

# Mutual Assistance in Criminal Matters between Switzerland and Taiwan

The *Andrew Wang and others* Case

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## 1. Introduction

The case of *Andrew Wang and others v. Swiss Office of Justice*<sup>1</sup> marks the culmination of a long evolution of the practice of the Swiss Federal Office of Justice, as well as of the case law of the Swiss Supreme Court in the field of international mutual assistance in criminal matters. It clearly affirms that assistance can be granted to a requesting party, even if no bi- or multilateral treaty on mutual assistance requires Switzerland to do so. This assistance can even be granted if the requesting party in question is not recognized as a state by Switzerland.<sup>2</sup> It also reaffirms that assistance can be granted only to the extent that it serves justice in the requesting party, and that the human-rights standards are respected in the procedure for which the assistance is sought.

But neither of these two policy decisions is without consequence. The first policy has political consequences for the foreign relations of Switzerland, which have eventually to be dealt with by the executive branch. The second presupposes that the respect for human rights in the requesting party can be effectively assessed and controlled, which is more difficult in a party with which Switzerland has no diplomatic relations.

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1 Case *Wang et consort c. Office des juges d'instruction fédéraux*, Swiss Supreme Court, 1st Court of Public Law, 3 May 2004, ATF 130 II 217, available online at <http://www.bger.ch/fr/index/jurisdictionjurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm> (visited 6 February 2005).

2 As will be seen below, the Swiss Supreme Court distinguishes between those states which are recognized as such and those states which, despite meeting all requirements of a state, have not been recognized as such.

## 2. The Background to the Case

In 2001, following a suspicious activity report filed by a Swiss bank, the Swiss federal prosecution authorities started an investigation in relation to allegations of money laundering, lack of due diligence in financial matters and various alleged acts of forgery. All of those alleged criminal actions were said to have been related to the sale by France of six frigates to the Republic of China (ROC)<sup>3</sup> (Taiwan) for a total price exceeding US \$2.5 billion. The investigating magistrate asserted that Mr Wang acted as an intermediary to bribe ROC officials and pay kickbacks to various French politicians and, for his services, received US \$500 million.

In the course of his investigation, the Swiss investigating judge requested from the ROC a number of documents. Those were eventually provided to him by the ROC, despite the fact that Switzerland and ROC are not bound by any treaty on mutual assistance in criminal matters.

Later on, it was the turn of the General Prosecutor before the Supreme Court of the ROC to ask the Swiss Office of Justice, through the cultural and economic mission of Taipei (ROC) in Berne, for assistance in the parallel criminal case which was pending before the courts in the ROC. The Swiss Office of Justice agreed to the request.

Mr Wang appealed to the Swiss Supreme Court against the decision, arguing that assistance could not be granted to the ROC, as it was not recognized as a state by Switzerland. He also argued, among other arguments, that this assistance would contradict the 'one China' policy of Switzerland and therefore hamper diplomatic relations with the People's Republic of China. Lastly, he said that the ROC could not be granted assistance, as it did not respect fair-trial standards. The Supreme Court rendered its judgment on 3 May 2004, dismissing the argument on the lack of state capacity, but sending the case back to the Office of Justice for further investigations and new guarantees from the ROC that a fair trial would be granted to the accused.

## 3. The Judgment of the Supreme Court

### *A. Assistance to a State not Recognized as such by Switzerland*

As Switzerland and the ROC are not parties to any treaty on mutual assistance in criminal matters,<sup>4</sup> Switzerland could only rely on domestic

3 This term was used most of the time in the opinion of the Supreme Court.

4 Presently, Switzerland is bound by a multilateral treaty on mutual assistance in criminal matters with all States Parties to the Council of Europe's 1959 Convention on Mutual Assistance in Criminal Matters (ETS 030), as well as, on a bilateral basis, with the United States of America (treaty of 25 May 1973), India (exchange of letters of 20 February 1989), Philippines (treaty of 19 October 1989), Australia (treaty of 25 November 1991), Canada (treaty of 7 October 1993), Peru (treaty of 21 April 1997), Ecuador (treaty of 4 July 1997), Hong Kong (treaty of 15 March 1999), Egypt (treaty of 7 October 2000), available online at <http://www.admin.ch/ch/f/rs/0.35.html#0.351> (visited 6 February 2005).

legislation on mutual assistance in criminal matters,<sup>5</sup> which provides that the Office of Justice can transmit documents and transfer proceeds of crime to a requesting party, provided that certain conditions are met. This law does not provide the requesting party with a right to obtain the assistance.<sup>6</sup> Since the *Marcos* case,<sup>7</sup> however, the Swiss Supreme Court considers that Switzerland has a general interest not to be perceived as, or to become a haven for, the proceeds of crimes or dirty money, and therefore to participate in the fight against crime and corruption by means of mutual assistance with other states.

But the case of assistance with the ROC was peculiar in one major respect, as Switzerland has no official diplomatic relations with the ROC. Switzerland was, in fact, the first Western state to break its diplomatic relations with the Chiang Kai-Shek regime and to recognize the reality of the People's Republic of China, with which it has, ever since, enjoyed full diplomatic relations.<sup>8</sup> Therefore, and logically, Switzerland should only have provided mutual assistance to the regime which it recognizes, namely that of Beijing, if the People's Republic of China asked for such assistance.

This rather formalistic approach was not adopted by the Supreme Court. Instead, the Court took a different path, and granted assistance to the ROC. The Court noted that for matters concerning the island of Taiwan, the ROC 'presents all the characteristics of a State', namely a territory, a population and an effective and independent government,<sup>9</sup> yet without mentioning the importance of a state declaring itself to be one, which scholars have generally considered to be of paramount importance.<sup>10</sup>

As to the formal recognition of the Republic, or absence thereof, the Supreme Court held that it was a political matter which belonged to the executive branch of the government (in Switzerland, this is the Federal

5 Law on International Mutual Assistance in Criminal Matters ('IMAC'), *Recueil systématique* (RS) 351.1. On mutual assistance in criminal matters in Switzerland, see L. Moreillon (ed.), *Entraide internationale en matière pénale* (Basel: Helbing & Lichtenhahn, 2004); P. Popp, *Grundzüge der internationalen Rechtshilfe in Strafsachen* (Basel: Helbing & Lichtenhahn, 2001); R. Zimmermann, *La coopération judiciaire internationale en matière pénale* (2nd edition, Bern: Stämpfli; Bruxelles: Bruylant, 2004).

6 See Art. 1 IMAC: '...provided that international agreements do not provide otherwise, this Act shall govern all procedures of international cooperation in criminal matters. ... This Act shall confer no right to demand international cooperation in criminal matters.'

7 Case *BAP v. Aguamina Corp.*, Swiss Supreme Court, 1st Court of Public Law, 10 December 1997, ATF 123 II 599 c. 5a, p. 607.

8 Report of the Department for Foreign Affairs, 1949, p. 12, in 7 *Annuaire Suisse DI* (1950); Communication of 17 January 1950 of the Department for Foreign Affairs on the recognition of the People's Republic of China, in J.P. Müller and L. Wildhaber (eds), *Praxis des Völkerrechts* (3rd edition, Bern: Stämpfli, 2001), 235.

9 Case *Wang et consort c. Office des juges d'instruction fédéraux*, Swiss Supreme Court, 1st Court of Public Law, 3 May 2004, No. 5.2.

10 See, e.g. American Law Institute, *Restatement of the Law, Third, the Foreign Relations Law of the United States*, § 201, comment f.

Council as a whole<sup>11</sup>). The Supreme Court added that the granting of assistance in the field of criminal matters was not tantamount to an act of tacit recognition:

States recognize each other as such (...). According to the majority view, recognition only has a declarative (not a constitutive) effect, in that it only amounts to the recognition that the constitutive elements of a state already exist. International recognition of an entity is not a precondition to its existence as a state (...). It cannot be said that the granting of mutual assistance to Taiwan would amount to the recognition, even implicitly, of the Republic of China. This therefore excludes the possibility that the granting of mutual assistance to Taiwan could be regarded as a hostile act towards the People's Republic of China. The absence of recognition and of diplomatic relations (between Switzerland and Taiwan) does not mean that mutual assistance with Taiwan would be forbidden.<sup>12</sup>

What matters in granting or deciding to grant mutual assistance, the Supreme Court said, is the material ability of the authority requesting mutual assistance to exercise powers similar to those traditionally exercised by a state and, in the particular case of assistance in criminal matters, whether the state may administer criminal justice on its territory. As it is the government of Taipei (and not of Beijing) that is able to exercise effective authority on the island of Taiwan, the assistance could only be provided to this government. The non-recognition of the government of Taiwan at the diplomatic level did not, therefore, prevent the Swiss authorities cooperating in relation to particular criminal proceedings:

The request for mutual assistance relates to facts which took place within the sphere of influence of the Taiwanese authorities. The accused are Chinese from Taiwan, where some of them are being detained. A criminal procedure has been opened which might eventually lead to the appearance of the accused before the Taiwanese authorities. The continued functioning of local institutions, including judicial institutions, is guaranteed. Even if Switzerland may not, by definition, sign treaties with the Republic of China as it does not recognize it as a state, this does not preclude collaborations from time to time between authorities, as in the present case.<sup>13</sup>

The Supreme Court also ruled that a statement sent by the ROC authorities to the Swiss Office of Justice, in which the ROC authorities guaranteed reciprocity to their Swiss counterparts for any future implementation of requests for assistance in criminal matters, fulfilled the requirements for a declaration of reciprocity.

11 Art. 54(2) Swiss Constitution: Foreign Relations: '(2) the Confederation shall strive to preserve the independence of Switzerland and its welfare; it shall, in particular, contribute to alleviate need and poverty in the world, and to promote respect for human rights, democracy, the peaceful coexistence of nations, and the preservation of natural resources.'

12 Case *Wang et consort c. Office des juges d'instruction fédéraux*, Swiss Supreme Court, 1st Court of Public Law, 3 May 2004, No. 53.

13 *Ibid.*, No. 54.

The fact that the ROC had no official representative in Switzerland was also dismissed by the Supreme Court as irrelevant to this matter. The Court stated that the request for mutual assistance could well, in practice, be sent, as it had been the case in this instance, through other bodies such as the cultural and economic delegation of Taipei in Berne.

***B. Assistance is not Precluded by the Fact that Switzerland has Diplomatic Relations with the People's Republic of China***

The appellants also raised the argument that the provision of assistance to the ROC could compromise relations between Switzerland and the People's Republic of China, and could therefore constitute a threat to Switzerland's national interests. In that sense, the appellants relied on Article 2 of the Law on International Mutual Assistance in Criminal Matters (IMAC), which provides that 'the sovereignty, security, public order or similar essential interests of Switzerland shall be taken into account'.

By national interest, one has to consider the economic interests of Switzerland as a whole. If the People's Republic of China wanted to prevent the ROC from consolidating its claim to statehood, it could threaten Switzerland with paying the price for its relations with Taiwan, e.g. by disadvantaging Swiss businessmen in continental China.

Here, the Swiss Supreme Court considered at some length the increase in commercial transactions between Switzerland and Taiwan, and referred to the discretionary power of the Executive Branch, through the Federal Office of Justice, to decide whether assistance to the ROC could lead to diplomatic problems with the People's Republic of China. It also noted the fact that the Federal Office of Justice had consulted beforehand with the Federal Department for Foreign Affairs, which itself was of the opinion that the granting of assistance to the ROC would not imply its recognition as a state by Switzerland. The Supreme Court also mentioned that an appeal could still be lodged with the Federal Council on the political appropriateness of the assistance to the ROC.<sup>14</sup> On that basis, the Supreme Court dismissed the argument.

<sup>14</sup> According to Art. 184 of the Swiss Constitution, the foreign relations of Switzerland are of the competence of the Federal Council as a whole. Eventually, Andrew Wang did lodge an appeal on 11 October 2004 to the Federal Council against the decision of the Federal Office of Justice. The Federal Council has no general jurisdiction on the case but can only review whether the assistance could threaten the sovereignty, security, public order or similar essential interests of Switzerland. At the time of the submission of the present paper (end of January 2005), the Federal Council had not yet taken any decision on the case.

### C. The Republic of China Respect for Human-Rights Standards

The Supreme Court also discussed at length whether the ROC fulfilled the requirements provided by human-rights instruments such as the European Convention on Human Rights and the International Covenant on Civil and Political Rights in the proceedings against the accused.

Indeed, Swiss law on mutual assistance in criminal matters cannot be granted if the foreign procedure under consideration does not comply with the principles established by the said instruments.<sup>15</sup> This requirement is justified by the fact that Switzerland does not wish to contribute, through judicial assistance or extradition, to proceedings that do not guarantee the person charged or prosecuted a minimum standard of protection corresponding to those normally provided in a democratic state. This requirement is also to be found in the case law of the European Court of Human Rights, in particular the *Soering* case.<sup>16</sup>

On the other hand, the Supreme Court insisted on the necessity of being careful in making a subjective judgment upon the internal affairs of a state, in particular its political regime, its institutions, its conception of fundamental guarantees and its actual compliance therewith, and on the independence and impartiality of its judiciary. In this case, the facts that the ROC had not ratified the International Covenant on Civil and Political Rights (ICCPR) and that it was not bound by any treaty with Switzerland motivated the Supreme Court to consider these issues.

It stated that, on paper at least, and considering Article 82 of the Constitution of the ROC, judiciary in ROC could be considered as governed by the rule of law. It also said that, theoretically, ROC judges exercised their function with complete independence and impartiality (Articles 80 and 81 Constitution of the ROC). In criminal matters, accused persons appeared to enjoy the same basic rights as provided for by the ICCPR.

Yet, the Supreme Court was not convinced by this set of legal rules, and considered that the ROC did not have a good record in terms of human rights. Besides, Switzerland could not, by law, provide assistance to a

15 Article 2(a) IMAC: '[A request for cooperation in criminal matters may not be granted if the foreign procedure] does not meet the standards of the European Convention of 1950 on the Protection of Human Rights.'

16 *Soering v. the United Kingdom*, Series A, No. 161; Application No. 14038/88, European Court of Human Rights (1989) 11 EHRR 439, 7 July 1989. On this case, see S. Breitenmoser and G.E. Wilms, 'Human Rights v. Extradition: the *Soering Case*', 11 *Michigan JIL* (1990) 845–886; M. Frankowska, 'The *Soering Case*', 85 *AJIL* (1991) 128–149; F. Sudre, 'Extradition et peine de mort: arrêt *Soering* de la Cour Européenne des Droits de l'Homme du 7 juillet 1989', 94 *RGDIP* (1990) 103–121; S. Williams, 'Extradition to a State that Imposes the Death Penalty', 28 *Canadian YBIL* (1991) 117–168. See also C. Van den Wyngaert, 'Applying the European Convention on Human Rights to Extradition: Opening Pandora's Box?', in J. Dugard and C. Van den Wyngaert (eds), *International Criminal Law and Procedure* (Dartmouth: Aldershot, 1996), 757–779, as well as R.J. Currie, 'Human Rights and International Mutual Legal Assistance: Resolving the Tension', 11 *Criminal Law Forum* (2000) 143–181.

requesting party in which an accused person could be sentenced to death. Therefore, the Supreme Court conditioned the assistance to the ROC on the following conditions:

- (a) the accused will have the necessary time and facilities to prepare their defence and the right to be assisted and to communicate freely with a counsel of their choice;
- (b) the presumption of innocence will be respected;
- (c) the death penalty will not be requested, ordered or enforced.

Therefore, it sent the case back to the Federal Office of Justice and asked it to obtain sufficient guarantees from the ROC that these conditions would be met in practice.<sup>17</sup>

#### 4. Merits and Shortcomings of the Judgment

With this case, the Swiss Supreme Court adopted an approach already well developed in Switzerland in the field of mutual assistance in criminal matters: according to that approach, a state (Switzerland, in this case) need not be bound by a treaty before it may provide assistance to another requesting party; it may instead rely on its own domestic legislation to do so. The Court found, furthermore, that even if Swiss law does not oblige the government to provide assistance to third countries, it is in the general interest of Switzerland not to be seen, or considered, as a haven for criminal evidence and the proceeds of crimes. Even if, in theory, assistance is only provided for if the requesting party respects reciprocity, Switzerland may be willing to accept informal declarations of reciprocity instead. On the other hand, assistance is granted only if the requesting party shows that the standards for its procedure are comparable to those of a democratic country. If doubts arise in this respect, the requesting party must give formal guarantees to the requested state.

This case illustrates well the pragmatic approach of the Swiss Supreme Court: what counts in assistance in criminal matters is the practical possibility for the requesting party to fight crime, rather than diplomatic and political considerations. To put it differently, the real foreign policy of Switzerland is to be seen as cooperating with other parties in the fight against crime.

At first sight, the approach of the Supreme Court is laudable, as it seems to favour justice rather than political considerations or legal technicalities. Yet, it has drawbacks, as this case has shown the limits of this general approach.

<sup>17</sup> This requirement of the requested state to ask for 'satisfactory assurances' that the accused person would not be treated contrary to the European Convention of Human Rights is provided for by Art. 80(p) IMAC. This practice has been endorsed by the European Court of Human Rights in the *Einhorn c. France*, ECHR (2001) case, No. 71555/01, § 33, 2001-XI.

First, it is almost impossible to isolate the judicial proceedings of mutual assistance in criminal matters from the political and diplomatic consequences that they may trigger, as they eventually give rise to problems of power and alliances in any case. Whatever the Swiss Supreme Court said about the (lack of) consequences of its decision, Switzerland may be perceived as recognizing *de facto* the independence of the ROC from the mainland.

As a matter of fact, the question of the status of Taiwan is presently under renewed consideration before the Swiss Federal Council. The executive branch now has to decide whether the 'one China' policy which it has followed since 1950 could survive the kind of cooperation with the ROC as endorsed by the Swiss Supreme Court in the *Wang* case.<sup>18</sup> It also has to decide whether it would not be more advantageous for Switzerland to put less emphasis on its fight against crimes in the ROC (and the economic interests of Switzerland with it) than on its good relationships — diplomatic, political and economic — with the People's Republic of China.

Secondly, the Swiss Supreme Court's general trust in the good faith of the requesting party has seemed, in previous cases, naive (or overly cynical) to the extent that it considered that the mere fact that a state is a party to the ICCPR or to other human-rights instruments is a sufficient guarantee that the state in question would comply with the human-rights standards established by those instruments. Yet, it is also questionable whether a simple 'declaration' on the part of a requesting state which is not a party to the ICCPR or any other generally accepted human-rights instruments should be regarded as sufficient guarantee that the procedure will be 'fair and equitable'.

In the present case, the Swiss Supreme Court properly asked for actual and practical guarantees that the principle of a fair trial would be respected. But it has to be seen how Switzerland could verify in the ROC whether the trial is fair, as Switzerland has no diplomatic representative in Taiwan. One may also wonder how Switzerland could react in the future if the ROC, with which Switzerland has no formal relations, does not keep its word.

Finally, one should not overlook the possibility that the ROC may use the process of requesting judicial assistance precisely partly to obtain some kind of recognition. If so, the Court may be simply playing into the requesting party's hands.

18 Actually, the Federal Council was called on 29 September 2004 by 50 MPs to explain its position on foreign policy towards Taiwan, and in particular with regard to its 'one China' policy, available online at [http://www.parliament.ch/afs/data/f/gesch/2004/f\\_gesch\\_20043471.htm](http://www.parliament.ch/afs/data/f/gesch/2004/f_gesch_20043471.htm) (visited 6 February 2005).