions had been filed with the Public Prosecutor's Office's registry. The applicant's counsels subsequently objected to the admission of the interceptions as evidence. In particular, they argued that contrary to Article 268 of the Code of Criminal Procedure (hereinafter, the “CPP”) the

District Court had failed to hold a specific sitting before the trial hearing in the presence of both the defence counsels and of the prosecution in order to select those interceptions that were significant and exclude those considered illegal. Further, the prosecution had failed to apply for an extension of the fifteen-days duration of the telephone tapping, so that those interceptions which had been carried out after the first fifteen days were illegal and could not be used.

3. The divulging through the press of the content of the intercepted telephone conversations

28. The content and the name of the interlocutors of certain telephone conversations were subsequently published in the press.

29. In particular, "*L'Unità*" of 30 September 1995 published an article entitled “Dossier and conspiracies against Di Pietro [one of the magistrates of the clean hands team]". It stated that the interceptions made on the applicant's phone showed that he was preparing a defamatory campaign against some political men with the help of a "lady from Bologna", who was a member of an illegal association of free-masons. Moreover, in one of the interceptions Mrs Margherita Boniver (an Italian politician) had told Craxi that Mr Berlusconi (the current Prime Minister of Italy) had had a conversation with Mr Arafat about him and that Arafat would have "invited" Craxi. In another telephone call, the son of one of the applicant's lawyers had said that "the Minister" would have commenced proceedings against Mr Paolo Ielo.

30. On the same day, as well as on 1 and 2 October 1995, *L'Unità* also published the following extracts from some of the intercepted phone calls.

Conversation on 26 July 1995 with a certain Luca:

Craxi (speaking with Luca): “This Salamone [the Public Prosecutor of Brescia] is another one who wants to make a show of himself, I am going to see whether there are elements to introduce a criminal complaint against him.”

Conversation on 28 July with an unknown woman:

Woman: “I'm in a telephone box in Rome. I saw that friend of yours from the Senate.”

Craxi: “Why has this big friend of mine failed to say one single word?”

Woman: “He leaves the comments to you. He is lost and says that this person had been used by the Milan group as a killer. He says that he knew from Biondi that the one who spoke is in practice a servant of Caselli [a well-known Italian magistrate].”

Craxi: “Ah, yes?”

Woman: “Concerning the story of the brother.”

Conversation on 3 August 1995 with an unidentified friend:

Craxi: “They should go and see. It should be established whether a magistrate can buy a Mercedes at a very favorable price. May he borrow money from a friend in order to pay his gambling debts? So all this is legitimate, it can be done. Let's put it in the law: magistrates may borrow money without paying legal interests.”

Conversation on 14 August 1995 with an unknown man:

man: “Next week I will provide you with all the things you asked me on kronos [a press agency], the most important thing [is] that, at least until one month and a half ago, I do not know if now he has been revoked, Prodi was a counsellor of its biggest company.”

Craxi: “Ah, ah, ah, very well, give me all the data, please.”

man: “Counsellor of its biggest company, one of the five members of the directing body was Prodi, so ...”

Craxi: “Super, then I would like to have the material concerning that other thing ...”

Conversation on 25 August 1995 with Mr Filippo Facci [a journalist]:

Craxi: “... There are some pillars in *Tangentopoli* [term used by the press to design the corruption system disclosed by the clean hands inquiry] that stayed outside, they should be all those who stayed inside, then we can find the solution, but no kidding, I am not getting upset because of the apartment of D'Alema [an Italian politician who had subsequently been the Prime Minister of Italy] ... ”

Facci: “Sorry, the phone fell while I was taking the book, pages 192 and 193, where it speaks about Giovannini ...”

Craxi: “There is a tale, not really about that thing which will make a little scandal, but it will be a regular contract on which it was not possible to lay ... lies are others and this one Giovannini is another Greganti, close to D'Alema, fuck him. The Public Prosecutor's Office in Rome opened an inquiry for calumny, but the day of reckoning will come, son of ...”

Conversation on 2 September 1995 with a certain Valterino:

Craxi: “What is going on with the inquiry of Salamone? Now it does not concern Di Pietro, but myself?”

Valterino: “These are saying that they brought papers against you.”

Craxi: “What papers?”

Valterino: “The papers concerning the search.”

Craxi: “The papers concerning the search have nothing to do with Di Pietro.”

Conversation on 2 September 1995 with lawyer Guiso:

Guiso: “Di Pietro is in Cernobbio. Today *Il corriere della sera* says that he is nobody, and he had been recommended - and this is very important - by an agent of the branch of the American police investigating on financial matters. He is substantially accompanied by him, please consider that he had been three months in America and appears in Cernobbio, he should speak this morning on the subject “foreign politic, ethic and finance.”

Craxi: “It's crazy, but it is the subject of the Mac Namara Foundation.”

Guiso: “[This] shows that he was linked to America, not at all the uncertain future he had declared when he abandoned his post. Then, a journalist gave me a book with plenty of information. I cannot send it to you by fax as the characters are very small.”

Craxi: “Send it to me to that address by DHL. To that address you know.”

Conversation on 5 September 1995 with a journalist of “*Il Messaggero*”:

Journalist: “Did you hear about the new Italian politicians?”

Craxi: “Who are they?”

Journalist: “Di Pietro.”

Craxi: “A little adventurous trafficker (*avventuriero trafficante*).”

Conversation on 6 September on Craxi's line in Hammamet. Mrs. Tina Soncini speaks with a certain Michele:

Soncini: “I have interesting news to give him.”

Michele: “He says you can send a fax.”

Soncini: “I will send it tomorrow with some references to Bologna.”

Michele: “Let's use a code, a slightly modified code, we know of what kind of persons we are speaking about.”

Soncini: “I will send some telephone numbers ... I had been told that the mother is a very worldly-minded person.”

Michele: “Newly rich, all this is useful for us, maybe also apartments ...”

Conversation on 6 September 1995 with a certain Simona:

Craxi: “The problem was to build up the physiognomy of the personage ... In sum, this is the clue, it seems he had made a number of things on which he was wrong.”

Simona: “It is an enormous thing, there are ten documents per day.”

Craxi: “The trials he made, I know about something, we should look at them, people say that the tribunal shut the door in his face, they speak about the preparation of some books by certain friends, ask to send them the list of the members of the publishing house.”

Conversation on 11 September 1995 with Mr De Jorio, a journalist:

Craxi: “You should speak with somebody who will come and speak to me. The problem ... is to have the hands free and to have information.”

De Jorio: “We have some.”

Craxi: “What is a newspaper like this doing, scandal and satire, isn't it?”

De Jorio: “We were the sole newspaper is Italy which published documents on red *gladio* [a secret organization that the communist party was suspected to have built in order to achieve its aims during the cold war] ... judges have discontinued the proceedings on this matter.”

Craxi: “It is not the only matter on which they discontinued proceedings, there is a systematic tendency to discontinue proceedings concerning the communist party.”

De Jorio: “Do you know what we have discovered? That apart from Pio La Torre, also the gangster Felice Cavallero Pollini was a member of *gladio* and had been trained abroad ... also the one of the gold of Dongo.”

Craxi: “There are many things. They believe they have solved the problem with the scapegoat, they are under an illusion, they should have killed me, but as they did not succeed in this ... they tried twice, once the American intelligence, once the English one.”

De Jorio: “Mr. President, be careful, I know that here in Italy they want to organize [something], to come [over there] and take you, it seems they are offering 60 million [lire, which is approximately 30 987 euros] per person, within the intelligence, in order to take you and to bring you elsewhere.”

Craxi: “All right, all right, try to do so.”

De Jorio: “I am telling you this because a person I trust during his last meeting with me ... I know that a group Z has been constituted, kept in the shade of a free-masons organisation constituted by approximately 600 magistrates, and the head of this group would be Scalfaro [the President of the Italian Republic at the relevant time].”

Craxi: “I heard about this thing, but I do not believe it, I am not convinced.”

Conversation on 12 September 1995 with an unidentified journalist:

journalist: “Will Salamone come [to see you in Hammamet]?”

Craxi: “I have no idea. I am here, everybody knows where I can be found.”

Conversation on 12 September 1995 with an unknown journalist:

Journalist: “I will state that you said: “I have friends not only in the Arabic world and I think that in a European capital a center such as the Wiesenthal center will be built, [and this center] will investigate the judicial clans and all those who in these past three years had acted unfairly against me and against many other people.”

Craxi: “No, that is not good. First of all it is not only against me, it is not the judicial clans, but all the clans including the judicial ones ... [a center which] looks after and will look for the truth ... So much truth which still has to come out.”

Journalist: “Then I ask you the thing on Di Pietro and then you will answer “I'm writing a book which will be entitled “Mimì an Italian miracle.”

Craxi: “No, I want to write, I want to write a little book, not a book ... It's too important.”

Conversation on 21 September 1995 with Mr Pierangelo Maurizio, a journalist:

Maurizio: “Now I'm working for “*Il tempo*”, and the television show of Gianfranco about *Cinquestelle* has started again ... I saw that thing about Enel [the Italian electric energy producing company].”

Craxi: “This story on today's “*Il giornale*” is the end of the world, do you know whom the political personality I am referring to is?”

Maurizio: “No, frankly not.”

Craxi: “It's D'Alema, there is a statement [made by] Bitetto [a director of Enel who was accused of corruption and made statements calling into question the criminal liability of Craxi and other politicians].”

Maurizio: “... about which you speak in your books.”

Craxi: “I wasn't aware, there is a statement [made by] Bitetto exposing that years ago, but there is a continuity in the criminal offence, he took part in a meeting in Bari or Brindisi in which were present D'Alema, the regional secretary of PSI and others, where he, as a representative of Enel ... discussed the contracts for public works in Brindisi.”

Maurizio “What about this statement?”

Craxi: “I have it, I will forward it to you.”

Maurizio: “Maybe, I will call you tomorrow.”

Craxi: “Now a number of things will come out on that young man.”

Maurizio: “They are getting a different turn ... all the things about D'Alema.”

Craxi: “Those things from Venice are the less [important], there are other things ... I would like to be personally informed. I would like to have a fax number where I can send things to you.”

Conversation on 23 September 1995 with a certain Rosario:

Rosario: “The fax is broken, I would have liked to send you some extracts from yesterday's and today's newspapers concerning that little dog named Lulù [probably, the former Milan magistrate Antonio Di Pietro] and his son. Did you see them?”

Craxi: “Yes, yes, thanks.”

Conversation on 23 September 1995 with Roberto “Bobo” Craxi, the applicant's son:

Bobo: “The thing will come out next Monday.”

Craxi: “Not the next one.”

Bobo: “Not the next one, also because next [Monday] there is the Andreotti case. It will come out Monday, it's 25 pages and they will anticipate it.”

Craxi: “all right, it will be a hot week and they will be afraid.”

Conversation on 23 September 1995 with Mrs Pia Luisa Bianco, a journalist:

Bianco (speaking with Craxi): “The thing has already been paged up. I will forward it to you in advance ... we will put a big emphasis on it, we already have an agreement with *Il corriere della sera* in the sense that they will make big titles, don't worry because it is very well managed, you will see, it will have a big impact.”

Conversation on 24 September 1995 with Mrs. Tina Soncini:

Soncini: “Apart from these documents, I have a channel to acquire more detailed information, but I need that you organize an appointment.”

Conversation on 25 September 1995 with a certain Luca:

Craxi: “They should be attacked frontally, without fear, to Mancuso they are doing ... This Ielo is behaving like a pure *mafioso*, an arrogance from the power.”

Luca: “There is no other alternative but screaming it in their face, we will do it, we will do it. Here everything is all right except for that little asshole of Intini [an Italian politician].”

Conversation on 25 September 1995 with a certain Salvatore [probably Mr Salvatore Lo Giudice, the son of one of the lawyers officially representing Craxi in the *Metropolitana Milanese* trial. Mr Salvatore Lo Guidice, who is also a lawyer, acted as his father's substitute during some hearings]:

Salvatore: “Yes, he will think about it.”

Craxi: “He has nothing to do with this.”

Salvatore: “No, sure he has, the ministry will think about this.”

Craxi: “Because it's 289 [Article of the Criminal Code punishing the attempt to impede the functioning of the Constitutional organs].”

Salvatore: “This is something up to him.”

Craxi: “To introduce a claim calmly is one thing, but one cannot make all the comments and the political polemics, the speculation made by Ielo is a defamatory one.”

Salvatore: “But now the serious point is to give him a hand. It is essential to break them on this Venice thing which is the only one they are afraid of, so as he has a number of suspicions, he needs it as he needs bread.”

Craxi: “I am completely unaware of that story.”

Salvatore: “I have a lot of material.”

Craxi: “I will immediately deal with this matter, tomorrow I will send faxes and then I will keep [you] informed.”

Salvatore; “Then, it is important to ask for the availability of the State.”

Craxi: “Is it enough that it arrives immediately, then you will call when it leaves.”

Salvatore: “We are doing everything very quickly, then I will go directly to Rome. In any case this one with whom we are working together can be trusted, then the serious thing is that he is using the same elements of Milan, therefore it would be a big mess if it comes out that with the same elements Milan failed to proceed, there are many ideas to be used.”

Conversation on an unspecified date with a certain Mr. Paolo Farina:

Craxi: “That one is an idiot, a first-class idiot.”

Farina: “He was replaced by ...”

Craxi: “He was replaced because he was incompetent.”

Farina: “He was replaced by Andò.”

Craxi: “He was incompetent.”

Farina: “He tried to suggest that his replacement ...”

Craxi: “Of course not ...”

Farina: “They presented themselves as supporters of An [*Alleanza nazionale*, an Italian political party].”

Craxi: “Precisely ... but that one is an idiot, an unpretentious personage, I do not know how he could have arrived there.”

L'Unità also reported that in another conversation with an unknown person, Craxi had showed his appreciation for a recital with Pavarotti transmitted by the Italian television; when he had learned that his friend had not seen it, he had said: “Phone Rossella [the director of a news bulletin] and make them send the cassette to you.”

31. "*Il Giorno*" of 30 September 1995 published an article entitled "The attempts to create false evidence by the friend of the head of P2 [an illegal free masons association]". It made reference to a telephone conversation that the applicant had had on 24 September with Mrs Tina Soncini, in which the discussion concerned "documents made *ad hoc*" in order to be sent to an editorial company. The article reported the links allegedly existing between Mrs Soncini and Mr Licio Gelli, head of the P2.

32. "*La Repubblica*" of 30 September 1995 published an article entitled "We will ask for the arrest of the [clean hands] Pool". As far as it concerned the telephone interceptions, the article indicated the names of some journalists who had spoken with the applicant on the phone, and the content of the telephone conversation with Mrs Boniver reported by *L'Unità*. *La Repubblica* moreover reported the content of a phone call that the applicant had had with Mr Luca Iosi, his "speaker in Italy", on 14 September 1995. The conversation at issue was interpreted as an attempt to attack Mr Di Pietro in relation to an apartment rented to his son. Its content was the following.

> Iosi: "The son of the hero contributes each year for 2 400 000 lire [approximately 1 239 euros]."
>
> Craxi: "So much... When will this thing come out?"
>
> Iosi: "Now we will make the case grow and then we will shoot them right in the balls [Italian expression which means to attack someone hardly], 200 000 lire [approximately 103 euros] in spite of the rent rates and formally in his own name only in order to put his son in it."

33. *La Repubblica* also reported the content of some telephone conversations the applicant had had with Mrs Tina Soncini, with a certain Anna, with Mr Alessandro Caprettini (the director of an Italian newspaper), with Mrs Alda D'Eusanio and Mr Enrico Mentana (two journalists), and with a certain Ugo. Their content is the following.

> Conversation on 21 July 1995:
>
> Craxi: "Enrico, in this moment you are not helping me."
>
> Mentana: "You mean, honouring the truth."
>
> Craxi: "By reporting the things I am saying, for the Holy Virgin's sake, nothing more ... The boys from *Giovine Italia* [a political organisation] did something this morning."
>
> Mentana: "I'm not aware of this."
>
> Craxi: "Think about it, nobody was there, there were no televisions, now you should report this news, report this news at least, they were one hundred, they are good, I have sent a memorial of historical nature, something about the *Giovine Italia* of Mazzini [an Italian patriot] ... if you continue, you will see the little surprise."

Conversation on 24 July 1995:

Craxi: “I should come as I came many times in Italy with moustaches: in fact I was coming with a wig and false moustaches ... Idiots.”

D'Eusanio: “This is the moment to do something about the procedural guaranties, about the magistrates, about the *pentiti*, Contrada, Tortora [persons accused by *pentiti* in mafia trials], if you are not taking advantage from these occasions, there would be nothing you could do.”

Craxi: “Let's say the truth, there are some gangs organising a push-off, real gangs.”

D'Eusanio: “Bettino [nick-name of Craxi], there are idiots, inefficient persons, cowards.”

Craxi: “no, no, they reached an agreement, and lack of courage is inside the information, as all this wouldn't happen if there weren't a number of cowards in the newspapers and the televisions.”

D'Eusanio: “My director is a person who believes in nothing, therefore he is keen on his position and there is somebody protecting him and his friends [to continue] believing in nothing.”

Conversation on 3 August 1995:

Caprettini: “I believe, the funny thing is the following, you know what I am going to do, I will of course publish this thing, then I will address myself to a magistrate friend and then I'll tell him: let's investigate on this matter, so we'll keep the problem alive.”

Conversation on 29 August 1995:

Craxi (speaking with Ugo): “I can't understand what is going on in Italy, if we are going to the elections immediately or not; in the affirmative, there is nothing to do; in the negative, in eight months time we will sort out a socialist list, we will put a nice pink carnation [the symbol of the PSI] on it. I will make the socialist list being made, no kidding. This situation cannot be accepted anymore.”

Conversation on 20 September 1995:

Soncini: “I had information about this, it is hearsay, the father of D'Alema in 1941 was the Secretary of the Guf [University fascist group] of Ravenna, it is for sure.”

Craxi: “I would like to have a more precise ..”

Soncini: “I can provide you with the whole story, because after having caused the death of three hundred people, he told it to a journalist.”

Craxi: “And then we will deal also with the betrayer.”

Conversation on 25 September 1995:

Craxi: “Send me a text.”

Anna: “it is very important, I will send it to you and you will forward it to the Public Prosecutor of Venice, Mr Nordio ... Now the important point is to give them a hand, to attack them on this Venice thing which is the only one they fear ... this person who is working with us is somebody I trust, then the serious thing is that he is using the same elements of Milan, which will prove that with the same elements Milan failed to proceed.”

34. *La Repubblica* also reported the following telephone conversation current on 10 August 1995 between Anna Craxi, the applicant's wife, and Mrs Veronica Berlusconi, the wife of the actual Prime Minister of Italy.

Veronica Berlusconi: “Anna, how are you?”

Anna Craxi: “And how do you do, everything all right?”

Veronica Berlusconi: “Everything all right, we arrived in Sardinia two days ago. The trip was extremely tiring ...”

35. *La Repubblica* noted that “the day on which Lady Veronica made her polite phone call to her friend, the husband of the latter had already been declared *latitante* [which means deliberately evading justice] by the Milan District Court”.

36. *Il corriere della sera* of 1 October 1995 published the content of a telephone conversation that the applicant had with a certain Salvatore, afterwards identified as Mr Salvatore Lo Giudice. The text is the following.

Salvatore: “We should say we are ready to be heard. Because this is an interesting situation. I had a number of contacts with this magistrate.”

Craxi: “All right. In the meanwhile I do not even know what these things are.”

Salvatore: “It's obvious, but he knows that it is not absolutely irrelevant.”

Craxi: “In view of a speech of a general nature.”

Salvatore: “Correct. He knows that [this] has nothing to do with that other story; it's only stuff he inserted in order to come and hear you.”

Craxi: “Send me a text.”

Salvatore: “It's very important. I'll send it and you will forward it to Mr Nordio, Public Prosecutor attached to the Venice District Court. Do you have that note?”

Craxi: “I did not even read it.”

Salvatore: “Look at it, because it is a serious thing. There won't be any problem with Tunisia.”

Craxi: “Here they are a little bit upset with Italy, in general. I will intervene.”

Salvatore: “In this way, we will create a great problem for them, as this [person] told me very interesting things. For instance, he has consulted Digos [a branch of the

Italian police], and you are in the list of *latitanti*. So a big contrast will be created, which would help us a lot."

Craxi: "Why?"

Salvatore: "Because then we will be able to prove that the order declaring you *latitante* was arbitrary. So, if we can bring him [seeing you] it would be difficult for them to justify the fact that you are evading justice."

Craxi: "So the other one is not going to come?"

Salvatore: "He has been blocked in Milan."

Craxi: "I do not believe it."

Salvatore: "Yes, I know it for sure, he told me. This one, on the contrary, is ready to do seas and mountains [Italian expression which means everything is necessary in order to achieve one's aims]."

Salvatore: "Then at the Ministry there is an agreement, it would be ..."

37. On the same day *Il corriere della sera* published an interview with Mr Salvatore Lo Giudice, who explained that the telephone call at issue did not concern a "conspiracy" organised by the applicant, and a letter of Mrs Belusconi, challenging the opportunity of putting in the file the conversation she had had with the applicant's wife. Articles appeared in *Il Corriere della sera* and in other newspapers concerning interviews and declarations made by Mr Nordio, Public Prosecutor attached to the Venice District Court, who criticised the release into the public domain of the telephone interceptions and declared that he had never followed irregular procedures in order to serve the interests of the applicant. The latter was at freedom to believe that he could have taken advantage from the legitimate and impartial investigations that Mr Nordio was making. Other declarations made by the persons who spoke with the applicant on the phone were published by the press, as well as the replies of the applicant to the speech made by Mr Paolo Ielo on 29 September 1995. The applicant stated, in particular, that the Public Prosecutor at issue was a "certified liar" (*bugiardo matricolato*) and had used a "Stalinist" language.

38. In the following days, *La Repubblica*, *L'Unità* and *Il Corriere della sera* published articles which referred to the above mentioned telephone conversations and to the speech made by Mr Paolo Ielo at the hearing of 29 September 1995. They included attempts to interpret the precise meaning of the conversations. Some of the newspapers commented that the transcripts of the telephone conversations showed, together with other elements, that the applicant was trying to use his influence and his relationships to organise a defamatory campaign against his political adversaries and against the magistrates who were investigating on him. It was moreover discussed in the press whether the applicant had the power to

influence the political line of the party *Forza Italia*, with some members of which he had, apparently, kept close contacts. *La Repubblica* of 2 October 1995 published an article written on 18 September 1995 by the applicant himself and containing considerations of a political nature.

39. Mr Paolo Ielo granted the press a number of interviews on the matter; he declared he regretted having compared the applicant to a "certified criminal", but that it was his duty to control the telephone conversations of a person who was deliberately evading a court order. Even if the telephone interceptions did not disclose any criminally relevant behaviour, they should be taken into account in order to assess the applicant's personality and to fix the penalty that the Public Prosecutor could have demanded at the outset of the court proceedings.

4. The decisions on the lawfulness of the telephone interceptions

40. At the hearing of 19 October 1995 the Milan District Court asked the parties to clarify who had disclosed to the press the content of the telephone interceptions before the competent judicial authority had had the opportunity of pronouncing itself on their admissibility. Mr Ielo pointed out that immediately after the hearing of 29 September 1995, the file containing all the telephone interceptions had been forwarded to Mr Guiso, the applicant's lawyer; the file had been returned to the Public Prosecutor Office only the following Monday, when part of the transcripts had already been released into the public domain. Mr Ielo concluded that the Public Prosecutor could not be held responsible for the divulging of these acts. The representative of the civil party declared that he had nothing to say on this point: he had not copied the transcripts and he had not given them to third persons. Mr Guiso confirmed the version given by Mr Ielo. He indicated that he had copied the file which had been forwarded to him, but that this was done in a particularly secret manner, in order to protect the applicant's interests and to avoid any divulging which could be prejudicial for him. Some journalists had requested to be granted access to the transcripts, but Mr Guiso had categorically refused. Mr Giuso underlined that, as prescribed by the law, the file with the transcripts had been made available to all the parties of the trial, and not only to the applicant's defence lawyers. Mr Guiso concluded that the divulging of the transcripts was clearly due to the action of third persons. He was not interested in that, the only point he wanted to raise being why the telephone interceptions had been presented at the public hearing. The lawyers of the other accused persons declared that they were not responsible for the disclosure.

41. In an order of 19 October 1995, the Milan District Court found that contrary to the applicant's allegations (see paragraph 27 above), the failure to hold a specific hearing prior to the trial in order to select the intercepted telephone conversations did not amount to a violation of the relevant provisions of Italian law. The District Court first observed that according to

Article 271 of the CPP and to the Court of Cassation's case law, failure to respect the formalities indicated in Article 268 §§ 4 and 6 of the CPP did not prevent the use of the interceptions. It moreover noted that according to Article 295 § 3 of the CPP, the said Article 268, which concerned wire-tapings made during the preliminary investigations, could apply to the trial phase only "if possible". In the present case, the selection of the material had been made in the presence of the parties and in its "natural" place, which was the trial hearing. The District Court however decided not to make use of the information yielded by the telephone interceptions made between 20 July and 3 August 1995, in that they were relevant but not "absolutely necessary" within the meaning of Article 507 of the CCP in order to assess the applicant's personality. The District Court further held that the interceptions made after 3 August 1995 could not be used as evidence, as no application had been made by the prosecutor for an extension of the duration of interception, nor could such authorisation be considered as having been implicitly granted for as long as the applicant would be absconding.

C. The applicant's conviction in the *Metropolitana Milanese* trial

42. In a judgment of 16 April 1996, the Milan District Court convicted the applicant to a penalty of eight years and three months' imprisonment and to a fine of 150 million Italian lire (approximately 77,468 euros). This sentence was confirmed on appeal on 5 June 1997. However, the appeal judgment was quashed by the Court of Cassation and the case was re-heard by the Milan Court of Appeal, which, on 24 July 1998, reduced the penalty imposed on the applicant to four years and six months' imprisonment. This decision became final on 20 April 1999.

43. The applicant complained about the unfairness of the *Metropolitana Milanese* criminal proceedings in the ambit of application n° 63226/00, introduced on 15 October 1999. In a decision of 14 June 2001, the Court declared this application inadmissible.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Accomplishment of investigation acts after the committal for trial and access to these acts and to the documents included in the Public Prosecutor's file

44. Article 430 § 1 of the CPP allows the Public Prosecutor to accomplish, even after the committal for trial, further investigation acts (*attività integrativa di indagine*) with a view to presenting requests to the trial judge. All the documents concerning these acts are immediately filed

with the Public Prosecutor's registry. Counsels for the defendants and for the civil party are granted access to the acts at issue and may obtain a copy of them.

Article 268 of the CCP states that the Public Prosecutor should file in its registry the transcripts of any telephone conversation which has been wire-tapped. Counsels for the defendants and for the civil party are granted access to these transcripts and may obtain a copy of them.

B. The prohibition to publish acts and documents

45. Article 114 § 1 of the CCP prohibits the partial or total publication of any act or document to which the secrecy rule applies. According to Article 329 of the CCP, this rule of secrecy covers all the acts made by the Public Prosecutor or the police during the investigations, but ceases to apply at the end of the preliminary investigations. Once the trial has commenced, the prohibition to publish covers all the acts included in the Public Prosecutor's file (*fascicolo del pubblico ministero*) until the delivery of the appeal judgment (see Article 114 § 3 of the CCP). The acts not covered by the secrecy rule can always be published (see Article 114 § 7 of the CCP).

C. The rules concerning the selection of the material obtained during the telephone interceptions

46. According to Article 268 § 6 of the CPP, the representatives of the parties are informed that, within a determined time-limit, they may examine the transcripts of the interceptions and hear their content. Once this time-limit has expired, the judge should order the inclusion into the file of all the conversations which are not manifestly irrelevant. He should proceed, even *ex officio*, to the exclusion (*stralcio*) of the material whose use is prohibited. The Public Prosecutor and the defence lawyers have the right to take part to the exclusion procedure and are informed about it at least twenty-four hours in advance (*Il pubblico ministero e i difensori hanno diritto di partecipare allo stralcio e sono avvisati almeno ventiquattro ore prima*).

According to Article 271 of the CPP, the results of the telephone interceptions cannot be used if they have been done in cases non permitted by law or if the prescriptions of Articles 267 and 268 §§ 1 and 3 have not been respected.

Article 295 § 3 of the CPP stipulates that in order to facilitate the researches of a person who is deliberately evading the court's jurisdiction, the Public prosecutor or the judge may order telephone interceptions. In this case, the provisions of Article 268 should apply “if possible” (*ove possibile*).

THE LAW

I. SCOPE OF THE CASE

47. Following the Court's admissibility decision, the applicant made submissions on the merits in which he complained about the unlawfulness of the telephone interceptions.

48. The Court recalls that, in its decision of 7 December 2000, it declared admissible the applicant's complaint relating to the release into the public domain of the telephone interceptions, whilst declaring inadmissible the remainder of the applicant's complaints, including the question of the alleged unlawfulness of the interceptions at issue. Thus, the scope of the case now before it is limited to the complaints which have been declared admissible (see *Lamanna v. Austria*, no. 28923/95, § 23, 10 July 2001, unreported).

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

49. The applicant complained about the release into the public domain and the subsequent divulging through the press of the content of the intercepted telephone conversations. He argued in particular that the Public Prosecutor's decision to deposit material - which he considered of no probative value - in the registry was contrary to Article 8.

This provision reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

1. The parties' submissions

(a) The applicant

50. The applicant criticised that reference to certain interceptions had been made in open court at the hearing of 29 September 1995 in the presence of the press without imposing any reporting restrictions. He considered that their content was not relevant for the trial and was disclosed with a view to damaging his public image and that of the persons who had talked with him on the phone. In particular, some of the comments made by Mr Ielo about Mrs Tina Soncini were false, incorrect and amounted to a

form of libel. Moreover, the applicant alleged that the authorities failed to respect the procedures prescribed by law, and notably by Article 268 of the CPP. In this respect, he observed that before presenting them at the public hearing, the Public Prosecutor should have filed the transcripts of the intercepted conversations with the registry, thus rendering the defence aware of their content. In addition to that, a specific hearing should have been held in private in order to proceed to the exclusion (*stralcio*) of the material which could not have been used (see paragraph 46 above).

51. At any rate, the applicant considered that the source of the press information had not been the hearing, but mainly the deposit of the bulk of the transcriptions in the registry. In this respect, the applicant underlined that the Public Prosecutor had failed to distinguish, in the material which he deposited in the court's registry, between material which he considered might be probative and the remaining interceptions. He could not have been unaware of the confidential and private contents of the material which he had examined and knew that its deposit in the registry would make it public. In the applicant's view, nothing in Italian law required the deposit of all the interceptions in the registry, and nothing prevented the prosecution from providing the applicant with all or part of the interceptions before their deposit.

52. The applicant furthermore underlined that the *mani pulite* campaign had been conducted in an unfair way and pursuing a political aim. In particular, a number of violations of the secrecy covering the investigations were committed in order to attract the attention of the media. He concluded that by releasing the interceptions into the public domain the Italian authorities had failed to respect the positive obligations imposed on them by Article 8 of the Convention.

(b) The Government

53. The Government argued that the circumstance that the press had had access to the transcriptions of the telephone interceptions was in conformity with the applicable legislation as to the publicity of hearings and of non-classified trial documents. The prosecution had legitimately chosen to seek the inclusion of the interceptions as evidence at the public hearing, so that counsels for the applicant would have a full opportunity of challenging that request. In these circumstances, the judicial authorities bore no responsibility in respect of the divulging of the content of the intercepted telephone conversations for which the prosecution had sought the inclusion as evidence against the accused.

54. As regards the remainder of the telephone interceptions (those whose admission as evidence had not been sought by the prosecution), the Government pointed out that they had been deposited in the registry in order to disclose them to counsels for the applicant and thus to give them the opportunity to use them. Access to documents filed with the registry is

granted only to the parties and to their counsels, and not to journalists or to other persons. Moreover, after their deposit in the Public Prosecutor's registry, the documents are not anymore covered by the secrecy rule, and may be published according to Article 114 § 7 of the CCP. The fact that also the press had had access thereto did not entail any responsibility of the State, as the Public Prosecutor could not have imagined that someone could have disclosed to the journalists the content of the interceptions. The Government further pointed out that, before the deposit in the registry, the transcripts had been duly kept confidential, as it appears from the fact that before that date their content was not known to the press.

55. The Government moreover considered that the allegation of the applicant, according to which the Public Prosecutor had failed to distinguish the material which he considered might be probative from the remaining interceptions, was unfounded and lacked any basis in the Italian legal system. In fact, it is up to the trial judge, and not to the prosecution to decide which documents are relevant for the decision on the charges. According to the Government, by depositing all the material in his possession in the registry, the Public Prosecutor provided the accused with a fair opportunity of taking knowledge of the elements against him.

56. The Government finally observed that by publishing the material concerning the telephone interceptions, the press exercised its right, guaranteed by Article 10 of the Convention, to impart information to the public. It is true that the press should not overstep the bounds imposed by the protection of the reputation of others; however the Government observed that the applicant had failed to produce any document showing that the persons involved in the telephone interceptions had availed themselves of the domestic remedies protecting their right to enjoy a good reputation, such as an action for damages before the civil judge or a request for the opening of criminal proceedings.

2. The Court's assessment

57. The Court points out that telephone conversations are covered by the notions of “private life” and “correspondence” within the meaning of Article 8 (see, among other authorities, the following judgments: *Malone v. the United Kingdom* of 2 August 1984, Series A no. 82, p. 30, § 64; *Kruslin v. France* and *Huvig v. France* of 24 April 1990, Series A no. 176-A and B, p. 20, § 26, and p. 52, § 25; *Halford v. the United Kingdom* of 25 June 1997, *Reports of Judgments and Decisions* 1997-III, pp. 1016–17, § 48; *Kopp v. Switzerland* of 25 March 1998, *Reports* 1998-II, p. 540, § 53). Therefore, the reading out at the hearing of 29 September 1995 and the disclosure of the content of the telephone interceptions to the press amounted to an interference with the exercise of a right secured to the applicant in paragraph 1 of Article 8 of the Convention. The Government did not dispute this.

58. Such an interference will contravene Article 8 unless it is "in accordance with the law", pursues one or more of the legitimate aims referred to in paragraph 2 and furthermore is "necessary in a democratic society" in order to achieve them (see *Petra v. Romania*, judgment of 23 September 1998, *Reports* 1998-VII, p. 2853, § 36).

59. In order to ascertain whether the interference complained of was in conformity with the Convention, the Court will examine separately the publication by the press of passages of the telephone conversations and the reading out at the trial of the content of some of the interceptions.

(a) The publication by the press of passages of the telephone conversations made by the applicant

60. The Court notes that the applicant criticised, in particular, the fact that after the hearing of 29 September 1995, the press published the content of certain conversations intercepted on his telephone line in Hammamet.

61. The Court observes that the reference made by the Government to Article 114 § 7 of the CCP seems to suggest that the publication at issue was lawful under the Italian legal system. However, in the particular circumstances of the present case, the Court does not consider it necessary to ascertain whether the interference complained of was "in accordance with law" and whether it pursued a legitimate aim, but will assume for the purposes of this case that these requirements were complied with.

62. The Court recalls that freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance (see, among other authorities, *Jersild v. Danemark*, judgment of 23 September 1994, Series A no. 298, p. 23, § 31).

63. As concerns more specifically reporting by the press of news concerning pending criminal proceedings, it is to be pointed out that there is general recognition of the fact that the courts cannot operate in a vacuum. Whilst the courts are the forum for the determination of a person's guilt or innocence on a criminal charge, this does not mean that there can be no prior or contemporaneous discussion of the subject matter of criminal trials elsewhere, be it in specialised journals, in the general press or amongst the public at large (see, *mutatis mutandis*, *Sunday Times v. the United Kingdom (no. 1)*, judgment of 6 November 1980, Series A n° 38, p. 40, § 65).

64. Reporting, including comment, on court proceedings contributes to their publicity and is thus perfectly consonant with the requirement under Article 6 § 1 of the Convention that hearings be public. Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them (see *Worm v. Austria*, judgment of 29 August 1997, *Reports* 1997-V, pp. 1551-1552 , § 50). This is all the more so where a public figure is involved, such as, in the present case, a political man and former Prime Minister. Such persons inevitably and knowingly lay themselves open to close scrutiny by both journalists and the

public at large (see, among other authorities, *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103, p. 26, § 42).

65. However, public figures are entitled to the enjoyment of the guarantees set out in Article 8 of the Convention on the same basis as every other person. In particular, the public interest in receiving information only covers facts which are connected with the criminal charges brought against the accused. This must be borne in mind by journalists when reporting on pending criminal proceedings, and the press should abstain from publishing information which are likely to prejudice, whether intentionally or not, the right to respect for the private life and correspondence of the accused persons (see, *mutatis mutandis*, *Worm v. Austria*, judgment quoted above, *ibidem*).

66. The Court observes that in the present case some of the conversations published in the press were of a strictly private nature. They concerned the relationships of the applicant and his wife with a lawyer, a former colleague, a political supporter and the wife of Mr Berlusconi. Their content had little or no connection at all with the criminal charges brought against the applicant. This is not disputed by the Government.

67. In the opinion of the Court, their publication by the press did not correspond to a pressing social need. Therefore, the interference with the applicant's rights under Article 8 § 1 of the Convention was not proportionate to the legitimate aims which could have been pursued and was consequently not "necessary in a democratic society" within the meaning of the second paragraph of this provision.

68. It remains to ascertain whether the interference complained of could be imputed to the State and therefore engage the responsibility of Italy before the Convention organs.

69. In this respect, the Court notes that the publication was made by private newspapers. It has not been suggested by the applicant that these newspapers were in some way under the control of the public authorities.

70. The interceptions published by the press had to some extent not been read out in court, as the prosecution had not sought their admission as evidence against the applicant. In these circumstances, the Court finds it established that the source of the journalists' information was the bulk of the interceptions deposited in the registry.

71. As concerns the way in which the press had access to these transcripts, the Court cannot accept the applicant's allegation according to which by depositing in the registry the bulk of the interceptions the Public Prosecutor chose to release them into the public domain. It is apparent from the relevant provisions of domestic law (see paragraph 44 above) that under the Italian legal system the deposit of a document in the registry does not render it accessible to the public, but only to the parties.

72. In these circumstances, the Court reaches the conclusion that the divulging of the conversations through the press is not a direct consequence of an act of the Public Prosecutor, but is likely to have been caused either by

a malfunction of the registry or by the press obtaining the information from one of the parties to the proceedings or from their lawyers.

73. Nevertheless, the Court recalls that while the essential object of Article 8 is to protect the individual against arbitrary interferences by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in effective respect for private life (see *Botta v. Italy*, judgment of 24 February 1998, *Reports* 1998-I, p. 422, § 33). The Court therefore needs to ascertain whether the national authorities took the necessary steps to ensure effective protection of the applicant's right to respect for his private life and correspondence (see, *mutatis mutandis*, *Guerra and others v. Italy*, judgment of 19 February 1998, *Reports* 1998-I, p. 227, § 58).

74. In this context, the Court considers that appropriate safeguards should be available to prevent any such disclosure of a private nature as may be inconsistent with the guarantees in Article 8 of the Convention (see, *mutatis mutandis* and in relation to disclosure of personal health data, *Z v. Finland*, judgment of 25 February 1997, *Reports* 1997-I, p. 347, § 95). Furthermore, when such disclosure has taken place, the positive obligation inherent in the effective respect of private life implies an obligation to carry out effective inquiries in order to rectify the matter to the extent possible.

75. In the present case the Court recalls that disclosures of a private nature inconsistent with Article 8 of the Convention took place (cf. § 67 above). It follows that once the transcripts were deposited under the responsibility of the registry, the authorities failed in their obligation to provide safe custody in order to secure the applicant's right to respect for his private life. Also, the Court observes that it does not appear that in the present case an effective inquiry was carried out in order to discover the circumstances in which the journalists had access to the transcripts of the applicant's conversations and, if necessary, to sanction the persons responsible for the shortcomings which had occurred. In fact, by reason of their failure to start effective investigations into the matter, the Italian authorities were not in a position to fulfil their alternative obligation of providing a plausible explanation as to how the applicant's private communications were released into the public domain.

76. The Court holds, therefore, that the respondent State did not fulfil its obligation to secure the applicant's right to respect for his private life and correspondence. There has consequently been a violation of Article 8 of the Convention.

(b) The reading out of the telephone interceptions at the hearing of 29 September 1995

77. The Court observes that at the hearing of 29 September 1995, the Public Prosecutor read out in open court certain extracts of the interceptions, as being part of the material which he requested to be admitted as evidence.

In particular, according to the Public Prosecutor, the interceptions at issue could have proved that the applicant was trying to abscond and to damage the reputation of some magistrates and politicians.

78. The Court should first ascertain whether the interference complained of was "in accordance with the law". Even if it is primarily for the national authorities, notably the courts, to interpret and apply the relevant internal rules (see *Kruslin v. France*, judgment of 24 April 1990, Series A no. 176-A, pp. 21-22, § 29, and *Amann v. Switzerland* [GC], no. 27798/95, § 52, ECHR 2000-II), the Court can and should exercise a certain power to review whether domestic law has been complied with.

79. In the applicant's submissions, according to Article 268 of the CPP, before presenting them in open court, the Public Prosecutor should have filed the transcripts of the intercepted conversations with the registry, thus allowing the defence to present their comments; moreover, a specific hearing should have been held in private in order to proceed to the exclusion (*stralcio*) of the material which could not have been used (see paragraph 46 above).

80. In the Court's view, the aim of this was to provide the parties and the judge with an opportunity to select the interceptions which were of no avail for the purposes of the judicial proceedings and whose disclosure could have adversely, and uselessly, interfered with the accused person's right to respect for private life and correspondence. Its application therefore constituted a substantial safeguard for the right secured by Article 8 of the Convention.

81. In using its uncontested right to interpret domestic law, the Milan District Court held that Article 268 did not apply in the applicant's case, this provision concerning only the wire-tapings made during the preliminary investigations (see paragraph 41 above). However, the Court notes that according to one of the provisions on which the domestic jurisdiction based its reasoning, namely Article 295 § 3 of the CPP, when telephone interceptions were ordered with a view to facilitating the researches of a person who was deliberately evading the court's jurisdiction, Article 268 should apply "if possible" (see paragraph 46 above). However, nothing in the Milan District Court's order of 19 October 1995 explains why during the trial phase the guarantees provided by this Article could not be observed.

82. In the light of the above, the Court considers that the applicant was deprived of a substantial procedural safeguard provided by domestic law for the protection of his rights under Article 8 of the Convention without proper explanations being given by the competent domestic tribunals. In these circumstances, it cannot conclude that the interference complained of was "in accordance with the law", the Italian authorities having failed to follow, before the reading out of the telephone interceptions at the hearing of 29 September 1995, the procedures prescribed by law.

83. Moreover, the Court notes that the interpretation of the domestic provisions given by the Milan District Court amounted to a recognition of

the absence, in the legislative framework concerning wire-tapings, of safeguards to protect the rights secured by Article 8 of the Convention. Such interpretation would therefore in any case raise serious concerns about the respect, on the part of the State, of its positive obligations to endorse the effective protection of these rights.

84. Thus, the Court finds that there has been a violation of Article 8. It is not necessary, in these circumstances, to go into whether the interference in question pursued a "legitimate aim" or was "necessary in a democratic society" in pursuit thereof.

III. ALLEGED VIOLATION OF ARTICLES 14 AND 18 OF THE CONVENTION

85. According to the applicant, the release into the public domain and the subsequent divulging of the intercepted telephone conversations also amounted to a breach of Articles 14 and 18 of the Convention, which read as follows:

Article 14

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Article 18

> "The restrictions permitted under [the] Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

86. The Court notes that the complaint under Articles 14 and 18 arises out of the same facts as those it examined when dealing with the complaint under Article 8 of the Convention. Having regard to its decision on Article 8, the Court considers that it is not necessary to examine the case under Articles 14 and 18.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

87. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

88. The applicant's lawyers alleged that the moral and material damage suffered by their client until his death is enormous and difficult to calculate on the basis of documented evidence. They leave the evaluation of the amount to the discretion of the Court.

89. The Government did not comment on this point.

90. The Court does not find it established that the applicant suffered any material damage and, thus, rejects the claim under this head. However, the Court finds that the applicant suffered damage of a non-pecuniary nature. Having regard to the circumstances of the case and ruling on an equitable basis as required by Article 41 of the Convention, it decides to award him 6,000 euros (EUR). This amount should be shared between the applicant's heirs, which means that 2,000 EUR should be paid to each of them.

B. Costs and expenses

91. The applicant's lawyers did not present any claim for reimbursement of costs and expenses, although invited to do so.

92. Accordingly, the Court decides not to award any reimbursement in this respect.

C. Default interest

93. The Court considers that the default interest should be fixed at an annual rate equal to the marginal lending rate of the European Central Bank plus three percentage points.

FOR THESE REASONS, THE COURT

1. *Holds* by six votes to one that there has been a violation of Article 8 of the Convention in that the respondent State failed to provide safe custody of the transcripts of the telephone conversations and to subsequently carry out an effective investigation as to how these private communications were released into the public domain;

2. *Holds* unanimously that there has been a violation of Article 8 of the Convention by reason of the failure of the Italian authorities to follow, before the reading out of the telephone interceptions at the hearing of 29 September 1995, the procedures prescribed by law;

3. *Holds* unanimously that the applicant's complaint under Articles 14 and 18 of the Convention does not give rise to any separate issues;

4. *Holds* unanimously
(a) that the respondent State is to pay to each of the applicant's heirs, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 2,000 (two thousands euros) in respect of non-pecuniary damage plus any tax that may be chargeable;
(b) that simple interest at an annual rate equal to the marginal lending rate of the European Central Bank plus three percentage points shall be payable from the expiry of the above-mentioned three months until settlement.

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 17 July 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Deputy Registrar

Christos ROZAKIS
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly dissenting opinion of Mr V. Zagrebelsky is annexed to this judgment.

C.R.
S.N.

PARTLY DISSENTING OPINION OF JUDGE V. ZAGREBELSKY

I agree with the majority that the fact that the Public Prosecutor read out in open court extracts of some of the applicant's telephone conversations constitutes a violation of Article 8 of the Convention. However, I regret that I cannot agree with the reasoning that led the majority to find a violation of Article 8 on account of the publication in the press of the bulk of the intercepted conversations after the hearing.

In this case there were two issues to be examined separately.

(a) As for the reading out at a public hearing of a certain number of the applicant's telephone conversations with friends, lawyers, politicians and journalists, I would observe that their interception had been authorised by the Tribunal at the hearings, under Article 295 § 3 of the Code of Criminal Procedure (hereinafter the "CCP"). This Article permits the monitoring of telephone calls to facilitate the search for a defendant who is deliberately evading the court's jurisdiction. The same Article states that various other Articles in the CCP, which regulate ordinary cases of interception during a preliminary investigation, shall be applicable "if possible". These include Article 268, which regulates the procedure for using the content of intercepted telephone calls. Other Articles of the CCP regulate the type of offence for which monitoring may be authorised, the maximum length of such monitoring, the transcription of recorded conversations under a judicial expertise procedure and supervision by the judge.

The aim of the procedure set out in Article 268 is (a) to protect the privacy of the person whose conversations have been intercepted and the persons who spoke with him or her; (b) to allow parties to the proceedings to adduce in evidence the conversations favourable to their case; (c) to allow the judge to make a selection of the conversations, and to exclude conversations which were not adduced in evidence by the parties, are manifestly irrelevant or whose use is not permitted by law.

The parties' lawyers receive a full copy of the transcripts of the recorded telephone calls and may also request a copy of the original recordings. The law provides that the entire selection procedure is secret. Only conversations ruled admissible by the judge will become known to the public during the trial phase. The recordings are kept by the Public Prosecutor until the final judgment is delivered, but interested persons may ask the judge to order the destruction of recordings that are not relevant to the trial (see Articles 266-271 of the CCP).

In my view, the procedure provided for by Italian law meets the requirements laid down in the Court's case-law. The Court has held: "While the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, it does not merely compel the State to

abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves (see *X and Y v. the Netherlands,* judgment of 26 March 1985, Series A no. 91, p. 11, § 23, and *Stjerna v. Finland,* judgment of 25 November 1994, Series A no. 299-B, p. 61, § 38). However, the concept of respect is not precisely defined. In order to determine whether such obligations exist, regard must be had to the fair balance that has to be struck between the general interest and the interests of the individual, while the State has, in any event, a margin of appreciation" (see *Botta v. Italy*, judgment of 24 February 1998, *Reports* 1998-I, § 33).

Moreover, in the particular field of the interception of telephone calls the Court has held that the following minimum safeguards are necessary in the statute in order to avoid abuses of power: a definition of the categories of people liable to have their telephones tapped by judicial order, the nature of the offences which may give rise to such an order, a limit on the duration of telephone tapping, 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 and by the defence and the circumstances in which recordings may or must be erased or the tapes destroyed, in particular where an accused has been discharged by an investigating judge or acquitted by a court (see the following judgments: *Valenzuela Contreras v. Spain*, of 30 July 1998, *Reports* 1998-V, § 46; *Kruslin v. France*, of 24 April 1990, Series A no. 176-A, § 35; *Huvig v. France*, of 24 April 1990, Series A no. 176-B, § 34).

In the present case, the Public Prosecutor read out in public some of the applicant's conversations with third persons, asked the Tribunal to accept them and immediately placed the transcripts of all the intercepted conversations at the disposal of the private parties' lawyers. At the next hearing the Tribunal, after hearing the parties to the proceedings, refused to admit the conversations in evidence, partly because the interceptions had continued even after the authorised period, but also because in any event they were not absolutely necessary for deciding the case. In fact, the Prosecutor had asked the judge to admit those conversations in evidence in the final part of the trial, at which stage new evidence is allowed only "if absolutely necessary" (Article 507 of the CCP).

The Tribunal also said that the procedure for selecting which intercepted conversations to admit in evidence had rightly taken place in public. It held that the secret procedure was not possible during the trial phase and that the rule of secrecy was only applicable during the preliminary-investigation phase.

In my opinion, there has been an interference with the applicant's private life and communications and that interference was contrary to domestic law because the Tribunal could, and therefore in law should, have selected the relevant conversations in private with the participation of the parties.

In any case, if doubts were possible as to how the law should be applied during the trial phase, the authorities should have interpreted the law in a way that was compatible with the Convention. The Italian Constitutional Court in its judgment no. 10 of 1993 held that Law no. 848 of 1955, which introduced the Convention into the Italian system, is an "atypical" source of law and thus cannot be abrogated or modified by other ordinary laws. This means that ordinary laws such as the CCP should be interpreted and applied in accordance with the Convention's provisions. One could add that Section 2(1) of Law no. 81 of 1987, which gave the Government the power to prepare and enforce a new code of criminal procedure, states that the provisions of the code must be in accordance with international conventions such as the European Convention on Human Rights and, consequently, the judiciary should interpret and apply those provisions in the light of the Convention.

I would add that if such an interpretation of Italian law were not possible and the Tribunal's ruling was the only possible one under the relevant law, then a violation of Article 8 of the Convention should be found for different reasons: the violation would be the consequence of the non-conformity of Italian law and not of the breach of that law.

For these reasons I conclude that there has been a violation of Article 8.

(b) The majority of the members of the Court considered in § 72 of the judgment: "[T]he Court reaches the conclusion that the divulging of the conversations through the press is not a direct consequence of an act of the Public Prosecutor, but is likely to have been caused either by a malfunction of the registry or by the press obtaining the information from one of the parties to the proceedings or from their lawyers".

I take this statement as the starting point for my own reasoning.

We can imagine all kinds of conduct on the part of public officers and lawyers, or the people assisting them in their work. We can imagine intentional acts or carelessness on the part of those responsible for keeping the transcript of the conversations. But we do not know who gave one or more journalists a copy of the bulk of the transcripts of the conversations or how they did so. All we know is that the text of all the applicant's conversations was disclosed to the parties immediately after the Prosecutor had read some of them out at the hearing. The disclosure to the parties was part of the procedure of selecting the recordings to be accepted by the judge.

Two arguments lead the majority to find a violation of Article 8 (see § 74): (a) "appropriate safeguards should be available to prevent any such disclosure of a private nature as may be inconsistent with the guarantees in

Article 8 of the Convention"; (b) "furthermore, when such disclosure has taken place, the positive obligation inherent in the effective respect of private life implies an obligation to carry out effective inquiries in order to rectify the matter to the extent possible".

The majority consider that "once the transcripts were deposited under the responsibility of the registry, the authorities failed in their obligation to provide safe custody in order to secure the applicant's right to respect for his private life. Also, the Court observes that it does not appear that in the present case an effective inquiry was carried out in order to discover the circumstances in which the journalists had access to the transcripts of the applicant's conversations and, if necessary, to sanction the persons responsible for the shortcomings which had occurred. In fact, by reason of their failure to start effective investigations into the matter, the Italian authorities were not in a position to fulfil their alternative obligation of providing a plausible explanation as to how the applicant's private communications were released into the public domain." (see § 75).

As summarised above, Italian law lays down a procedure for the monitoring of telephone calls, in line with the requirements of the State's positive obligations under the Court's case-law. As to the leaking of recordings before, or for reasons other than, their legitimate use in public hearings, the law provides that formal documents relating to criminal proceedings cannot be published, even if they are no longer covered by secrecy, until the appeal judgment has been delivered (Article 114 of the CCP). Public servants and lawyers are liable for breaches of Article 114 and disciplinary sanctions are applicable (Article 115 of the CCP). The Criminal Code lays down penalties for anyone (whether a public servant or a private citizen) responsible for any unlawful disclosure (see Articles 326 and 684 of the Criminal Code).

This statutory machinery fully complies with the requirements identified by the Court in § 74 of the judgment, but one point needs clarifying: contrary to what seems to follow from § 75, I do not think it possible to make the authorities in any way responsible for providing safe custody of the copies of the recordings and transcripts given to the private parties in the proceedings.

In this case – it seems to me, for the first time – the Court imposes on the Contracting States a new positive obligation going beyond what the Court has up till now required in cases concerning the interception of telephone calls by the authorities. The Court's case-law on this subject has been quoted above. Positive procedural obligations are seen by the Court as necessary and inherent in Article 8 in order to avoid abuses of power and thus a violation of this provision. To my knowledge, never before has the Court imposed in cases comparable to this one a procedural obligation on the State, similar to the obligation to conduct an effective investigation, after a violation of Article 8 has occurred. I refer not only to an interference with private life and correspondence through the interception of telephone

conversations, but also to the identical interference caused by censoring mail or leaking documents relating to judicial proceedings.

Up till now, only in cases concerning Articles 2 and 3 has the Court imposed on the States a procedural obligation to carry out an effective investigation subsequent to acts leading to a person's death, torture or inhuman or degrading treatment. But such a requirement is clearly and understandably justified by the necessity to protect such a fundamental right as the right to life and to prevent torture or ill-treatment. I do not think that that aim of the Court can easily be expanded so as to cover any possible violation of the Convention, beyond rights of such an importance as to be subject to no derogation even in time of emergency (article15 § 2).

This is my first reason for departing from the majority's conclusion.

But I wish to add a different additional argument, because one could think that the State's duty to carry out effective inquiry in order to establish who was responsible for the leak is an inherent consequence of the legal prohibition on disclosing certain documents. I would agree with that opinion so far as national law is concerned and it is certainly regrettable that the person responsible for the leak has not been identified and punished, but I do not see how it gives rise to a positive duty on the State under Article 8 of the Convention.

As to the position taken by the majority of the Court, I wonder what, in the Court's view, is an effective investigation in this kind of cases.

At the first hearing following the one at which the Public Prosecutor read out some of the intercepted telephone conversations, the presiding judge tried to establish who was responsible for the leak (see § 40 of the judgment). Was it an ineffective investigation because it did not lead anywhere? But at least an attempt has been made by the authorities.

According to the majority, that inquiry was not sufficient to fulfil the State's duty and the respondent State failed to carry out an effective inquiry. If so, the Court in my view should give some indication of what constitutes an effective inquiry in this context. And one has to be realistic about this. The Court should take into account the fact that normally the only effective method is to compel journalists to reveal their sources or to make use of very intrusive procedures against them, such as intercepting their communications or searching their homes or offices. However, this kind of investigation was found to be in violation of the Convention (Article 10) in *Roemen and Schmit v. Luxembourg* (judgment of 25 February 2003, no. 51772/99) and the protection of journalistic sources is one of the basic conditions for press freedom. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest (a public interest that could hardly be questioned in this case) (see *Goodwin v. the United Kingdom,* judgment of 27 March 1996, *Reports* 1996-II, § 39). Accordingly, Italian law provides for the protection of journalists' sources (see Articles 200 § 3, 201, 256 and 271 § 2 of the CCP). It has to be added that, according to the file, in this case the applicant did

not complain or ask the Italian authorities to carry out such an inquiry into the press articles. Nor did he sue anyone for damages.

The Court was unable to find any direct responsibility of the State for the leak. In my view, by putting the onus on Contracting States to conduct an effective inquiry, while at the same time reversing the burden of proof (see § 75 of the judgment), the Court has without sufficient reason adopted the scheme of positive State duties under Articles 2 and 3 of the Convention and imposed on the States an arduous, if not impossible, task to fulfil. In so doing, the judgment concludes by imposing on the State a kind of objective responsibility. And that, in my view, is hardly acceptable within the Convention system.