APPLICATION/REQUÊTE N° 17265/90

Alvaro BARAGIOLA v/SWITZERLAND

Alvaro BARAGIOLA c/SUISSE

DECISION of 21 October 1993 on the admissibility of the application

DECISION du 21 octobre 1993 sur la recevabilité de la requête

---

Article 6, paragraph 1 of the Convention

a) A virulent press campaign can in certain circumstances adversely affect the fairness of a trial and involve the State's responsibility particularly if it is sparked off by one of the State's organs

Balancing of the right to a fair trial and the public's right to information

b) Article 6 para. 1 does not lay down rules on admissibility of evidence which is primarily a matter for regulation under national law. The Commission must assess fairness on the basis of an examination of the proceedings as a whole

In this case a conviction partly on the basis of the evidence of co-accused who have agreed to testify for the prosecution and whose sentences have been reduced for that reason is not contrary to a fair trial in so far as their evidence has been open to challenge and there also existed other evidence. In addition no indication that the conviction was based on indirect information or on previous judgments

c) Impartiality of a tribunal is tested on both a subjective and an objective basis and appearances may be of importance

d) Limitation of access to an assize court hearing in a prison to persons with security passes is not contrary to the requirement of publicity, having regard to prison security and the subsequent reading out at a public hearing of the prisoners' witness statements

Article 6, paragraphs 1 and 3 (d) of the Convention

a) An accused should be given a proper opportunity to challenge a witness against him, who must be heard at a public hearing with a view to adversarial argument However, the reading out of the records of statements made by witnesses is not incompatible with Article 6 paras 1 and 3 (d), provided the use made of such statements as evidence complies with the rights of the defence

b) The term "witness" within the meaning of this provision must be understood as covering also experts In this case, no infringement of the principle of equality of arms, given the possibility of questioning the experts as witnesses

Article 6, paragraph 2 of the Convention *The presumption of innocence requires that no representative of the State declare that a person is guilty of having committed an offence before that guilt is established by a court*

Public remark by the President of the Cantonal Council (Switzerland), prior to trial about the dangerous character of the applicant In this case, no infringement of the presumption of innocence, as the remark referred to a previous conviction in another country

Article 6, paragraph 3 of the Convention *The guarantees specified in Article 6 para 3 must be interpreted in the light of the general notion of a fair trial contained in Article 6 para 1*

Article 6, paragraph 3 (d) of the Convention

a) This provision does not guarantee an unlimited right for an accused to have witnesses called

b) An accused who has declared that he is not prepared to take any further part in the proceedings cannot complain about a violation of this provision

Article 7, paragraph 1 of the Convention *Application of Article 6 of the Swiss Criminal Code to a person who acquired Swiss nationality after committing an offence is not contrary to this provision*

Article 4, paragraph 1 of the Seventh Protocol *This provision does not guarantee respect for the principle* ne bis in idem *where a person has been tried or punished by the courts of different States*

(TRANSLATION)

THE FACTS

The applicant, Alvaro Baragiola, is a Swiss national, born in 1955 and resident in Croglio (canton of Ticino) He is at present a prisoner at the "La Stampa" prison in Lugano

The applicant is represented before the Commission by Mr John Noseda, Mr Carlo Verda and Mr Edy Salmina, lawyers practising in Viganello Lugano

The facts of the case, as submitted by the applicant, may be summarised as follows

The applicant, born of a Swiss mother and Italian father, had Italian nationality and lived, after his parents' separation, with his mother at Castelrotto, a few kilometres

away from Lugano, taking the surname of his father - Loiacono. In 1969 he went to live with his father in Rome. From 1970 onwards he was an active member of left-wing political movements.

In a judgment dated 31 May 1980 the Rome Court of Appeal sentenced the applicant *in absentia* to 16 years' imprisonment, for aiding and abetting the murder of a Greek student, among other charges. The applicant's appeal on points of law against this judgment was dismissed by the Court of Cassation on 20 October 1981. After leaving Rome in the summer of 1981 the applicant went to Brazil on 31 December 1984.

Before the Court of Cassation delivered its judgment of 20 October 1981 a warrant for the applicant's arrest had been issued by the Italian authorities. He was suspected of having been a member of a terrorist organisation, the Red Brigades. On 24 January 1983, at the end of the so-called Moro 1 *bis* trial, the Rome Assize Court sentenced him *in absentia* to life imprisonment. He was found guilty of aiding and abetting the murder of Judge Girolamo Tartaglione, among other charges. On 14 March 1985 this conviction was upheld by the Rome Court of Appeal. An appeal on points of law was dismissed.

Having a Swiss mother, the applicant obtained a certificate of Swiss nationality on 19 June 1986 from the office of the registrar of births, marriages and deaths in Bellinzona (canton of Ticino). In September 1986 he returned to Switzerland. On 28 January 1987 the Ticino Cantonal Council authorised him to substitute for the surname Loiacono that of his mother - Baragiola. In September 1987 the applicant was taken into the employ of the third channel of the Swiss Italian language radio service as a game show host.

On 3 June 1988 the investigating judge attached to the Rome District Court issued a warrant for the applicant's arrest, charging him, *inter alia*, with aiding and abetting the kidnapping and murder of Aldo Moro.

The investigation proceedings

After being sought under international arrest warrants made out with the name Loiacono, the applicant was arrested on 8 June 1988 in Lugano and placed in detention on remand.

He was charged with committing in Rome between 16 March and 9 May 1978 crimes which included the killing of five police bodyguards, the kidnapping and murder of Aldo Moro, the attempted murder of a bystander and armed assault.

Immediately after his arrest a virulent press campaign began which aroused strong emotions in the canton of Ticino.

In order to prevent, as far as possible, the dissemination of incorrect information, the Ticino cantonal prosecution service issued a press communiqué on 20 June 1988, stating that the applicant, who proclaimed his innocence, had been questioned on a number of occasions by the investigating judge about the charges preferred against him and that the criminal proceedings opened by the Lugano Public Prosecutor's Office were pursuing their course in accordance with the procedural and constitutional rules, regard being had to the particularly delicate nature of the case

On 14 July 1988 the Italian authorities requested an order authorising the enforcement in Switzerland of the judgments given in Italy, which had become final

This request was rejected by the Federal Police Office on 22 July 1988 on the ground that the federal law on mutual international assistance in criminal matters had not come into force until 1 January 1983 and was not applicable retroactively. It therefore fell to the Swiss authorities themselves to try the applicant for the crimes committed in Italy

On 29 May 1989 the applicant was sent for trial in the Assize Court (corte delle assise criminali) of the canton of Ticino in Lugano. The court was composed of the vice-president of the Criminal Division of the Ticino Cantonal Court of Appeal, two judges, five jurors and two substitute jurors

The applicant was accused of aiding and abetting the murder of Judge Girolamo Tartaglione, committed on 10 October 1978 in Rome, aiding and abetting the attempted murder of another judge and aiding and abetting a number of attempted armed robberies committed during 1979 against the National Communications Bank

It was alleged in the indictment that the "Red Brigades" commando which had killed Judge Girolamo Tartaglione had been composed of five persons: Alessio Casimirri, who had shot at the judge, the applicant, who had covered Casimirri during the attack, the driver, Massimo Cianfanelli, and two women, one of whom had signalled the judge's arrival by riding ahead of him on a motor scooter, while the other, armed with a handgun and a sub-machine gun, kept watch on the outside of the judge's home.

In a decision also dated 29 May 1989 the Ticino cantonal prosecution service suspended the proceedings against the applicant in respect of the kidnapping and murder of Aldo Moro for lack of sufficient evidence.

The trial proceedings

The case was set down for trial on 9 October 1989. The Assize Court held fifteen hearings, the last of these on 6 November 1989.

At the hearing of 9 October 1989 the Assize Court dismissed the applicant's plea that the Swiss court lacked jurisdiction. All the other requests made by the applicant

at the hearings of 9, 10 and 12 October 1989 concerning the taking of evidence were rejected by the Assize Court

The challenge for bias

On 13 October 1989, the fifth day of the trial, the applicant challenged all the members of the Assize Court

He based this challenge on the Assize Court's presumed partiality, due to the influence exerted by the media on public opinion, and on the members of the court, particularly the jurors He claimed that a whole series of decisions taken by the Assize Court showed the prejudicial effect the press had had on the impartiality of the judges He alleged that the fairness of the proceedings had been affected in particular by the attitude of the president, criticising the way she had conducted the trial and applied the procedural rules

On the same day the vice president of the Court of Appeal appointed an *ad hoc* Assize Court to rule on the applicant's challenge for bias The challenge to the president was referred to the Criminal Appeals Division of the Court of Appeal

On 17 October 1989 the challenge for bias was dismissed by the two courts mentioned

The applicant then lodged a public law appeal against these decisions

The Federal Court's judgment of 15 February 1990 on the challenge for bias

In a judgment dated 15 February 1990 the Federal Court dismissed the applicant's appeal

It held that there was no objective evidence of the Assize Court's partiality

The Federal Court observed that, as a general rule procedural measures, irrespective of their merits, did not constitute sufficient foundation for an objective suspicion of bias on the part of the judge who had adopted them There was no objective evidence to support the applicant's claim, based on an alleged breach of procedural rules, that the president and all the members of the Assize Court, without exception, were biased

With regard to a humorous remark made by the president with the intention, State Counsel submitted, of lowering the tension artificially created by the defence the Federal Court held that humorous remarks were not sufficient evidence of partiality

With regard to the press campaign, the Federal Court observed that circumstances extraneous to the trial could influence a judgment, either in favour of or to the detriment of one of the parties However, it could not seriously be maintained

that the influences judges were exposed to every day were all likely to compromise their impartiality If any outside influence might lead to a judge being challenged, the State would no longer be able to guarantee the normal administration of justice during politically troubled periods

The Federal Court recognised that non professional judges were particularly exposed to the risk of being influenced by media hostile to the defendant It also considered that judges, as ordinary citizens, needed to keep themselves informed about current affairs and also, in so far as their activity allowed them, to form a political opinion, on condition, nevertheless, that their impartiality was not compromised

While it was true that the members of the Assize Court had been able to read the daily newspapers during the intervals between hearings, there was no objective evidence that they had been influenced by the articles which appeared in the press during the period from 9 to 13 October 1989 Admittedly, the information campaign had been very vigorous before the beginning of the trial, but it had not been one sided and had not appeared to be designed solely to convince the public of the defendant's guilt Various journalists had drawn attention to the power of the press and the danger of hasty judgment In this case it was also impossible to ignore the political turn the case had taken on account of the fact that the cantonal authorities had granted the applicant Swiss citizenship and had authorised him to change his surname although he had been convicted by the Italian courts in a final judgment for offences committed as a member of the Red Brigades

The Federal Court further observed that, in describing the applicant as a cruel terrorist in a debate broadcast by radio and television the president of the cantonal council had been referring to the final convictions pronounced by the Italian courts, not to the trial due to take place in Lugano

The Federal Court also held that, regard being had to the importance of the oath or solemn affirmation made by the jurors to the president when the Assize Court was constituted, the president's omission to warn them about the dangers of media influence over the way they reached their verdict was not particularly serious and had not affected the impartiality of the court This danger was even more remote because, in an assize court in the canton of Ticino judgment was given by both judges and jurors, rather than by the jurors alone, as in a normal assize court

In publishing a press communique on 20 June 1988, with the agreement of the defence, the public prosecution service's intention had been to urge the media to meet the requirements of justice and to respect the defendant's rights, including the principle of the presumption of innocence, with a view to the impartial conduct of the judicial proceedings

Having regard to the press communique, the Federal Court took the view that the president of the Assize Court was not required to urge the media, even before the opening of the trial to respect the presumption of innocence

However, as a general rule, and in order to avoid the need for any restrictions of the freedom of the press, journalists should in future not only be more disciplined and self-critical but also adhere more strictly to the code of ethics of their profession, exercising caution and objectivity The freedom of the press should never lead the information media to convict a defendant before the competent court had given judgment

The subsequent course of the trial

After the applicant's challenge for bias had been dismissed by the cantonal courts, on 17 October 1989, the Assize Court, sitting in its initial composition, held a further hearing on the very same day

At that hearing and the next, on 18 October 1989, a number of persons were heard, four of whom had been in prison in Italy and had been transferred to Lugano under Italian police escort These prisoners included Massimo Cianfanelli, who had participated in the murder of Judge Tartaglione but had been prevailed upon to give evidence for the prosecution

The other persons whose evidence was due to be heard either refused to leave the prisons where they were being held or, in the case of those already released, refused to appear before the Assize Court

At the hearing of 19 October 1989 the parties were informed of this situation The Assize Court then decided to take the evidence of these persons in Italy The applicant who had not been given a safe conduct by the Italian authorities, informed the Assize Court that he would not take part in the taking of evidence in Italy The Assize Court then invited him to submit a list in writing of the questions he wanted the witnesses to answer

On 20 October 1989 the Assize Court received a telegram from four defence witnesses stating that the reason why they had failed to appear at the hearing of 17 October 1989 was that the Italian authorities intended to take them to Switzerland by force and against their will

On 22 October 1989 the applicant informed the Assize Court that he considered a direct confrontation with the witnesses in Italy essential and that he had no intention of drawing up a list of questions in writing

At the hearing of 23 October 1989 the defence lawyers announced that they would not accompany the court to Italy At the same hearing the Assize Court informed the parties that the next hearing would take place on 25 October 1989 in Paliano prison, near Rome The defence unsuccessfully objected It also rejected the court's proposal that the applicant should be assisted by a lawyer appointed under the legal aid scheme during the taking of evidence in Italy

On 25 October 1989 the hearing was held, as planned in Paliano prison. Three persons were heard. The prison governor refused to allow a number of Swiss journalists to enter the prison because they did not have security passes.

On the same day the court took evidence from a woman in a police station at Tivoli, near Rome, and from two other persons at a public hearing in Rome itself.

At the next hearing, on 27 October 1989, which was once more held in Lugano, the Assize Court gave the defence the telegram received on 20 October 1989. It justified the delay in passing on the telegram by the need to check its source. In spite of protests by the defence, the Assize Court read out the statements taken down during the taking of evidence in Italy.

The Assize Court's judgment of 6 November 1989

In a judgment dated 6 November 1989 the Assize Court of the Canton of Ticino sentenced the applicant to life imprisonment, finding him guilty of aiding and abetting the murder of Judge Girolamo Tartaglione in Rome on 10 October 1978 and two armed attempts to rob the National Communications Bank in June and July 1979 in Rome. The court held that the applicant had conspired to commit murder and had participated in the murder itself by covering Casimirri, armed with a light machine gun, while the latter shot at the victim with a Glisenti automatic pistol.

On the other hand, the Assize Court acquitted the applicant of the attempted murder of another judge and of a third attempted armed robbery of the National Communications Bank in September 1979.

The Assize Court based its decision in the main on the testimony of Massimo Cianfanelli and Walter de Cera.

During the murder of Judge Girolamo Tartaglione Cianfanelli had remained at the wheel of a stolen car, armed with a pistol, waiting to drive the other members of the commando away from the scene. After his arrest on 20 May 1981 he had decided to co-operate with the Italian judicial authorities and had given them the names of his accomplices and other Red Brigades militants.

Walter de Cera had explained in detail how he, the applicant and other persons had been involved in the attempted robberies of the National Communications Bank. He had asserted that he had decided to co-operate with the judicial authorities out of his own desire for reconciliation and that this had been a moral choice not influenced in any way by the inducements provided for in the legislation concerning pentiti (i.e. self-confessed criminals who had agreed to co-operate with the authorities).

The Assize Court held that Cianfanelli and de Cera had each independently stated that the applicant had been an active member of the Red Brigades and had then committed the offences charged against him in the indictment. Their statements had

been corroborated by those of other co-defendants and a large body of persuasive circumstantial evidence Furthermore, the court had found no reason to doubt the truth of the testimony it had heard

The Ticino Cantonal Court of Cassation s judgment of 6 April 1990

The applicant and the prosecution appealed

In a judgment dated 6 April 1990 the Ticino Cantonal Court of Cassation (corte di cassazione e revisione penale) dismissed the applicant's appeal On the other hand, it upheld in part the appeal lodged by the prosecution by finding that the applicant was also guilty of the third attempted armed robbery, on 24 September 1979 in Rome However, by virtue of the new Article 112 of the Swiss Criminal Code (murder), which had come into force on 1 January 1990, it reduced the sentence to 17 years' imprisonment

The appeals to the Federal Court

The applicant and the prosecution appealed to the Federal Court, asking it to quash the above judgment

The applicant contested in particular the jurisdiction of the Swiss courts and pleaded the unlawfulness of the retroactive application of the Criminal Code

State Counsel asked for the case to be remitted to the cantonal authorities and for the applicant to be sentenced to life imprisonment in accordance with the prosecution submissions

On 5 June 1990 the applicant also lodged a public law appeal, claiming that he had not had a fair trial before the cantonal authorities He asserted that the Assize Court had assessed the evidence in an arbitrary manner, particularly with regard to the following points

the statements of his co defendants who had agreed to co operate (the 'pentiti),

- the expert reports and statements of two Italian experts about the weapon used to kill Judge Girolamo Tartaglione,

- the judgments delivered in Italy in the trial concerning the kidnapping and murder of Aldo Moro,

- the hearing of two Swiss police officers and two Italian police officers,

the statements of persons questioned in Italy in his absence and at a non public hearing,

- the witnesses he had wanted to call

The judgments of the Federal Court

In two judgments dated 9 April 1991, served on the applicant together with the reasons on 26 March 1992, the Federal Court dismissed the applicant's appeals

Ruling on the applicant's appeal in cassation, the Federal Court affirmed the jurisdiction of the Swiss courts, considering that Article 6 of the Swiss Criminal Code was applicable to the case That Article provided The present Code shall be applicable to any Swiss national who has committed abroad a crime or offence in respect of which Swiss law permits extradition, provided that the act concerned is also a criminal act in the State where it has been committed and that the person responsible is in Switzerland or is extradited to Switzerland on account of his offence The Federal Court held that the extension of Swiss jurisdiction to offences committed by Swiss nationals abroad was based on the principle of solidarity with other States and the need to ensure that criminals who, because of their Swiss nationality, could not be extradited did not go unpunished

Under that interpretation, the conditions of applicability of Article 6 of the Swiss Criminal Code were fulfilled if the person alleged to have committed the offence was a Swiss citizen at the time when it was committed or at the time of his arrest with a view to his extradition to Switzerland and prosecution there

Ruling on the applicant's public law appeal, the Federal Court noted that under the Italian legislation on pentiti the applicant's co defendants in the Italian proceedings, who were questioned by the Assize Court in Lugano and Rome not as witnesses but merely as persons providing information, had been given extremely light sentences and considerable advantages, such as conditional release, as a reward for their co-operation with the Italian authorities

However, the Ticino criminal authorities had not made use of any practice similar to that whereby a defendant is allowed to turn Queen's evidence , which the practice introduced by the Italian regulations on terrorists co-operating with the authorities resembled

The Federal Court ruled that it would be contrary to the principle of unfettered discretion to assess evidence, which was enunciated in federal law, to consider generally inadmissible all statements given in the form of "Queen's evidence by foreign nationals

The Federal Court held in that connection that the judges and jurors were aware that the credibility of the pentiti was an important issue That is why they had not been heard as witnesses but as co-defendants and had not been asked to take the oath Their statements had been considered credible because they were corroborated by a large body of circumstantial evidence and because no important aspect of their precise and consistent statements had been shown to be false

The Federal Court concluded that the use of the statements of the "pentiti had not infringed the applicant's right to a fair trial

With regard to the weapon used to kill Judge Girolamo Tartaglione, the Federal Court pointed out that the Assize Court had appointed a Swiss expert to produce a new report It considered that the applicant had not explained in what way the Assize Court had acted arbitrarily, as he alleged, in regarding the previous reports, submitted by two Italian experts, merely as documents, and these experts' statements merely as witness statements

With regard to the judgments delivered in Italy, the Federal Court stated that these had been read out during the first instance trial proceedings, apart from passages concerning the acts of which the applicant stood accused At the end of autonomous proceedings the Assize Court had given its own judgment There had thus been no infringement of the principles of direct evidence, *viva voce* testimony or the presumption of innocence

With regard to the taking of evidence from two Italian police officers and two Swiss police officers, the Federal Court held that the applicant had not substantiated his complaint that his conviction had been based on the allegedly indirect statements made by these officers

With regard to the hearings held by the Assize Court in Italy the Federal Court held that in this case the applicant's absence from a limited part of the proceedings was not contrary to the principle of a fair trial The applicant's absence from the hearings at which evidence was taken in Italy was not imputable to the Assize Court but was the indirect consequence of proceedings previously brought against him in Italy The records of the hearings held in Italy had been read out in his presence when the trial resumed at the Assize Court in Lugano The applicant had not established that through his absence from the hearings held in Italy he had been prevented from questioning those who had made statements incriminating him He could, in particular, have asked the court to arrange for such questions to be put during a second visit to Italy

With regard to the absence of the applicant s counsel from the hearings held in Italy the Federal Court noted that they had refused to go there without a valid reason and had thus waived the right to conduct the applicant's defence in his absence The applicant knew that his counsel would not be participating in the taking of evidence in Italy Nevertheless, he had not availed himself of the possibility of having a lawyer appointed under the legal aid scheme for that stage of the proceedings

With regard to respect for the principle of public hearings the Federal Court observed that the public had not been excluded except in so far as a security pass was required for access to Paliano prison

The Federal Court also observed that the Assize Court could not have resolved the problem concerning the taking of evidence in any other way The principle of

proportionality had been respected, and all the conditions for an exceptional and partial derogation from the public proceedings principle for a small portion of the trial had been satisfied

The Federal Court held that the records of the taking of evidence had been read out with the aim of attenuating, as far as possible, the disadvantage the applicant was at as a result of the fact that neither he nor his counsel had attended the hearings in Italy

With regard to the failure to hear the defence witnesses, the Federal Court observed that the Court of Cassation's finding that the defence had waived their request that these witnesses be heard had not been arbitrary

The Federal Court also dismissed the applicant's complaint that the Assize Court had not done what was necessary to remove the obstacles preventing the transfer of the Italian prisoners called by the defence It further held that these prisoners, contrary to the claims they made in their telegram, had never intended to participate in the proceedings in the Lugano Assize Court As regards the alleged delay in passing on their telegram, the Federal Court observed that the applicant could have retracted his decision not to call the defence witnesses even after the Assize Court's return from Italy

With regard to the Assize Court's refusal to hear witness evidence from two officers of the cantonal police on the subject of the pressure allegedly brought to bear on the 'pentiti" by the Italian police officers present at the hearing, the Federal Court observed that the applicant himself did not have any material evidence to back up his allegations Even if the Italian police officers had brought pressure to bear on the pentiti , the cantonal police officers would probably not have been aware of this

With regard to the applicant's allegation that the Ghisenti pistol had been arbitrarily presumed to be the weapon used to kill the judge, the Federal Court noted that this weapon had been found to be the weapon used to commit the crime not merely on the basis of a Swiss expert's report but also on the basis of other evidence, including in particular the testimony of Cianfanelli

Lastly, with regard to the other complaints, the Federal Court observed that the applicant had done no more than submit other possible conclusions in place of the Assize Court's conclusions Having regard to the cautious assessment of the credibility of the "pentiti", and taking into account weighty evidence corroborating relevant aspects of their statements, there was no reason to believe that the cantonal judges had assessed the evidence in a manifestly untenable way

COMPLAINTS

1 The applicant complains of the retroactive application of the criminal law He alleges that he was convicted by a court that did not have jurisdiction and that he is the victim of unlawful imprisonment

He asserts in particular that Article 6 of the Swiss Criminal Code cannot be applied retroactively He maintains that this provision clearly states, and has always been interpreted so to state, that the Criminal Code is applicable to any Swiss national who has committed a crime At the time when the offence was committed he was incontestably not a Swiss national The Federal Court interpreted Article 6 of the Swiss Criminal Code in an unusual and unforeseeable way According to the Commission's case-law however, the manner in which the courts will define the constituent elements of an offence must be foreseeable for any person with appropriate legal advice (No 8710/79, Dec 7 5 82, D R 28 p 77)

The applicant alleges a violation of Article 5 para 1 (a) and Article 7 of the Convention

2 The applicant further complains that he did not have a fair trial before the Swiss courts He alleges violation of paragraphs 1, 2, 3 (b) and 3 (d) of Article 6 of the Convention

a He asserts in the first place that the trial was conducted in an atmosphere of intimidation for which the press bore responsibility

He submits in particular that immediately after his arrest he was the victim of a press campaign that had no precedent in its intensity, persistence or impact in a small canton like Ticino More than seven hundred articles, allegedly, were published on the Baragiola case up until the date of his conviction, and it is submitted that this campaign influenced both public opinion and the members of the Assize Court, particularly the jurors, against him

Even before the opening of the trial the press, radio and television had established his guilt and described him as a terrorist and member of the Red Brigades' The members of the Assize Court had also been influenced by the president of the cantonal council's reference to him as a cruel terrorist (efferato terrorista) These remarks were made during a debate in the cantonal council broadcast on radio and television on 19 September 1988 In addition, Swiss Italian language television broadcast a programme on terrorism on 6 October 1989, i e three days before the opening of the trial Lastly, the negative influence of the media had been manifested through acts of vandalism, insults and telephone threats against members of his family and his lawyers

The applicant complains in particular that during the intervals between hearings the judges and jurors were able to read the newspapers Although the Federal Court had found that jurors needed to keep abreast of current affairs, application of that argument to the present case was not appropriate, given the sheer scale of the press campaign when seen in relation to the geographical, political and cultural characteristics of the canton of Ticino, particularly its low population and the tendency of its inhabitants to believe everything printed in the press

That being the case, access to the media seriously compromised the objectivity of the judges and jurors. The vast majority of the articles in question made him out to be guilty, on the basis of information allegedly leaked by the Ticino authorities, particularly the police and the cantonal prosecution service, and by the Italian authorities.

The prejudicial influence of the media over the Assize Court was also manifested in the conduct of the president during the trial and in the categorical rejection of all his applications aimed at preserving the rights of the defence.

Lastly, the applicant considers that, contrary to the opinion expressed by the Federal Court, the oath sworn by the jurors at the beginning of the trial did not constitute an appropriate and sufficient guarantee of their impartiality and did not eliminate the need to make them aware of the danger of a trial by media. However, they were given no warning nor was any measure taken by the Assize Court to bring the influence of the media under control, even though the defence had requested this several times. The applicant considers that it was incumbent upon the Swiss judicial authorities to take the necessary measures to ensure that his right to a fair trial was respected, to prohibit the disclosure of confidential information and to guarantee the authority and impartiality of the judiciary.

He alleges violation of the right to a fair trial before an impartial tribunal and of the presumption of innocence, as guaranteed by Article 6 paras. 1 and 2 of the Convention.

b. Relying on Article 6 para. 1 of the Convention, the applicant complains that his conviction was essentially based on the statements of persons whose sentences had been substantially reduced, pursuant to the Italian legislation on "pentiti". He asserts that this legislation creates the risk of false accusations, and is contrary to Swiss procedure, under which recourse to inducements, threats or other means of coercion in order to obtain statements is prohibited. But his co-defendants in the Italian proceedings were heard by the Assize Court in the presence of and under the supervision of Italian police officers. If the "pentiti" had changed their previous evidence, they would have run the risk of losing the advantages they had been granted under Italian legislation. The Assize Court omitted to warn the jurors about the danger of the truth being obscured by such statements. Moreover, it wrongly refused to carry out any investigation to verify whether pressure had been brought to bear on the "pentiti".

In its judgment of 9 April 1991 the Federal Court did not take into account either the criticisms expressed by legal writers in connection with the judgment in the Schenk case given by the European Court of Human Rights on 12 July 1988 or the reservations expressed by the Court itself in that judgment. Furthermore, contrary to the assertions of the Federal Court, the Assize Court did not take into account the special situation in which the "pentiti" found themselves, even though it had questioned them not as witnesses but as co-defendants. In fact, no distinction had been made

between the pentiti and the other persons questioned In addition, the Court of Cassation's judgment of 6 November 1989 gave the figure for the co-defendants' expenses under the heading witnesses

c The applicant further complains that by refusing to call two cantonal police officers to give evidence as witnesses on the subject of the pressure brought to bear on the 'pentiti" by the Italian police the Assize Court assessed the evidence without hearing it, in breach of Article 6 of the Convention

d The applicant further complains that the Assize Court questioned four persons in Italy in his absence, although he had expressly requested the opportunity to confront them He never unequivocally waived his right to be present at the hearings for the taking of evidence held in Rome Both the investigating authorities and the president of the Assize Court had declared in writing that he would have that right However, when the Assize Court learned that the Italian authorities would not grant him a safe conduct it did not call off the hearings in Italy, as it should have done Without even mentioning its earlier promise to hold the hearing in Italy in the applicant's presence, it merely asked him whether he intended to accompany the court to Rome Thus the Assize Court broke faith with the applicant and infringed the principle of a fair trial

His counsel did not participate in the hearings in Italy because, in his absence they would not have been able to defend his rights properly No other measure, such as the theoretical possibility of asking for a second set of hearings to be held in Italy or the presence of his lawyers at those actually held there, could have taken the place of a direct confrontation between the applicant and the persons questioned, or compensated for the unfairness of the trial Nor can the possibility of asking those concerned questions in writing be held to be equivalent to the right to question witnesses for the prosecution oneself in open court There was accordingly also a violation of Article 6 paras 1 and 3 (d) of the Convention

e In addition, at the hearings held in Rome, the principle of public trial, as guaranteed by Article 6 para 1 of the Convention, was infringed Secrecy of the proceedings was the principle applied, while publicity was the exception Access to the room in which the hearing was held was reserved for those in possession of a security pass issued by the Ministry of Justice It was thus not the court itself which decided to what extent the trial should be public, but the Ministry of Justice Moreover, in view of the importance of what was at stake, it was not just a question of a partial and exceptional lack of publicity during a short stage of the trial, as the Federal Court held

The applicant maintains that the violation of the principle of public trial was all the more serious because, when the proceedings resumed in Lugano, the Assize Court read out the records of the hearings for the taking of evidence in Italy His conviction was based in part on those records, but the persons questioned in Italy did not confirm the truth of their statements reported in these records

f Relying on Article 6 para 3 (d) of the Convention, the applicant complains that the Assize Court omitted to take the necessary measures to ensure that the witnesses for the defence in prison in Italy were heard These witnesses had protested only about the arrangements made for their transfer, not against the principle of giving evidence as such The defence had never waived its request that they be heard

The applicant further complains that the telegram of 20 October 1989 in which the defence witnesses gave the reasons why they had not appeared before the Assize Court was not communicated to the parties until 27 October 1989, i e after the Assize Court's return to Lugano The need to check the source of the telegram should not have prevented it being passed on immediately to the defence It would have been an important factor to be taken into consideration in connection with the question of participation by the defence in the hearings due to take place in Rome, and the defence was compelled to reach a decision on this question without having all the necessary information

g The applicant complains that the Assize Court accepted in evidence the statements of the Italian experts and the reports they had drawn up on the subject of the murder weapon in the context of the Italian proceedings, whereas their independence and impartiality were open to doubt He asserts that the rule whereby a judge may be asked to stand down or challenged when he has previously been involved in a case in another capacity also applies to experts The applicant alleges that the Assize Court infringed the principles established by the European Court of Human Rights in the Bonisch judgment of 6 May 1985 (Series A no 92) and the Brandstetter judgment of 28 August 1991 (Series A no 211) and the principle that a judge must be personally satisfied that guilt has been proved, in breach of Article 6 paras 1 and 3 (d) of the Convention

h In addition, the applicant complains that the Assize Court questioned two Italian police officers and two Swiss police officers about the statements they had made in his absence during the investigation stage He alleges that in so doing the Assize Court based his conviction on indirect testimony, without giving him sufficient opportunity to challenge these witnesses and infringing the principles established by the European Court of Human Rights in the Kostovski judgment of 20 November 1989 (Series A no 166)

i The applicant further complains that the Italian judgments decisively influenced his conviction in Switzerland, in breach of the principles of *viva voce* testimony, direct evidence and the presumption of innocence He alleges that the Assize Court merely repeated the conclusions reached in these judgments and neglected to form its own autonomous opinion as to his guilt

Moreover, the Assize Court's judgment was based on arbitrary assessment of the facts and the evidence With regard to the murder weapon, the Assize Court held to be scientifically established facts which, according to the Swiss expert's report, were merely possible Nor did it take into account contradictions between the statements

made by a "pentito" and those of certain eye-witnesses concerning the clothes and appearance of the murderers. Lastly, the Assize Court did not take into account the fact that the applicant's car, which, according to the prosecution, had been used as a means of transport for shooting practice sessions, was at the material time in England in the possession of another person.

3. Lastly, the applicant complains that he was convicted twice in respect of the same acts, and that the Swiss authorities did not take any measure capable of protecting him from the risk that both judgments, the Italian and the Swiss, might be enforced The applicant alleges violation of Article 4 of Protocol No. 7.

THE LAW

1 Relying on Article 7 of the Convention, the applicant complains that, through the retroactive application of the criminal law he was convicted by courts which lacked jurisdiction, since the Swiss Criminal Code, under Article 6 thereof, is applicable to any Swiss national "who has committed abroad a crime or offence". But at the time of the acts he stood accused of he was an Italian national, not a Swiss national. He complains in particular of the Federal Court's unforeseeable interpretation of that provision.

Article 7 para. 1 of the Convention is worded as follows:

> "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed ..."

The Commission points out that Article 7 para 1 of the Convention enshrines the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy; it follows from this that an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable (cf. Eur. Court H.R , Kokkinakis v. Greece judgment of 25 May 1993, Series A no. 260-A, p. 22, para 52).

The Commission notes that, according to the Federal Court, the applicability of Article 6 of the Swiss Criminal Code to cases in which an offender has acquired Swiss nationality after committing an offence is not barred by the principle "*nullum crimen sine lege certa*", applicable to the interpretation of criminal statutes. The Commission recalls that it is, in the first instance, for the national authorities, and in particular the courts, to interpret and apply domestic law (cf Eur. Court H.R , previously cited Kokkinakis v. Greece judgment, p. 19, para. 40, and Hadjianastassiou v Greece judgment of 16 December 1992, Series A no. 252, p 18, para. 42).

The Commission notes in the first place that Article 6 of the Swiss Criminal Code does not specify the constituent elements of an offence. That provision does not in itself define an offence It settles a question of judicial practice, namely the applicability of the provisions of the Criminal Code. In this case the Federal Court's interpretation of the provision concerned does not appear to be unreasonable or arbitrary. On the contrary, it is consistent with a policy of judicial co-operation between European legal systems based on the rule of law

Accordingly, the Commission cannot find any appearance of a violation of Article 7 para. 1 of the Convention It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para 2 of the Convention

2. The applicant, who proclaims his innocence, also complains that he did not have a fair trial before the Swiss courts.

He complains in particular of the prejudicial influence of the media over the members of the Assize Court, the importance attached to the statements of the "pentiti", the failure to hear two cantonal police officers, the taking of evidence from persons in prison in Italy in his absence at a non-public hearing, the failure to hear witnesses for the defence, the acceptance in evidence of the statements and reports of two Italian experts, the use of indirect evidence and, in general, arbitrary assessment of the facts and the evidence

Paragraphs 1, 2 and 3 (d) of Article 6 are worded as follows

"1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal ... Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, ... to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice

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

3. Everyone charged with a criminal offence has the following minimum rights

(..)

d to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(. .)"

a With regard to the virulent press campaign which he claims was conducted against him, the applicant maintains that he was the victim on that account of an infringement of his right to a fair trial before an impartial tribunal and of the principle of the presumption of innocence, these infringements being imputable to the Swiss authorities He considers that it was incumbent upon the Swiss authorities to take the necessary measures to prohibit the disclosure of confidential information and to guarantee the authority and impartiality of the judiciary

The Commission has examined this complaint from the standpoint of paragraphs 1 and 2 of Article 6 of the Convention, under which every person charged with a criminal offence has the right to a fair trial and to be presumed innocent until proved guilty

The Commission has already acknowledged that in certain cases a virulent press campaign can adversely affect the fairness of a trial by influencing public opinion, and consequently the jurors called upon to decide the guilt of an accused (see, in particular, No 10486/83, Hauschildt v Denmark, Dec 9 10 86, D R 49 pp 86, 101, No 10857/84, Briemont v Belgium, Dec 15 7 86, D R 48 p 106, Nos 8603/79, 8722/79, 8723/79 and 8729/79, joined, Dec 18 12 80, D R 22 p 147 227 Nos 7572/76, 7586/76 and 7587/76, joined, G Ensslin, A Baader and J Raspe v Federal Republic of Germany, Dec 8 7 78, D R 14 pp 64, 112)

The Commission notes that the applicant's arrest and trial were discussed in a large number of radio and television programmes and in the course of a large-scale press campaign, particularly in Ticino, but also in the other Swiss cantons

While it is true that, because of the public's right to information, particular importance should be attached to the freedom of the press, a fair balance must nevertheless be struck between that freedom and the right to a fair trial guaranteed by Article 6 of the Convention In a democratic society within the meaning of the Convention that right holds such a prominent place that a restrictive interpretation of Article 6 para 1 would not correspond to the aim and purpose of that provision (cf Eur Court H R , Delcourt judgment of 17 January 1970, Series A no 11, p 15, para 25)

The Commission notes that the interest of the media in the "Baragiola case', and the considerable effect it had on public opinion, particularly in the canton of Ticino, were largely the result of the proximity of Italy and the terrorist activities of the Red Brigades during the 1970s, and of the role played by the cantonal government in the case, in view of the ease with which the applicant had been able to change his nationality and surname and get a job working for the Swiss Italian language radio service in spite of his antecedents

The Commission observes that one unusual feature of the present case is that the applicant had already been found guilty in Italian judgments which had become final Neither the press nor indeed the authorities responsible for criminal policy can be

expected to refrain from making any statement about the guilt of a defendant when they possess such information as, in the present case, the applicant's previous convictions in Italy

The Commission considers that the remark made by the president of the cantonal council on 19 September 1988 in which he described the applicant as a cruel terrorist should be placed in this context Admittedly, the Commission has held that the presumption of innocence is binding not only on the criminal court determining a criminal charge but also on the other authorities of the State (cf , in particular, No 9295/81 Dec 6 10 82, D R 30 p 227, No 7986/77, Dec 3 10 78, D R 13 p 73) However, the remark in question was made in a political context more than a year before the opening of the trial with the aim of providing the public with an explanation of the administrative authorities' conduct It referred to the applicant's conviction in Italy, but could not be interpreted as suggesting that the applicant was guilty according to Swiss law

The Commission recalls that what is decisive is not the subjective apprehensions of the suspect concerning the impartiality required of the trial court, however understandable, but whether, in the particular circumstances of the case, his fears can be held to be objectively justified (see, as the most recent authorities, Eur Court H R , Nortier v Netherlands judgment of 24 August 1993, Series A no 267, p 15, para 33, and Fey v Austria judgment of 24 February 1993, Series A no 255-A, p 12 para 30)

The Commission observes in that connection that the press was not unanimous in considering the applicant guilty and emphasised the danger of a premature trial by the press Moreover the prosecution service published a press communique with a view to preventing, as far as possible, the dissemination of incorrect information

The Commission cannot find any sign of partiality in the Assize Court's decisions The Assize Court took account of the particular circumstances of the case and assessed the evidence carefully The Commission further observes that the professional judges and the jurors decided the question of the applicant's guilt together, thus limiting the risk of media influence over the jurors The Commission also notes that, although the interests of the applicant were defended by three lawyers, who assisted him throughout the trial, the applicant, as the Federal Court noted, did not make use of the ordinary remedies available to him under cantonal law in order to appeal against the procedural decisions complained of Lastly, the Federal Court also examined in detail the question of media influence over the members of the Assize Court and reached the conclusion that their impartiality was not open to doubt

Consequently, the Commission cannot find, in the particular circumstances of the case any infringement of the principle of impartiality or, in general, of the principles of fair trial and the presumption of innocence

b The applicant also complains of the importance attached to the statements of the co defendants whose sentences had been substantially reduced pursuant to the Italian

legislation on pentiti' He asserts that these statements were inadmissible evidence, and alleges that reliance on them made the trial unfair and violated Article 6 para 1 of the Convention

The Commission recalls that the rules governing the taking of evidence are in the first place a matter for domestic law and that it is for the domestic courts, as a general rule, to assess the evidence before them The Commission's task, under the Convention, is to ascertain whether the proceedings in their entirety including the way in which evidence was taken, were fair (see Eur Court H R , Saidi v France judgment of 20 September 1993, Series A no 261-C, p 56, para 43, Edwards v United Kingdom judgment of 16 December 1992, Series A no 247-B, pp 34 35, para 34)

The Commission notes that the statements of the Italian co defendants who had given evidence for the prosecution incriminating themselves (the "pentiti') were not, in Swiss law, unlawfully obtained evidence

The Commission further points out that, according to its case-law the use during a trial of evidence obtained from an accomplice by granting him immunity from prosecution may put in question the fairness of the hearing and thus raise an issue under Article 6 para 1 of the Convention (cf No 7306/75, Dec 6 10 76 D R 7 pp 115, 118)

It notes that in this case the sentences imposed on the co defendants who had given evidence for the prosecution were considerably reduced and alleviated in other ways under the Italian legislation on pentiti As they ran the risk of losing the advantages they had been given if they went back on their previous statements or retracted their confessions, their statements were open to question It was therefore necessary for the Swiss courts to adopt a critical approach in assessing the statements of the pentiti

Although the Assize Court did not hear the 'pentiti as witnesses, but merely as persons asked to provide information and exempted from the obligation to take the oath, for the purposes of Article 6 para 3 (d) of the Convention they must be considered witnesses, a term to be given an autonomous interpretation (cf , among other authorities, Eur Court H R , Artner v Austria judgment of 28 August 1992, Series A no 242 A, p 10, para 19) In this case it should be noted that the applicant had the opportunity, at a public hearing of the Assize Court in Lugano, to challenge the statements made against him by his former co defendants Furthermore, it can be seen from the Assize Court's judgment that the finding of the applicant's guilt was based on a number of different items of evidence which the Assize Court carefully assessed

That being the case, the use of the statements of the pentiti as evidence did not deprive the applicant of a fair trial and accordingly was not in breach of Article 6 para 1 of the Convention

c. The applicant also complains that the Assize Court refused to question two cantonal police officers on the subject of the pressure allegedly brought to bear on the "pentiti" by the Italian police during their transfer to Switzerland

The Commission recalls that Article 6 para 3 (d) of the Convention does not give the defence an absolute right to question any witnesses it wishes to call (see Eur Court H R , Vidal v. Belgium judgment of 22 April 1992, Series A no 235-B, p 32, para 33). A court may thus refuse to examine witnesses whose testimony is not likely to help establish the truth (see, in particular, No 10486/83, Hauschildt v Denmark, previously cited, D R 49 pp. 86, 102)

The Commission notes that the Assize Court gave as the reason for refusing to hear the witnesses the applicant wished to call its opinion that their testimony was not necessary to establish the truth. It does not have sufficient evidence that on this point the Assize Court's assessment of the situation was arbitrary It further notes that the Assize Court adopted a critical approach in assessing the evidence and in particular took account of the possibility that the "pentiti" might have confirmed their previous statements in order not to lose the advantages they had been granted

The Commission accordingly considers that the applicant was in no way deprived of effective enjoyment of the rights guaranteed in this regard by Article 6 of the Convention

d The applicant complains that the Assize Court examined some of his former co defendants in Italy in his absence and in breach of the principle of public trial Their statements formed an important part of the evidence during the trial in the Assize Court. Consequently, he was found guilty on the basis of statements he was unable to challenge adequately because of a considerable curtailment of the rights of the defence He relies on paragraphs 1 and 3 (d) of Article 6 of the Convention

As the requirements of the third paragraph of Article 6 are specific aspects of the right to a fair trial, guaranteed under paragraph 1, the Commission will consider these complaints in the light of the two provisions taken together (see, among other authorities, Eur. Court H R , Melin v France judgment of 22 June 1993, Series A no 261-A, p 11, para. 21, and Hadjianastassiou v Greece judgment, previously cited, Series A no. 252, p. 16, para 31).

The Commission recalls that evidence must in principle be produced in the presence of the accused at a public hearing with a view to adversarial argument. That does not mean that the statement of a witness must always be made in court and in public to be admitted as evidence; in particular, that may be impossible in some cases The use as evidence of statements obtained during the preliminary investigation is not in itself inconsistent with paragraphs 3 (d) and 1 of Article 6 As a rule these provisions require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him either at the time when he makes any

statement or at a later stage of the proceedings (see, among other authorities, Eur Court H R , previously cited Saidi v France judgment, Series A no. 261-C, p 56, para 43, Ludi v. Switzerland judgment of 15 June 1992, Series A no 238, p 21, para 47)

The Commission notes that in the circumstances of this case a direct confrontation between the applicant and the persons whom it was proposed to examine in Italy was impossible both in Switzerland, because they refused to appear before the Assize Court, and in Italy, because the Italian authorities refused to issue the applicant with a safe conduct

The Assize Court did not abandon its plan to examine these witnesses, but invited the applicant to submit in written form the questions he wanted them to be asked. Considering that a direct confrontation with the persons concerned was indispensable, the applicant stated that he would not avail himself of this opportunity He also objected to his counsel accompanying the Assize Court to Italy and refused to have a lawyer appointed under the legal aid scheme for that stage of the proceedings

The Commission considers that, in those circumstances, the applicant cannot complain that he did not have the opportunity to examine or have examined the witnesses against him It recalls in that connection that a defendant who has waived the right to take part in criminal proceedings cannot subsequently complain that he was deprived of the opportunity to have examined the witnesses against him and to obtain the examination of witnesses on his behalf (No 8386/78, Dec 9 10 80, D R 21 pp 126, 131)

As regards the complaint that statements taken down in writing during the investigation were read out to those persons who refused to answer questions during the taking of evidence in Italy, the Commission recalls that, provided the rights of the defence are respected, the reading of such statements is not incompatible with Article 6 paras 1 and 3 (d) of the Convention (see above and also, *mutatis mutandis*, Eur Court H R., previously cited Artner judgment, Series A no 242 A, p 10, para 22)

However, the concept of a fair trial includes the fundamental right to adversarial procedure in criminal proceedings That right means that each party must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other (see Eur Court H R , Brandstetter v Austria judgment of 28 August 1991, Series A no 211, p 27, paras 66 and 67) In order to remedy, as far as possible, the lack of adversarial argument during the investigation and the taking of evidence in Italy, the Assize Court read out the records of the statements made by the persons examined there at a public hearing held immediately after its return from Italy The Commission notes that the applicant objected to the taking of evidence in Italy and the reading out of these records, as such However, he did not contest the result of the taking of evidence After the statements of the persons examined in Italy had been read out in the Assize Court, the applicant did not request that further questions be put to them at a further hearing in Italy, although he could have done so The Commission considers that, in those circumstances, the Assize Court was entitled

to take account of these statements, especially as they seemed to be corroborated by other evidence, including the statements of Cianfanelli and Walter de Cera, and by a large body of other circumstantial evidence all pointing the same way (see, *mutatis mutandis*, Eur Court H R , Isgrò judgment of 19 February 1991, Series A no 194-A, p 13, para 35)

Consequently, the applicant's absence from the hearings held in Italy did not, in the circumstances of this case, infringe the rights of the defence, nor did it deprive the applicant of a fair trial

e With regard to the alleged violation of the principle of public trial, the Commission notes that public access to the hearing held in Paliano prison was not generally prohibited, but was restricted in that only persons bearing security passes were admitted The Commission notes that this was merely a restriction of public access for prison security reasons and concerned only one isolated part of the trial The Commission points out that the records of the statements made were subsequently read out at a public hearing of the Assize Court in Lugano and that the applicant, who emphasises the importance of these statements, objected to their being read but did not contest their content Consequently, the Commission considers that the restriction of publicity during the hearing held in Paliano prison did not infringe Article 6 of the Convention

f The applicant complains that the Assize Court omitted to examine the defence witnesses in prison in Italy He alleges that this impairment of the equality of arms was all the more serious because the only persons the court examined in Italy were those whose statements incriminated him Contrary to the Federal Court s findings, he had clearly stated that he did not wish to waive his request that they be heard

The Commission recalls that, as a general rule, it is for the national courts to assess the evidence before them and the relevance of the evidence which defendants seek to adduce More specifically, Article 6 para 3 (d) leaves it to them, again as a general rule to assess whether it is appropriate to call witnesses, in the autonomous sense given to that word, it does not require the attendance and examination of every witness on the accused's behalf its essential aim, as is indicated by the words 'under the same conditions', is a full 'equality of arms' in the matter" The concept of 'equality of arms" does not, however, exhaust the content of paragraph 3 (d) of Article 6, nor that of paragraph 1, of which this phrase represents one application among others The task of the Convention institutions is to ascertain whether the proceedings in issue, considered as a whole, were fair for the purposes of paragraph 1 (see, among other authorities, Eur Court H R , previously cited Ludi v Switzerland judgment, Series A no 238, p 20, para 43)

In this case, as the Federal Court held, the Court of Cassation's finding that by deciding not to participate in the taking of evidence in Italy the defendant had unconditionally waived his request that the witnesses on his behalf in prison in Italy be examined was not arbitrarily reached Moreover, the reasons given by the witnesses

for the defence in their telegram explaining their failure to attend the hearing in the Assize Court were unfounded The Italian authorities never contemplated compelling these witnesses, by force and against their will, to appear before the Assize Court Lastly, even after the Assize Court's return from Italy, the applicant could still have repeated his request that these witnesses be examined

The Commission takes the view that, having regard to the reasons given, the Assize Court's decision not to examine the witnesses initially requested by the defence was not arbitrary Consequently the failure to examine them did not, in the circumstances of this case, infringe the rights of the defence, nor did it deprive the applicant of a fair trial

g The applicant complains that the Assize Court examined the Italian experts and took into account the reports concerning the murder weapon they had filed in the earlier proceedings in the Italian courts He maintains that, in those circumstances, the impartiality of these experts was open to doubt

The Commission will examine the applicant's complaint under the general rule of paragraph 1 of Article 6 of the Convention, whilst having due regard to the requirements of paragraph 3 It notes that, read literally, sub-paragraph (d) of paragraph 3 relates to witnesses and not experts In any event the guarantees contained in paragraph 3 are constituent elements, amongst others, of the concept of a fair trial set forth in paragraph 1 In this context it is necessary to take into consideration the position occupied by the experts throughout the proceedings and the manner in which they performed their functions (cf Eur Court H R , previously cited Brandstetter v Austria judgment, Series A no 211, pp 20 21, para 42)

However, the Commission notes that the experts concerned were not heard by the Assize Court as experts but as witnesses, and their reports, although admitted as evidence, had no more probative value in the court's eyes than any other document, not that which expert reports ordered by a court generally have It was open to the applicant and his counsel to question these witnesses Consequently, the Commission cannot discern any evidence that either the applicant's right to a fair trial or the principle of equality of arms inherent in the concept of a fair trial (see Eur Court H R , Bonisch judgment of 6 May 1985, Series A no 92, p 15, para 32) was infringed in this case

h The applicant further complains that the statements of the two Italian police officers and the two Swiss police officers were not original evidence but hearsay He asserts that he was unable to challenge their testimony

The Commission notes that the applicant has not adduced any evidence in support of this complaint and that it does not appear from the file that his conviction was based on the statements made by the police officers concerned

i The applicant complains that the Swiss courts based their decisions on an arbitrary assessment of the facts and the evidence, as well as on the conclusions set out in the Italian judgments, in breach of the principles of *viva voce* testimony, direct evidence and the presumption of innocence

However, the Commission considers that the reasons given in the judicial decisions criticised by the applicant show that the courts did not draw arbitrary conclusions from the facts submitted to them Moreover, nothing in the file would justify the assertion that the Assize Court based the applicant's conviction on the judgments pronounced in Italy The Assize Court gave judgment on the question of the applicant's guilt in accordance with its reasonable belief after considering a large body of evidence taken in the course of proceedings which, as the Commission has just found, satisfied in every respect the requirements of Article 6 of the Convention

It follows that the applicant's complaints under Article 6 of the Convention are manifestly ill-founded and must be rejected, pursuant to Article 27 para 2 of the Convention

3 Lastly, relying on Article 4 of Protocol No 7, the applicant complains that he was convicted twice in respect of the same acts, contrary to the *'ne bis in idem'* principle

Paragraph 1 of that provision is worded as follows

> No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State

However, it is clear, from the express terms of this provision, that it upholds the *ne bis in idem'* principle only in respect of cases where a person has been tried or punished twice for the same offence by the courts of a single State But the applicant was first convicted in Italy, whereas the second conviction, in respect of the same acts, was pronounced by a Swiss court

It follows that this part of the application must be rejected as being incompatible *ratione materiae* with this provision within the meaning of Article 27 para 2 of the Convention

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE