

Telephone tapping complaint: application inadmissible for failure to exhaust domestic remedies

In its decision in the case of [Gernelle and S.A. Société d'Exploitation de l'Hebdomadaire *Le Point* v. France](#) (application no. 18536/18) the European Court of Human Rights has unanimously declared the application inadmissible.

The case concerned a complaint about telephone tapping, ordered in criminal proceedings, by persons who had not been parties to those proceedings, in so far as they had been concerned by the interceptions.

As part of a judicial investigation into the financing of an election campaign, a telephone line used by one of the candidate's press officers had been tapped by the decision of an investigating judge. Several of the press officer's conversations with journalists from the news magazine *Le Point* had been transcribed as a result, but the journalists had never been accused of any wrongdoing.

The publication director and the publisher of *Le Point* complained before the Court that several telephone conversations with the magazine's journalists had been intercepted. They also submitted that they had no effective remedy in that regard.

The Court noted that the applicants had lodged their application without having first sought redress domestically. It considered that as they had not brought an action under Article L. 141-1 of the Code of Judicial Organisation, through which defects in the public justice system could be rectified by means of compensation, the applicants had failed to take the necessary steps to allow the domestic courts to play their fundamental role in the machinery of protection established by the Convention.

The Court thus declared the application inadmissible for failure to exhaust domestic remedies.

The decision is final.

Principal facts

The first applicant is Étienne Gernelle, the publication director of the *Le Point* news magazine and website. The second applicant is the Paris-based company that publishes the two media platforms.

On 13 April 2013 a judicial investigation involving several measures was opened into the financing of Nicolas Sarkozy's 2007 presidential election campaign.

At the time of the investigation Mr Sarkozy no longer held elected office but still had the use of office premises and staff, including Véronique Waché, his press officer. A telephone line used by Ms Waché was placed under surveillance by the decision of an investigating judge. Several of the conversations intercepted on that line were transcribed.

On Friday 11 July 2014 Ms Waché was contacted by a journalist working with *Le Point*, who told her that the magazine was preparing to publish an interview with a cousin of Muammar Qaddafi in which he indicated that the Libyan regime had helped to finance Mr Sarkozy's campaign. The journalist asked if Mr Sarkozy wished to comment. Several other telephone conversations were intercepted subsequently, most notably one between Ms Waché and Mr Gernelle.

Le Point ultimately opted not to publish the article.

The interview finally appeared in the *L'Express* news magazine on 16 September 2014. It contained detailed allegations of the Libyan regime's financial contribution to the campaign.

A book on the affair was published on 18 October 2017, recounting how Ms Waché's telephone line had been tapped and reproducing lengthy extracts from the transcript of her conversation with Mr Gernelle. The tapping was again mentioned in an interview published by the news website *Mediapart*.

The applicants' lawyers sought an explanation from the Paris public prosecutor, who informed them that the judicial investigation in question was being overseen by the National Public Prosecutor's Office for Financial Offences. The public prosecutor for financial offences confirmed that information in writing to the applicants, stating: "While I regret that confidential information from an investigation file has been made public, I can assure you that the telephone tapping in question was lawfully ordered, as part of proceedings covered by the secrecy of judicial investigations and accessible only to the parties thereto, and that no telephone lines belonging to journalists were tapped or any sources revealed during those proceedings. ..."

The judicial investigation, which was ongoing when proceedings were initiated before the Court, was closed on 25 August 2023. Thirteen people, including Mr Sarkozy, were committed for trial at the Paris Criminal Court, where proceedings are pending.

Complaints, procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 16 April 2018.

The applicants relied on Article 8 (right to respect for private life), Article 10 (freedom of expression) and Article 13 (right to an effective remedy).

The decision was given by a Chamber of seven judges, composed as follows:

Georges **Ravarani** (Luxembourg), *President*,
Lado **Chanturia** (Georgia),
Carlo **Ranzoni** (Liechtenstein),
María **Elósegui** (Spain),
Mattias **Guyomar** (France),
Kateřina **Šimáčková** (the Czech Republic),
Mykola **Gnatovskyy** (Ukraine),

and also Victor **Soloveytschik**, *Section Registrar*.

Decision of the Court

[Articles 8, 10 and 13](#)

The Court noted that the applicants had lodged their application without having made use of any remedies before the domestic courts and that the main criminal proceedings were still ongoing.

The Government argued that the applicants had not used the remedy provided for in Article L. 141-1 of the Code of Judicial Organisation and asked that their application be declared inadmissible for failure to exhaust domestic remedies.

The Court first observed that the remedy in question involved bringing proceedings to establish State liability for the defective operation of the public justice system on account of a fact or a series of facts resulting in the inability of the public justice system to fulfil its mission.

Second, the Court noted that the applicants complained, in particular, that the investigating judge had ordered telephone tapping unnecessarily and used disproportionate means of investigation. They submitted that there had been an abuse of process and an interference with source protection.

They also challenged the lawfulness of the transcription of the first applicant's conversations, arguing that it had not been needed for the purposes of the investigation.

The Court observed that that series of alleged defects could have been examined by the domestic courts as part of an action for compensation brought under Article L. 141-1 of the Code of Judicial Organisation. That avenue would have enabled the domestic courts to deal with the substance of the applicants' Convention complaint and to rule on the lawfulness and necessity of the impugned measure.

The Court also reiterated that if there was any doubt as to the effectiveness of a domestic remedy the point had to be taken before the domestic courts.

Third, concerning the applicants' legal standing, and in particular the fact that they were third parties to the criminal proceedings in issue, the Court noted that the remedy under Article L. 141-1 of the Code of Judicial Organisation was open to all users of the public justice system, a concept that had been interpreted broadly in domestic law. On the basis of the domestic case-law, the Court considered that it had been sufficiently established at the relevant time that this compensatory remedy was accessible to third parties to criminal proceedings.

Fourth, with regard to the appropriateness of the remedy under Article L. 141-1 of the Code of Judicial Organisation, the Court noted that such an avenue could afford redress for defective operation of the public justice system by means of compensation.

The applicants, however, had challenged the effectiveness of that remedy by emphasising that it was incapable of preventing or putting an end to a surveillance measure, or of having the related transcripts disallowed. In that connection, the Court reiterated that, when such a measure was ordered and while it was being carried out, the very nature and logic of secret surveillance dictated that not only the surveillance itself but also the accompanying review should be effected without the knowledge of the individual concerned.

The Court observed that the applicants were not seeking the destruction of the allegedly unlawful recordings. Rather, they were claiming the right to have the related transcripts disallowed as evidence in criminal proceedings to which they were not parties.

The Court had found in some cases that disallowing or excluding unlawfully obtained evidence could constitute appropriate redress for an interference with the private life of an individual under criminal investigation. It nevertheless pointed out that such a form of redress was not necessarily a prerequisite to the effectiveness of a remedy in respect of an Article 8 violation. In that connection, it reiterated that in certain circumstances monetary compensation could afford an adequate remedy. The Court considered that such was the case in the matter at hand, which concerned third parties to criminal proceedings who were complaining that their rights had been violated in the course of an investigation. In the Court's view, to find otherwise could unreasonably undermine legal certainty and the proper conduct of criminal proceedings.

In addition, the Court pointed out that the applicants had not denied being afforded procedural safeguards in the decision to carry out the telephone tapping. They had merely challenged the competent authorities' assessment of the necessity of the measure, arguing that it had excessively interfered with source protection and freedom to impart information. The Court considered that monetary compensation could be regarded as an appropriate remedy for those interferences in such circumstances.

Having regard to the applicants' legal standing, the subject matter of their complaint and the appropriateness of the remedy that an action brought under Article L. 141-1 of the Code of Judicial Organisation might have afforded, the Court considered that that avenue of redress had to be regarded as available and appropriate in the circumstances of the present case. As they had not pursued that avenue, the applicants had failed to take the necessary steps to allow the domestic

courts to play their fundamental role in the machinery of protection established by the Convention. The Court thus declared the application inadmissible for failure to exhaust domestic remedies.

The decision is available only in French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.