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

GRAND CHAMBER

**CASE OF STOLL v. SWITZERLAND**

*(Application no. 69698/01)*

JUDGMENT

STRASBOURG

10 December 2007

**In the case of Stoll v. Switzerland,**

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Jean-Paul Costa, *President*,
Luzius Wildhaber,
Boštjan M. Zupančič,
Peer Lorenzen,
Rıza Türmen,
Margarita Tsatsa-Nikolovska,
András Baka,
Mindia Ugrekhelidze,
Anatoly Kovler,
Vladimiro Zagrebelsky,
Antonella Mularoni,
Elisabet Fura-Sandström,
Renate Jaeger,
Egbert Myjer,
Dragoljub Popović,
Ineta Ziemele,
Isabelle Berro-Lefèvre, *judges*,
and Vincent Berger, *Jurisconsult*,

Having deliberated in private on 7 February and 7 November 2007,

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

# PROCEDURE

1. The case originated in an application (no. 69698/01) against the Swiss Confederation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Swiss national, Mr Martin Stoll ("the applicant"), on 14 May 2001.

2. The applicant was represented by Ms H. Keller, a lawyer practising in Zürich. The Swiss Government ("the Government") were represented by their Agent, Mr F. Schürmann, Head of the Human Rights and Council of Europe Section of the Federal Office of Justice.

3. The applicant alleged that his conviction for publishing "secret official deliberations" had been contrary to Article 10 of the Convention.

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

5. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Fourth Section (Rule 52 § 1). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. On 3 May 2005 the application was declared admissible by a Chamber composed of Nicolas Bratza, President, Josep Casadevall, Luzius Wildhaber, Matti Pellonpää, Rait Maruste, Javier Borrego Borrego and Ján Šikuta, judges, and of Michael O'Boyle, Section Registrar.

7. On 25 April 2006 the Chamber delivered a judgment in which it held, by four votes to three, that there had been a violation of Article 10 of the Convention. It considered that the finding of a violation constituted in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant. The applicant did not submit any claim for costs and expenses.

8. On 14 July 2006 the Government requested that the case be referred to the Grand Chamber under Article 43 of the Convention and Rule 73 of the Rules of Court. The panel of the Grand Chamber granted the request on 13 September 2006.

9. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24 of the Rules of Court.

10. The Government, but not the applicant, filed observations on the merits. The applicant submitted his claim for just satisfaction.

11. In addition, third-party comments were received from the French and Slovakian Governments, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2).

12. A hearing took place in public in the Human Rights Building, Strasbourg, on 7 February 2007 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr F. SCHÜRMANN, Head of the Human Rights and Council of Europe Section of the Federal Office of Justice, Federal Department of Justice, *Agent*,
Mr P. SEGER, Ambassador, Jurisconsult, Head of the International Public Law Directorate, Federal Department of Foreign Affairs,
Mr A. SCHEIDEGGER, Deputy Head of the Human Rights and Council of Europe Section,
Ms D. STEIGER, Legal Assistant, Human Rights and Council of Europe Section, *Counsel*;

(b) *for the applicant*

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|---|---|---|
| Ms | H. KELLER, | *Representative*, |
| Mr | S. CANONICA, Legal Adviser, TA Media, | |
| Mr | A. DURISCH, Editor, *Sonntags-Zeitung*, | |
| Mr | A. FISCHER, Lecturer, University of Zürich, | |
| Ms | D. KÜHNE, Lecturer, University of Zürich, | |
| Ms | M. FOROWICZ, Lecturer, University of Zürich, | *Advisers*. |

The applicant was also present.

The Court heard addresses by Ms Keller, Mr Schürmann and Mr Seger. The parties' representatives replied to the questions asked by one judge.

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

13. The applicant was born in 1962 and lives in Switzerland.

### A. Background to the case

14. In 1996 and 1997 negotiations were conducted between, among others, the World Jewish Congress and Swiss banks concerning compensation due to Holocaust victims for unclaimed assets deposited in Swiss bank accounts.

15. Against that background Carlo Jagmetti, who was the Swiss ambassador to the United States at the time, drew up on 19 December 1996 a "strategy paper", classified as "confidential", which was faxed to Thomas Borer, head of the task force that had been set up to deal with the matter within the Federal Department of Foreign Affairs in Berne. Copies were sent to nineteen other individuals in the Swiss government and the federal authorities and to the Swiss diplomatic missions in Tel Aviv, New York, London, Paris and Bonn.

16. Below are some extracts from the document, based on the article "That's all we need", which appeared in the *Tages-Anzeiger* on 27 January 1997, the day after the applicant's articles were published (unofficial translation):

> "Ambassador,
>
> The campaign against Switzerland and the huge claims accompanying it, reflected in the activities of the Jewish organisations, the statements of American politicians and the class actions, will greatly occupy the authorities and public opinion on both sides of the Atlantic for some time to come ... However, the real reverberations will not be

felt until the inquiries which are to be launched have been completed, those claims that are well-founded have been met, the proceedings have been concluded and matters have been put right in historical, political, legal and moral terms. That will take at least three years, possibly much longer. Moreover, it is impossible to predict today the course of Swiss domestic and foreign policy in the years ahead. In any event, the political, economic and social challenges facing the country internally and the uncertainty surrounding the European issue (the EU, security, etc.) and globalisation are already prompting some painful soul-searching by the Swiss people.

The comments now coming from America are all we need. Suddenly, on top of the present and future uncertainties, we must come to terms with the past. The campaign against Switzerland, therefore, is being conducted in an already difficult climate ...

All Switzerland's efforts are aimed at preserving the country's integrity, forestalling or at least warding off dangers and maintaining international relations (in particular with the United States) during the crisis and beyond while avoiding any lasting damage. All interim goals must be viewed solely in relation to the main objective. Short-lived successes such as 'truces', temporarily positive reactions from the media, satisfaction at seeing certain projects put in hand, historical insights which may be favourable to Switzerland or constructive remarks from our negotiating partners abroad should not blind us to the long-term reality. Individual battles may be important, but ultimately it is the war that Switzerland must win ...

If we assume that the demands of the Jewish organisations and Senator D'Amato must be satisfied as a matter of urgency, and that then calm will be restored, an actual deal might be struck with the organisations concerned. Instead of just making the 'gesture' currently being speculated on, we could act immediately to resolve the matter by paying a lump sum in order to settle all the claims once and for all. Given that a large number of groups and countries are affected by this issue and that Switzerland is now being called to account, as it were, by the international community, the plan must have both a national and an international dimension and be based on a long-term strategy. It might look something like this:

– the measures planned to date (publication of the expert report on the compensation agreement with the countries of eastern Europe, commencement of the work of the historical commission, inquiries by the Volcker Committee) will be effectively implemented by Switzerland using the necessary resources and within a realistic time frame, with any difficulties being overcome in a determined manner;

– the dialogue with all the groups concerned must be continued in a correct and conciliatory manner, without making interim concessions which could jeopardise the entire process;

– as far as the activities of foreign governments and parliaments are concerned (particularly in the United States and the United Kingdom), the aim should be to bring about courteous bilateral cooperation focusing primarily on establishing the truth and avoiding any polemics. Where necessary, of course, a clear and firm stance should be taken, particularly if Switzerland is disparaged or accused without absolutely clear-cut reasons;

– when significant interim findings have been obtained and, especially, when all the inquiries have been completed, negotiations will need to be conducted on the conclusions to be drawn and on how any funds released should be used. These should

be conducted at governmental level, either multilaterally, if possible with all the countries concerned (including the Allies, those countries that were neutral at the time, Israel and Germany), bilaterally with Israel (which would mean giving up a long-standing position and accepting the risk of adverse reactions from the Arab world), or with non-governmental organisations. Much will depend on the strategy of our adversaries. However, the issue must be made an international one and other countries must be held to account. Switzerland, which has set a good example with its inquiries, should assume a leading role and hence seize the initiative ...

It must also be borne in mind that scenarios and strategies are not immune to outside influences and that events may occur or a new trend emerge at any time, calling everything into question or at least requiring considerable flexibility. Accordingly, a mix of action based on international law and interim payments would, if possible, be more realistic. Opting for this kind of mix from the outset would almost inevitably mean taking a pragmatic approach that evolves from day to day and scarcely deserves the ambitious description of a 'strategy' ... Switzerland cannot afford to just muddle through in this matter.

Whatever strategy is chosen, action will be needed on the external front to lend credibility to Swiss efforts. This can be done by taking the same – essentially reactive – stance taken hitherto or by adopting a more innovative approach. As part of the latter I would advocate campaigning systematically in political circles and in the media, maintaining ongoing contacts with the American administration in order to compare results and refine methods, cultivating relations with the Jewish organisations wherever possible in a friendly manner but without servility, and conducting a well-orchestrated public relations campaign including, for instance, seminars and round-table sessions. On the subject of public relations, however, statements should be made only if there is something new to be said and the time and place are right. Pilgrimages abroad are best avoided on tactical grounds and in view of the domestic policy aspects ...

The advantages and drawbacks of the different approaches are fairly obvious. However, it is clear that, from a historical, political and legal perspective, a 'deal' will never be satisfactory. Ideally, all the same, the legal strategy should be chosen. This places considerable demands on all concerned and calls for initiative, time and energy, to say nothing of the cost. In view of the main objective, however, we would be well advised to change the habit of a lifetime and make the necessary funds available without unseemly haggling. Let me repeat: this is a war Switzerland must wage and win on the external and domestic fronts. Most of our adversaries are not to be trusted. The potential damage to Switzerland from a boycott or perhaps even legislative action by other countries is immense. Even the figures for our national pension insurance scheme or the cost of the new trans-Alpine rail links, for instance, are liable to look modest by comparison. Switzerland must present a united and determined front ...

Carlo Jagmetti, Swiss Ambassador"

17. The applicant obtained a copy. It seems clear that he could not have acquired possession of the document without a breach of official secrecy by a person whose identity remains unknown.

## B. The impugned articles by the applicant

18. On Sunday 26 January 1997 the Zürich Sunday newspaper, the *Sonntags-Zeitung*, published the following article by the applicant (unofficial translation):

> "Ambassador Jagmetti insults the Jews [original title in German: *Botschafter Jagmetti beleidigt die Juden*]
>
> Secret document: 'Our adversaries are not to be trusted' [*Geheimpapier: 'Man kann dem Gegner nicht vertrauen*']
>
> by [the applicant]
>
> Berne/Washington – Another scandal involving the Swiss ambassador to the United States: Carlo Jagmetti, in a confidential strategy paper on the assets of Holocaust victims, talks of the 'war Switzerland must wage', and of 'adversaries' who 'are not to be trusted'.
>
> The paper is classified as 'confidential'. It was written by Carlo Jagmetti, Swiss ambassador to the United States. On 19 December the 64-year-old high-ranking diplomat in Washington sent the task force in Berne his views on what he described as a 'campaign against Switzerland'. This report has been obtained by the *Sonntags-Zeitung*, and is dynamite. In terms of its content, it is an unremarkable assessment of the situation. But the aggressive language used by Carlo Jagmetti has the effect of an electric shock on the reader. 'It is a war,' writes the ambassador, 'a war Switzerland must wage and win on the external and domestic fronts.' He describes Senator D'Amato and the Jewish organisations as 'adversaries', saying that 'most of our adversaries are not to be trusted'.
>
> In his paper, Carlo Jagmetti mentions the possibility of concluding an agreement, because 'the demands of the Jewish organisations and Senator D'Amato must be satisfied as a matter of urgency'. He uses the word 'deal' in this context. Ambassador Jagmetti suggests 'paying a lump sum' to the Jews in order to settle 'all the claims once and for all'. Then, he writes, 'calm will be restored'.
>
> Speaking of the 'external front', Carlo Jagmetti says that Switzerland should 'campaign systematically in political circles and in the media'. Relations with Jewish organisations should be 'cultivated in a friendly manner but without servility', with the help of a firm of lawyers, and a 'well-orchestrated public relations campaign [should be conducted], including seminars and round-table sessions'.
>
> No comments on this strategy paper by the eminent diplomat – due to retire in the spring – were forthcoming yesterday either from Flavio Cotti [head of the Swiss diplomatic service] at the Federal Department of Foreign Affairs or from the task force headed by Thomas Borer. Carlo Jagmetti had no comment to make to this newspaper.
>
> Martin Rosenfeld, President of the Swiss Federation of Jewish Communities (SIG/FSCI) described Carlo Jagmetti's remarks as 'shocking and profoundly insulting'. He said he foresaw 'a difficult run-up to retirement' for Mr Jagmetti."

19. In the same edition of the *Sonntags-Zeitung* of 26 January 1997, another article by the applicant read (unofficial translation):

> “The ambassador in bathrobe and climbing boots puts his foot in it [*Mit Bademantel und Bergschuhen in den Fettnapf*]
>
> Swiss Ambassador Carlo Jagmetti’s diplomatic blunderings [*Der Schweizer Botschafter Carlo Jagmetti trampelt übers diplomatische Parkett*]
>
> by [the applicant]
>
> Berne/Washington – Swiss Ambassador Carlo Jagmetti constantly gets himself noticed on the diplomatic scene. With his insensitive remarks on the assets of Holocaust victims, he has thrown Swiss foreign policy into turmoil – and not for the first time.
>
> Early on Friday morning the temperature began to rise in the offices of the Swiss embassy in Washington. ‘We do not comment on internal documents’ said an embassy spokesman emphatically to this newspaper ... By the following day, nevertheless, ... [an] editor on the [daily newspaper] *Neue Zürcher Zeitung* had already leapt to the defence of his close friend Carlo Jagmetti. Under the heading ‘Leaks continue unabated’, he announced that ‘this balanced document, some parts of which might, of course, be mischievously construed, may be published this weekend’.
>
> Damage limitation, therefore, was the name of the game in Washington on Friday. Ambassador Carlo Jagmetti, who has represented Switzerland abroad for 34 years, was clearly aware of the explosive nature of his strategy paper, dated 19 December 1996, on the subject of unclaimed Jewish assets. In his paper, he talks about a ‘war Switzerland must wage and win on the external and domestic fronts’. He winds up with a flourish by observing: ‘Most of our adversaries are not to be trusted.’
>
> The Swiss embassy in Washington is, however, experienced in crisis management. Carlo Jagmetti, who heads the embassy, regularly puts his foot in it. In 1993, a few months after moving into his office in the prestigious Cathedral Avenue, this senior diplomat committed his first *faux pas*. In an interview with the magazine *Schweizer Illustrierte*, he complained about the American administration, saying ‘I’ve observed a certain lack of courtesy’. Even Bill Clinton, who was said to ‘burst out laughing sometimes at inopportune moments’, was criticised during the interview. Apparently, Mr Clinton had ‘kept [Carlo Jagmetti] waiting for four months’ before he was accredited. And, according to the ambassador, it was legitimate to ask, on a general note, ‘who [was] actually governing the United States’.
>
> Berne reprimanded the ambassador for his ill-chosen remarks and for an unconventional public appearance (Carlo Jagmetti and his wife were pictured [in an article in *Schweizer Illustrierte*] in their bathrobes), but the ambassador did not prove much more reticent in his subsequent utterances. And in the highly topical debate concerning the assets of Holocaust victims, Carlo Jagmetti has also given the impression of somebody blundering onto the diplomatic stage in outsize boots. He rebuked the Holocaust survivor Gerda Beer in front of the assembled American press, saying that her claims were unfounded as her uncle had emptied the Swiss bank account in question. The incident-prone diplomat based his remarks, however, not on proven facts, but on unsubstantiated rumours which had been circulating.

Berne was left with no choice but to apologise for his undiplomatic remarks in a bid to limit the damage.

These remarks, which have now been made public, are all the more embarrassing since the tension seemed to be easing. Only last Friday Senator D'Amato and the World Jewish Congress had for the first time welcomed Switzerland's agreement to set up a fund for Holocaust victims.

Swiss diplomats are now engaged in behind-the-scenes efforts to head off the impending crisis by stressing the fact that Carlo Jagmetti is due to retire shortly. In any event, they argue, Mr Jagmetti played only a minor role in the recently concluded negotiations between Jewish organisations and the American Senator D'Amato.

Carlo Jagmetti himself has declined to comment. He absented himself from the major press conference held by Senator D'Amato on Friday before the world's press. He was reportedly on holiday in Florida."

## C. Other press articles

20. A third article, which also appeared in the *Sonntags-Zeitung* on 26 January 1997 and was written by the editor Ueli Haldimann, was entitled "The ambassador with a bunker mentality" ("*Botschafter mit Bunkermentalität*").

21. On Monday 27 January 1997 the Zürich daily, the *Tages-Anzeiger*, reproduced lengthy extracts from the strategy paper in an article entitled "That's all we need" ("*Das hat gerade noch gefehlt*"). Subsequently, another newspaper, the *Nouveau Quotidien*, also published extracts from the paper.

## D. The opinion of the Swiss Press Council

22. Following publication of these articles, the Swiss Federal Council (*Bundesrat*) requested the Swiss Press Council (*Presserat*) to examine the case.

23. The Swiss Press Council acts as a complaints body for media-related issues. It is an institution under Swiss private law set up by four associations of journalists which formed a foundation (*Stiftung*) to organise and fund the activities of the Press Council. According to the Press Council rules, its activities are intended to contribute to the discussion of fundamental ethical issues in relation to the media. Its task is to uphold freedom of the press and freedom of information, and it adopts opinions, on its own initiative or in response to complaints, on issues concerning journalistic ethics. The Swiss Press Council has adopted a "Declaration on the rights and responsibilities of journalists", which is available on the Internet.

24. Its opinion (*Stellungnahme*) of 4 March 1997 concerning the present case (no. 1/97, C. J./*Sonntags-Zeitung*) reads as follows (unofficial translation):

"II. Considerations

...

2. With regard to the publishing of confidential information, the following extracts from the Declaration on the rights and responsibilities of journalists are of relevance:

(a) '[Journalists'] responsibility to the public [shall take precedence over] their responsibility ... towards the ... authorities ... in particular' (Preamble).

(b) Journalists shall have free access 'to all sources of information and [shall have the] right to investigate without hindrance any facts which are in the public interest; objections of secrecy in public or private matters may be raised only in exceptional cases, with sufficient reasons given in each case' (point (a) of the Declaration of rights).

(c) Journalists shall publish only 'such information, documents [or] images whose origin is known to them; [they shall not suppress] information or essential elements [and shall not] distort any text, document, image ... or opinion expressed by another. [They shall] present unsubstantiated news items very clearly as such [and] make clear when pictures have been edited'. They shall comply with reasonable deadlines (point 3 of the Declaration of responsibilities).

(d) Journalists shall not make use of 'unfair methods in order to obtain information, ... images or documents' (point 4 of the Declaration of responsibilities).

(e) They shall respect 'editorial secrecy and shall not reveal the sources of information obtained in confidence' (point 6 of the Declaration of responsibilities).

(f) They shall not accept 'any favours or promises which might compromise their professional independence or their ability to express their own opinions' (point 9 of the Declaration of responsibilities).

...

5. It must first be established whether diplomats' reports come under the heading of vital interests. The federal authorities and those who share their point of view argue that these reports are highly sensitive and comparable to the negotiations conducted by the Federal Council and the reports preceding such negotiations. These documents, they argue, merit greater protection than, for instance, expert reports or minutes of parliamentary committees. The Federal Department of Foreign Affairs and the Federal Council cannot form an accurate picture of international relations unless the ambassadors provide them with additional information, different from and more sensitive than that provided by the media. Diplomats also provide information they have obtained from confidential sources, behind the scenes or off the record. They need, for instance, to be able to express in plain language their views about violations of human rights and political relations in Iran, the involvement of leading Colombian politicians in drug trafficking and the true picture with regard to the balance of power

and intrigue in the Kremlin. If, despite everything, reports of this kind are published, the ambassador concerned will almost automatically be declared *persona non grata* in the host country. If reports of this kind were to be published on a regular basis, ambassadors would no longer be able to report on everything that was going on. That would have an adverse impact on Swiss foreign policy, perhaps even paralysing it completely. And if everything were to be made public, Switzerland might just as well recall its diplomats and replace them with the media. In exercising their function as critic and watchdog, the media must always remain mindful of their responsibilities. This applies with particular force in the sphere of foreign policy, as the reports relating to foreign policy are also read abroad. If only for this reason, they are more sensitive than reports on domestic policy matters.

...

The Press Council acknowledges the importance of the principle that diplomatic correspondence should remain confidential. In the past, the Swiss media have observed that principle in substance and have not set out to expose the internal workings of diplomacy to public view. Disclosures in the foreign policy sphere have been the exception rather than the rule in Switzerland. Media bosses are clearly aware of the responsibilities inherent in the media's role as critic and watchdog in this sphere.

At the same time, it should not be forgotten that disclosures by the media in the field of foreign policy are commonplace in other countries, particularly in the United States, but also in the United Kingdom and Israel. Clearly, other governments and diplomats have long had to contend with this risk of disclosures concerning foreign policy, and have learned to live with it. Whether they like it or not, the Swiss authorities must also learn to adjust to a situation in which foreign policy is as much the focus of media attention as domestic policy, and in which revelations may come not just from the Swiss media but also from foreign media. An approach which places confidentiality before the public interest in too rigid a manner is neither realistic nor legitimate, particularly since diplomatic reports are regularly forwarded to a large number of authorities.

There can be no doubt that the revelations in the *Sonntags-Zeitung* and the *Tages-Anzeiger* were a source of embarrassment and problems for those responsible for Swiss foreign policy, but they did not restrict their room for manoeuvre substantially. Diplomatic reports are confidential by right, but when the conditions that allow confidential reports to be published are met, freedom of the press must take precedence (Opinion 2/94, Moser/Reimann parliamentary questions).

6. The Press Council must now examine whether the content of Mr Jagmetti's strategy paper is of such importance that it was appropriate to invoke the public interest, and whether it should have been published. In the view of Ueli Haldimann, editor of the *Sonntags-Zeitung*, the public interest lay in the fact that it was important to let people know how the Swiss ambassador in Washington perceived the complex issue of Holocaust victims' assets and the way Switzerland was coming to terms with its past, and what kind of aggressive language he used. According to Haldimann, his newspaper did not publish any leaked information unless the public interest was at stake. Although there were more leaks now than previously, they were not damaging in principle, and were often the only remaining means of putting a stop to harmful conduct ...

From the Press Council's standpoint, the next step is to assess the strategic importance of Mr Jagmetti's paper. Mr Jagmetti set out in this document to make a perfectly reasonable analysis of the situation, making a number of constructive proposals. He explored two 'extreme' options – the first involving some kind of 'deal' and the second involving a 'legal strategy'. The paper testifies to a fundamental concern to get at the truth, to find a generous financial solution and to protect Swiss interests and the country's good relations with the United States. However, it could not escape the attention of even the most casual reader that Mr Jagmetti used very bellicose language and that he regarded his negotiating partners as adversaries who were not to be trusted and who might be amenable to some kind of deal. The language used betrays attitudes which are problematic even in an internal document, since attitudes are liable to be reflected also in negotiations and informal contacts. In that connection, Mr Jagmetti was to have been engaged in important discussions concerning the assets of Holocaust victims during the last six months of his tenure.

The Press Council is mindful of the fact that the degree of public interest of confidential information cannot be determined in a wholly objective manner, but depends on the ideological, cultural, economic and advertising context in which the medium operates. Nevertheless, in the case of Mr Jagmetti's strategy paper, the public interest was clear, as the debate surrounding the assets of Holocaust victims and Switzerland's role in the Second World War was highly topical in late 1996 and early 1997 and had an international dimension, and because the Swiss ambassador in Washington was to occupy a prominent position in the forthcoming discussions. Knowing what that ambassador thought and how he formulated his opinions was relevant, and not a trivial concern. Leaving aside the question of the public interest and the relevance of the ambassador's remarks, the publication of this supposedly confidential paper was justified from an ethical viewpoint, since only as a result of its publication did it become clear that those in charge still had no clear idea, despite the creation of the task force, as to the question of Swiss responsibility and what steps should be taken. From the perspective of political transparency, publication of the confidential paper, despite the fact that it was more than a month old and that in the meantime there had been talk of setting up a fund for Holocaust victims, might have spurred the government on to engage in debate in order to overcome the problems, demonstrate leadership and devise convincing solutions.

7. Finally, it is necessary to assess whether the information was made public in the most appropriate form. According to one school of thought, the media are in a position of power, since not only do they inform, they also suggest by the way in which they present the information how it is to be assessed. In the present case the *Sonntags-Zeitung*, it is argued, presented an internal analysis of foreign policy in truncated form and, by publishing it alongside comments from third parties who had not seen the original text, planted in people's minds the idea that Ambassador Jagmetti had 'insulted the Jews'. The newspaper, by accusing Mr Jagmetti of anti-Semitism, started a rumour in an irresponsible manner. Reproducing the full text would not have placed Mr Jagmetti under the same kind of pressure and would not have forced him to resign. The manner in which the information was published, therefore, was a source of problems and consternation.

The opposing school of thought argues that it is vital to analyse the salient points of Mr Jagmetti's remarks. According to the *Sonntags-Zeitung*, there was no question of accusing Ambassador Jagmetti of anti-Semitism. Nevertheless, the newspaper's editors have acknowledged off the record that it would have been wiser to publish the strategy paper in full. They maintain that, on the day of publication, it would have

been virtually impossible to add another page to the newspaper and that plans to publish the full text on the Internet were abandoned owing to technical problems.

The Press Council regards these arguments as spurious, and agrees with the criticism regarding the manner of publication. The *Sonntags-Zeitung* did not make sufficiently clear that Ambassador Jagmetti had outlined several options in his strategy paper, of which the 'deal' was just one. Nor did it make the timing of the events sufficiently clear, particularly since the document was already five weeks old and had reached the addressees before the interview given by the outgoing Swiss President on the programme *24 heures/Tribune de Genève*. The newspaper unnecessarily made the affair appear shocking and scandalous and, by its use of the headline 'Ambassador Jagmetti insults the Jews', misled the reader and made it appear that the remarks had been made the previous day. It was incorrect to assert that Mr Jagmetti's letter undermined the process which had begun in January, particularly since the document had been circulated beforehand and had not previously been in the public domain, and could not therefore adversely affect the talks with the country's partners at home and abroad. When the *Sonntags-Zeitung* attempted to contact Mr Jagmetti on Friday 24 January in order to obtain a comment, and failed to reach him because he was in Florida, the newspaper's editors should have considered whether it might not be wiser to delay publication by a week so as to be able to publish an interview with Carlo Jagmetti alongside the extracts from his paper. The fact that publication went ahead in the next issue in spite of everything can only have been prompted by the fear of competition, which on no account constitutes sufficient justification for immediate publication. Hence, by publishing the strategy paper in the way it did, the *Sonntags-Zeitung* omitted vital pieces of information, in breach of the Declaration on the rights and responsibilities of journalists (point 3 of the Declaration of responsibilities).

...

III. Findings

1. Freedom of the press is too fundamental a right to be made subservient as a matter of principle to the interests of the State. The role of critic and watchdog played by the media requires them to make information public where the public interest is at stake, whether the source of information is freely accessible or confidential.

2. As to the publication of confidential information, the pros and cons must be weighed up carefully, with an eye to whether interests which merit protection are liable to be damaged in the process.

3. Internal reports by diplomats are confidential by right, but do not necessarily merit a high degree of protection in all cases. The media's role as critic and watchdog also extends to foreign policy, with the result that those in charge in the media may publish a diplomatic report if they consider its content to be in the public interest.

4. In the case of Mr Jagmetti, the interest to the public of his strategy paper should be acknowledged, as should the fact that its publication was legitimate on account of the importance of the public debate on the assets of Holocaust victims, the prominent position occupied by the Swiss ambassador in Washington and the content of the document.

5. In this case the *Sonntags-Zeitung*, in irresponsible fashion, made Mr Jagmetti's views appear shocking and scandalous by printing the strategy paper in truncated form and failing to make the timing of the events sufficiently clear. The newspaper therefore acted in breach of the Declaration on the rights and responsibilities of journalists (point 3 of the Declaration of responsibilities). The *Tages-Anzeiger* and the *Nouveau Quotidien*, on the other hand, placed the affair in its proper context following the revelations by reproducing the document in its near-entirety."

## E. The criminal proceedings against the applicant

### *1. Proceedings at cantonal level*

25. Following publication of the articles, the applicant was made the subject of an investigation by the Zürich cantonal authorities. By a decision of 6 March 1998, the Federal Public Prosecutor's Office ordered the discontinuation of the investigation into a breach of official secrecy (*Verletzung des Amtsgeheimnisses*) within the meaning of Article 320 of the Swiss Criminal Code. It remitted the case in respect of the charge of publication of official deliberations within the meaning of Article 293 of the Criminal Code to the prosecuting authorities of the Canton of Zürich.

26. On 5 November 1998 the Zürich District Office (*Statthalteramt des Bezirkes Zürich*) fined the applicant 4,000 Swiss francs (CHF) (approximately 2,382 euros (EUR) at the current exchange rate) for contravening Article 293 § 1 of the Swiss Criminal Code (see paragraph 35 below) by publishing the articles entitled "Ambassador Jagmetti insults the Jews" and "The ambassador in bathrobe and climbing boots puts his foot in it".

27. On 22 January 1999, following an application by the applicant to have the decision set aside, the Zürich District Court (*Bezirksgericht*) convicted him of an offence under Article 293 § 1 of the Swiss Criminal Code, but reduced the fine to CHF 800 (approximately EUR 476 at the current exchange rate).

28. The relevant passages of the District Court judgment read as follows (unofficial translation):

"5.2.2 According to the case-law of the Federal Court, the offence defined in Article 293 of the Criminal Code is based on a formal notion of secrecy whereby the confidential nature of a document, a set of talks or an investigation stems not from its content but from it being classified as such by the competent body. In accordance with this approach by the Federal Court, the strategy paper in question, which was marked '(classified) confidential' (Document 2/2), amounts to a secret in the formal sense, and as such attracts the protection of Article 293 of the Criminal Code.

When it comes to interpreting Article 293 of the Criminal Code, freedom of expression and freedom of the press (Article 10 of the European Convention on Human Rights and Article 55 of the Federal Constitution) should in principle be taken into consideration in the appellant's favour. With the revision of the Criminal Code of

10 October 1997, which made the publication of secrets of minor importance an extenuating circumstance (Article 293 § 3), the legislature added a substantive component to the notion of secrecy under Article 293. But even assuming that for these reasons – and contrary to the case-law of the Federal Court – the court were to base its decision on a purely substantive notion of secrecy, the outcome would not be favourable to the appellant.

The views expressed by Ambassador Jagmetti in the strategy paper were not in the public domain. This, moreover, is also apparent from the fact that the information conveyed and the way it was analysed provided the basis for 'sensationalist' articles by the appellant. Whether or not Ambassador Jagmetti might have been willing to divulge the content of the strategy paper in an interview is of little relevance here. However, there is every reason to doubt it, the more so given the limited number of persons to whom the document was sent. Furthermore, contrary to the appellant's claims, the content of the strategy paper was far from unremarkable. The document contained an assessment of the delicate foreign policy situation in which Switzerland found itself in December 1997 on account of the unclaimed assets, in particular *vis-à-vis* the United States. It also proposed a variety of strategies aimed at helping the country get out of its predicament. Documents setting out often carefully worded evaluations and assessments are an essential part of the formation of opinions and decision-making at embassy level, a process during which strongly held and often diverging opinions are exchanged and discussed internally until agreement is reached on a particular position. The protection which Article 293 of the Criminal Code is intended to provide also applies to the formation of opinions in as free a manner as possible and without undue outside influence (BGE (Federal Court Reports) 107 IV 188). In that regard, the document in question was aimed at helping the head of the task force to form an opinion and hence at influencing the course of events and the country's handling of the issue of the unclaimed assets. By its very nature, the publication of internal documents of this kind, which are designed to help form opinions, can have devastating consequences for the negotiations to be conducted. Consequently, given its explosive content and the fact that it was unknown to the public, the document in question was also secret in the substantive sense. It is thus fair to say that the question whether the broad formal notion of secrecy adopted by the Federal Court takes precedence over Article 10 of the European Convention on Human Rights remains open ...

6. To justify his actions, the appellant claims to have been defending legitimate interests. According to the Federal Court, this extra-legal justification may be relied on 'if the act in question constitutes a necessary and reasonable means of achieving a legitimate aim, is the sole possible course of action and is manifestly of less importance than the interests which the perpetrator is seeking to defend' (BGE 120 IV 213). The appellant argues that the editors of the *Sonntags-Zeitung* assessed the situation before arriving at the conclusion that the public interest carried greater weight. They took the view that the public was entitled to be informed when leading diplomats used language which was in glaring contradiction with Switzerland's official position (Document 2/5, p. 2). The tone employed by the ambassador was so inappropriate, they argued, that publication was necessary (Document 2/7). Ambassador Jagmetti, according to the editors, was not the right person to be conducting the negotiations with Senator D'Amato and the Jewish organisations, as he lacked the finesse needed to deal with this important issue (Document 17, p. 13). By publishing the confidential strategy paper, therefore, the appellant was in part attempting, as it were, to sideline from the negotiations a leading diplomat whose style he disliked. It must be said that, even if it was genuine, the

indignation expressed by the appellant with regard to the tone of the document seems somewhat naïve. While a section of the public may well have wished to be informed about internal documents of this kind, this has little to do with legitimate interests. Moreover, the appellant undoubtedly undermined the climate of discretion which is of vital importance in the sphere of diplomatic relations, thereby weakening Switzerland's position in the negotiations or at least compromising it substantially. In assessing the public interest relied on by the appellant in the light of the strict requirements laid down by the Federal Court with regard to the extra-legal justification of defence of legitimate interests, it is clear, firstly, that the means employed by the *Sonntags-Zeitung*, consisting in the impugned publication of secret official documents, were neither necessary nor reasonable and, secondly, that the interests which were damaged as a result were not 'manifestly' of less importance. In addition, the public debate on unclaimed assets which the appellant wished to see could perfectly well have been conducted without infringing Article 293 of the Criminal Code. The defence of legitimate interests cannot therefore be relied on as justification ...

8. Under Article 293 § 3 of the Criminal Code, the publication of secrets of minor importance amounts to an extenuating circumstance. As indicated above, however, the secret divulged in the present case was not of minor importance. The publishing of a strategy paper which was vital to the formation of opinions within the Federal Department of Foreign Affairs and the Federal Council, while it may not have actually weakened Switzerland's position *vis-à-vis* the outside world and in particular in the negotiations, at least temporarily compromised it. It was important to preserve the confidentiality of the document not just because it was classified as 'confidential'. The implications of the subject under discussion for Swiss foreign policy also called for greater discretion in dealing with the strategy paper. There are therefore no extenuating circumstances under Article 293 § 3 of the Criminal Code in relation to the facts constituting the offence.

...

The offence committed cannot now be regarded as minor, as the secrets which the appellant made public are not of secondary importance. In publishing the strategy paper, the appellant unthinkingly compromised Switzerland's tactical stance in the negotiations. Nevertheless, the offence is not a very serious one, as the appellant did not divulge an actual State secret whose publication could have undermined the country's very foundations. Nor should too much be made of the fault committed by the appellant, in so far as he committed his actions – with the backing of the newspaper's editor and its legal department – in a legitimate attempt, among other things, to start an open debate on all aspects of the unclaimed assets issue. A fine of CHF 800 is therefore appropriate ..."

29. The applicant lodged an appeal on grounds of nullity (*Nichtigkeitsbeschwerde*), which was dismissed by the Court of Appeal (*Obergericht*) of the Canton of Zürich on 25 May 2000.

*2. Proceedings at federal level*

30. The applicant lodged an appeal on grounds of nullity and a public-law appeal (*staatsrechtliche Beschwerde*) with the Federal Court (*Bundesgericht*). He argued that a journalist could be convicted of an

offence under Article 293 of the Swiss Criminal Code only in exceptional circumstances, namely if the secret published was of unusual importance and publishing it undermined the country's very foundations. He referred to the public interest in being made aware of the ambassador's remarks and the role of journalists as watchdogs in a democratic society.

31. The Federal Court dismissed the applicant's appeals in two judgments dated 5 December 2000 (served on 9 January 2001) in which it upheld the decisions of the lower courts.

32. In examining the appeal on grounds of nullity, the Federal Court firstly outlined some considerations regarding Article 293 of the Criminal Code (unofficial translation):

> "2.(a) According to the case-law and most commentators, Article 293 of the Criminal Code is aimed at protecting secrets in the formal sense. The sole determining factor is whether the documents, investigations or deliberations are secret by virtue either of the law or of a decision taken by the authority concerned. Whether they have been classified as 'secret' or simply 'confidential' is of little relevance; it is sufficient for it to be clear that the classification was designed to prevent their publication ... This formal notion of secrecy differs from the substantive notion, to which most of the Articles of the Criminal Code on the disclosure of secret information relate, for instance Article 267 (diplomatic treason) or Article 320 (breach of official secrecy). In the substantive sense, a fact is secret if it is accessible to only a limited number of persons, if the authority in question wishes to keep it secret and if that wish is justified by interests which merit protection ...
>
> Many commentators have argued in favour of the wholesale repeal of Article 293, saying that steps should at least be taken to ensure that publication of a secret in the substantive sense is punishable only if the secret is of major importance ...
>
> (b) As part of the revision of the criminal and procedural provisions relating to the media, the Federal Council proposed repealing Article 293 of the Criminal Code without replacing it with another provision. In its communication (BBl (Federal Gazette) 1996 IV 525 et seq.), the Federal Council argued in particular that it was unfair to punish the journalist who had published the confidential information, while the official or representative of the authority concerned who had originally made publication possible generally escaped punishment because his or her identity could not be established ... According to the Federal Council, Article 293 of the Criminal Code, which protected secrets in the formal sense ..., placed excessive restrictions on the freedom of action of the media. In its view, the 'second use' of a disclosed secret (by someone working in the media, for instance) was less serious in terms of criminal potential and unlawfulness than the initial disclosure of the secret by its holder. In addition, the journalist was by no means always aware that the information he had received was obtained as the result of betrayal of a secret. The actions of the 'second user' might be assessed differently in cases where the information disclosed was a genuine State or military secret. However, independently of Article 293 of the Criminal Code, the legislation in force in any case made provision, in relation to diplomatic treason (Article 267 of the Criminal Code) and breach of military secrecy (Article 329 of the Criminal Code), for two layers of protection in such cases, one against disclosure by the holder of the secret and the other against disclosure by the 'second user'. According to the Federal Council, the proposed repeal of Article 293 of the Criminal Code would not therefore undermine the protection of secrecy under

criminal law in important spheres. The objection that Article 293 also protected individual interests was at best indirectly relevant, as individuals' private and personal lives were protected first and foremost by Articles 179-79 *septies* of the Criminal Code and the provisions of the Civil Code concerning the protection of personality rights ...

In the federal authorities, those in favour of the wholesale repeal of Article 293 of the Criminal Code have also argued that the provision in question is rarely applied and is not effective. They contend that it is unfair, in particular, because it penalises only the journalist, who is the 'second user', whereas the identity of the initial perpetrator of the offence, namely the official or representative of the authority concerned, remains unknown ... and he or she cannot therefore be called to account for a breach of official secrecy, for instance. Even if Article 293 were simply repealed, they argue, the disclosure by a journalist of genuinely important secrets would still be punishable, for instance under Article 267 of the Criminal Code (diplomatic treason) or Article 329 (breach of military secrecy). Opponents of the repeal of Article 293 have argued ... that the provision is more necessary than ever, as the disclosure of secret or confidential information can have serious consequences ..."

33. The Federal Court then turned to the circumstances of the present case:

"8. The 'publication of secret official deliberations' (offence referred to in Article 293 of the Criminal Code) must still be considered to be based on a formal notion of secrecy, in line with the case-law of the Federal Court. The addition of a third paragraph to Article 293 has done nothing to change that. However, in view of the fact that it is now open to the criminal courts not to impose any penalty, they must determine in advance whether the classification as 'secret' can be justified in the light of the purpose and content of the disclosed documents. That is the case here.

The extracts from the confidential document published by the appellant were, moreover, also secret in the substantive sense. The appellant rightly refrains from arguing that the extracts in question were of minor importance within the meaning of Article 293 § 3 of the Criminal Code. In requesting that the application of Article 293 be confined to cases in which the secrets disclosed are of major importance and their disclosure threatens the very foundations of the State, the appellant is seeking a decision which goes well beyond any interpretation of Article 293 (in line with the Constitution and the case-law of the European Court of Human Rights), which the Federal Court is obliged to apply pursuant to Article 191 of the new Federal Constitution. The same is true of the argument that persons working in the media can be convicted of publishing secret official deliberations under Article 293 of the Criminal Code only if the interest of the State in preserving the confidentiality of the disclosed information outweighs the public interest in receiving the information. This comparison of the interests at stake has no bearing on the essential elements of the offence, although it may possibly have a bearing on the extra-legal justification of protection of legitimate interests. In any event, the circumstances of the present case are not such as to allow the protection of legitimate interests to be relied on as justification for publishing secret official deliberations.

9. This conclusion renders a comparison of the interests at stake in the present case redundant. It is therefore not necessary to respond to the appellant's criticism of the way in which the cantonal authorities balanced those interests.

For the sake of completeness, however, it should nevertheless be pointed out that, for the reasons set forth by the federal authorities, the interest in maintaining the confidentiality of the strategy paper in question carried greater weight than the public interest in being apprised of the extracts published in the newspaper. In order to avoid repetition, the court would refer here to the considerations set forth in the impugned judgment and in the first-instance judgment. It was in the interests not only of the ambassador and the Federal Council, but also of the country, to preserve the confidential nature of the strategy paper. The publication of isolated extracts was liable to interfere with the formation of opinions and the decision-making process within the State bodies in Switzerland, and above all to further complicate the already difficult negotiations being conducted at international level; this was not in the country's interest. On the other hand, the passing interest in the extracts published out of context in the newspaper which the eye-catching headline aroused among sensation-seeking members of the public is relatively insignificant in legal terms. This is all the more true since the 'tone' criticised by the appellant, used in an internal document written in a specific context (and the content of which was, according to the article, an unremarkable assessment of the situation), did not in any event permit the reader to draw clear and indisputable conclusions as to the 'mentality' of the ambassador, still less as to his ability to perform the task assigned to him ..."

34. In its judgment following the applicant's public-law appeal, the Federal Court found as follows (unofficial translation):

"3. In his public-law appeal, the appellant requests in particular that the principle of equality in the breach of the law [*Gleichbehandlung im Unrecht*] be applied to him and raises, among other things, a complaint concerning a violation of the principle of lawfulness ...

(b) There is no need to explore in detail here the reasons why the prosecuting authorities decided not to prosecute the other journalists mentioned by the appellant for publication of secret official deliberations on account of the articles which they wrote, or to consider whether those reasons were sufficient. Even if the latter question were to be answered in the negative, it would not benefit the appellant in any way.

It is clear from the explanations on this point set forth in the impugned judgment (pp. 5 et seq., Considerations point 4) and in the first-instance judgment (p. 3, Considerations point 4) that the exceptional circumstances in which the Federal Court's case-law recognises the right to equality in the breach of the law do not apply. The approach taken by the prosecuting authorities in this case does not in itself constitute a 'consistent' (possibly unlawful) practice, either in the sense that, in the absence of specific substantive grounds, journalists are only very exceptionally prosecuted for publication of secret official deliberations, not systematically, or in the sense that, where extracts from the same confidential document are published by several journalists in different articles, the journalist who for whatever reason – whether on the basis of the way the article was written or of the extracts selected – appears to be the most culpable is consistently singled out for prosecution. Moreover, there is nothing to suggest that either (possibly unlawful) practice will be adopted in the future ..."

## II. RELEVANT DOMESTIC, INTERNATIONAL AND COMPARATIVE LAW AND PRACTICE

### A. Swiss law and practice

35. Article 293 of the Swiss Criminal Code, entitled "Publication of secret official deliberations", reads as follows (unofficial translation):

> "1. Anyone who, without being entitled to do so, makes public all or part of the documents, investigations or deliberations of any authority which are secret by law or by virtue of a decision taken by such an authority acting within its powers shall be punished with imprisonment or a fine.
>
> 2. Complicity in such acts shall be punishable.
>
> 3. The court may decide not to impose any penalty if the secret concerned is of minor importance."

36. In a judgment of 27 November 1981 (BGE 107 IV 185), the Federal Court specified that the notion of secrecy on which Article 293 of the Criminal Code was based was a purely formal one.

37. The Swiss legislature recently adopted the Federal Administrative Transparency Act of 17 December 2004, which came into force on 1 July 2006 (Compendium of Federal Law 152.3). The relevant provisions of the Act, which is aimed at improving access to official documents, read as follows (unofficial translation):

> "**Part 1: General provisions**
>
> **Section 1 – Purpose and object**
>
> The present Act is aimed at fostering transparency as to the tasks, organisation and activities of the authorities. To that end, it shall contribute to informing the public by providing access to official documents.
>
> ...
>
> **Part 2: Right of access to official documents**
>
> **Section 6 – Principle of transparency**
>
> 1. Any person shall have the right to consult official documents and obtain information as to their content from the authorities.
>
> 2. The person concerned may consult the official documents *in situ* or request a copy of them, without prejudice to the copyright legislation.

3. If the official documents have already been published by the Confederation in paper or electronic form, the conditions set out in paragraphs 1 and 2 shall be deemed to have been fulfilled.

**Section 7 – Exceptions**

1. The right of access shall be restricted, deferred or refused where access to an official document:

(a) is liable to interfere significantly with the process of free formation of opinions and intentions within an authority governed by the present Act, another legislative or administrative body or a judicial authority;

(b) interferes with the implementation of specific measures taken by an authority in accordance with its objectives;

(c) is liable to jeopardise the country's internal or external security;

(d) is liable to jeopardise Swiss interests in the sphere of foreign policy and international relations;

...

2. The right of access shall be restricted, deferred or refused if access to an official document might interfere with the private sphere of a third party, unless the public interest in transparency is judged on an exceptional basis to carry greater weight."

38. The Order of 10 December 1990 on the classification and processing of civil-authority information (Compendium of Federal Law 172.015), in force at the material time, defines the different levels of classification (unofficial translation):

"**Part 1: General provisions**

**Section 1 – Object**

The present Order lays down the provisions on maintaining secrecy applicable to civil-authority information (hereinafter 'information') which, in the higher interests of the State, must not be passed on temporarily to other persons or be disclosed; it does so by means of instructions on the manner in which such information is to be classified and processed.

...

**Part 2: Classification**

**Section 5 – Categories of classification**

The body which issues the information (hereinafter 'the issuing body') shall classify it on the basis of the level of protection it requires. There shall be only two categories of classification: 'secret' and 'confidential'.

**Section 6 – ‘Secret’ information**

The following information is to be classified as ‘secret’:

(a) information which, if it became known to unauthorised persons, could seriously damage Switzerland’s external relations or jeopardise the implementation of measures designed to protect the country’s internal and external security and aimed, for instance, at maintaining government activity during an emergency or ensuring vital supplies;

(b) information to which only a very small number of persons have access.

**Section 7 – ‘Confidential’ information**

1. Information within the meaning of section 6 which is of less significance and to which, normally speaking, a greater number of people have access shall be classified as ‘confidential’.

2. A ‘confidential’ classification shall also be given to information which, if it became known to unauthorised persons, might enable them to:

(a) interfere with the activities of the government;

(b) frustrate the implementation of important measures by the State;

(c) betray manufacturing secrets or important commercial secrets;

(d) frustrate the course of criminal proceedings;

(e) undermine the security of major infrastructure.

**Section 8 – Persons authorised to classify information**

Heads of department, the Federal Chancellor, secretaries general, office directors and their deputies shall be responsible for classifying information and amending or removing classification. They may delegate their powers in certain cases.”

This Order was subsequently replaced by the Order of 4 July 2007 on the protection of federal information (Compendium of Federal Law 510.411), which came into force on 1 August 2007.

## B. International law and practice

39. On 19 December 2006 the four special representatives on freedom of expression (Mr Ambeyi Ligabo, United Nations Special Rapporteur on Freedom of Opinion and Expression; Mr Miklos Haraszti, OSCE Representative on Freedom of the Media; Mr Ignacio J. Alvarez, Organisation of American States (OAS) Special Rapporteur on Freedom of Expression; and Ms Faith Pansy Tlakula, African Commission on Human

and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression) adopted a joint declaration. The following is an extract from the declaration:

> "Journalists should not be held liable for publishing classified or confidential information where they have not themselves committed a wrong in obtaining it. It is up to public authorities to protect the legitimately confidential information they hold."

40. On 19 April 2007 the Parliamentary Assembly of the Council of Europe adopted a resolution on espionage and divulging State secrets. The paragraphs of relevance to the present case read as follows:

> "**Fair-trial issues in criminal cases concerning espionage or divulging State secrets (Resolution 1551 (2007))**
>
> 1. The Parliamentary Assembly finds that the State's legitimate interest in protecting official secrets must not become a pretext to unduly restrict the freedom of expression and of information, international scientific cooperation and the work of lawyers and other defenders of human rights.
>
> 2. It recalls the importance of freedom of expression and of information in a democratic society, in which it must be possible to freely expose corruption, human rights violations, environmental destruction and other abuses of authority.
>
> ...
>
> 5. The Assembly notes that legislation on official secrecy in many Council of Europe member States is rather vague or otherwise overly broad in that it could be construed in such a way as to cover a wide range of legitimate activities of journalists, scientists, lawyers or other human rights defenders.
>
> 6. ... For its part, the European Court of Human Rights found 'disproportionate' an injunction against the publication in the United Kingdom of newspaper articles reporting on the contents of a book (*Spycatcher*) that allegedly contained secret information, as the book was readily available abroad.
>
> ...
>
> 9. It calls on the judicial authorities of all countries concerned and on the European Court of Human Rights to find an appropriate balance between the State interest in preserving official secrecy on the one hand, and freedom of expression and of the free flow of information on scientific matters, and society's interest in exposing abuses of power on the other hand.
>
> 10. The Assembly notes that criminal trials for breaches of State secrecy are particularly sensitive and prone to abuse for political purposes. It therefore considers the following principles as vital for all those concerned in order to ensure fairness in such trials:
>
> > 10.1. information that is already in the public domain cannot be considered as a State secret, and divulging such information cannot be punished as espionage, even if the person concerned collects, sums up, analyses or comments on such information. The same applies to participation in international scientific

> cooperation, and to the exposure of corruption, human rights violations, environmental destruction or other abuses of public authority (whistle-blowing);
>
> 10.2. legislation on official secrecy, including lists of secret items serving as a basis for criminal prosecution must be clear and, above all, public. Secret decrees establishing criminal liability cannot be considered compatible with the Council of Europe's legal standards and should be abolished in all member States;
>
> ...”

41. As regards the classification of Council of Europe documents, Committee of Ministers Resolution Res(2001)6 of 12 June 2001 on access to Council of Europe documents articulates a clear principle: that of publishing information, with classification only in exceptional cases. Accordingly, it defines four categories of classification: (1) documents not subject to any particular classification, which are public; (2) documents classified as “restricted”; (3) documents classified as “confidential”; and (4) documents classified as “secret”. No definition exists which would enable documents to be classified according to their content. The principle of transparency promoted by Resolution Res(2001)6 has ultimately resulted in publication becoming the norm. It seems that, since its adoption, no Committee of Ministers document has been classified as “secret”.

42. The United Nations Human Rights Committee, in concluding observations adopted in 2001, criticised the implementation of the Official Secrets Act by the United Kingdom authorities and its impact on the activities of journalists (Concluding Observations, doc. CCPR/CO/73/UK of 6 December 2001):

> “...
>
> 21. The Committee is concerned that powers under the Official Secrets Act 1989 have been exercised to frustrate former employees of the Crown from bringing into the public domain issues of genuine public concern, and to prevent journalists from publishing such matters.
>
> The State Party should ensure that its powers to protect information genuinely related to matters of national security are narrowly utilised, and limited to instances where it has been shown to be necessary to suppress release of the information.”

43. In the *Claude Reyes et al. v. Chile* case before the Inter-American Court of Human Rights (19 September 2006, Series C no. 151), the Inter-American Commission on Human Rights submitted as follows:

> “58. ... The disclosure of State-held information should play a very important role in a democratic society, because it enables civil society to control the actions of the government to which it has entrusted the protection of its interests. ...”

The Inter-American Court of Human Rights found as follows:

> “84. ... In several resolutions, the OAS General Assembly has considered that access to public information is an essential requisite for the exercise of democracy,

greater transparency and responsible public administration and that, in a representative and participative democratic system, the citizenry exercises its constitutional rights through a broad freedom of expression and free access to information.

...

86. In this regard, the State's actions should be governed by the principles of disclosure and transparency in public administration that enable all persons subject to its jurisdiction to exercise the democratic control of those actions, and so that they can question, investigate and consider whether public functions are being performed adequately. ...

87. Democratic control by society, through public opinion, fosters transparency in State activities and promotes the accountability of State officials in relation to their public activities. ..."

## C. Comparative law and practice

44. Mr Christos Pourgourides, rapporteur on Resolution 1551 (2007) of 19 April 2007 (see paragraph 40 above), carried out a comparative study of legislation concerning State secrets in the member States of the Council of Europe. In his report he stressed that the disclosure of certain types of classified information appeared to be punishable in all countries, but with a wide variety of approaches being adopted. The report also made reference to the methods of classification used. Below are some extracts from the report:

"57. Generally speaking, one can identify three basic approaches: the first consists in a short and general definition of the notion of official or State secret (or equivalent), presumably to be filled in on a case-by-case basis. The second involves lengthy and more detailed lists of specific types of classified information. The third approach combines the other two by defining general areas in which information may be classified as secret, and then relying upon subsequent administrative or ministerial decrees to fill in more specifically which types of information are in fact to be considered as secret.

...

59. There are, of course, many other differences among the States' legislation that I need not dwell on. Some States (Austria and Germany, for example) distinguish between 'official secrets' and 'State secrets', whose violation is sanctioned more heavily. Most States also distinguish different degrees of secrecy (classified or restricted, secret, top secret, etc.). There are also differences in the harshness of penalties foreseen, which may be limited to fines in less serious cases. Some statutes distinguish between duties of civil servants and those of ordinary citizens. Some expressly penalise disclosure through negligence, others require criminal intent. For our specific purpose, these differences are immaterial.

...

> 68. To sum up, each of these legislative approaches allows for reasonable responses to the difficult task of specifying in advance the types of information that the State has a legitimate interest in protecting, while nonetheless respecting the freedom of information and the need for legal security. But any administrative or ministerial decrees giving content to more generally worded statutes must at the very least be publicly accessible. Also, in the absence of a vigilant and truly independent judiciary, and of independent media that are ready to expose any abuses of power, all legislative schemes reviewed are liable to abuse."

# THE LAW

## ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

45. The applicant alleged that his conviction for publication of "secret official deliberations" had infringed his right to freedom of expression within the meaning of Article 10 of the Convention. Article 10 provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

### A. Whether there was interference

46. The Chamber considered, and it was not disputed, that the applicant's conviction amounted to "interference" with the exercise of his freedom of expression.

47. The Court sees no reason to depart from the Chamber's findings on this point.

### B. Whether the interference was justified

48. Such interference will be in breach of Article 10 unless it fulfils the requirements of paragraph 2 of that Article. It therefore remains to be determined whether the interference was "prescribed by law", pursued one

or more of the legitimate aims referred to in paragraph 2 and was “necessary in a democratic society” in order to achieve them.

### *1. “Prescribed by law”*

49. The Chamber considered that the applicant’s conviction had been based on Article 293 of the Criminal Code (see paragraph 35 above).

50. The parties did not challenge that conclusion. The Court, for its part, sees no reason to adopt a different stance.

### *2. Legitimate aims*

#### (a) The Chamber judgment

51. The Chamber simply noted that the parties agreed that the impugned measure had been designed to prevent the “disclosure of information received in confidence”. Accordingly, it did not consider it necessary to examine whether the fine imposed on the applicant pursued any of the other aims referred to in Article 10 § 2.

#### (b) The parties’ submissions

52. The applicant accepted that preventing the “disclosure of information received in confidence” was one of the grounds which justified interference with the rights guaranteed by Article 10. However, he did not share the respondent Government’s view that publication of the paper had jeopardised “national security” and “public safety”. In his view, the disclosure of the report had not been liable to undermine the country’s fundamental and vital interests. In addition, the applicant argued that Article 293 of the Swiss Criminal Code did not encompass the protection of the rights of others and hence, in the instant case, the reputation of the ambassador who had written the report in question. He added that the relevant authorities had not instituted any defamation proceedings against him, although they could have done so.

53. The Government contended that the criminal sanction imposed on the applicant had been aimed not only at “preventing the disclosure of information received in confidence”, but also at protecting “national security” and “public safety”, given that the remarks by the report’s author had been made against a highly sensitive political background. They shared the view of the Press Council that publication of the report had also been apt to damage the reputation and credibility of the report’s author in the eyes of his negotiating partners (“protection of the reputation or rights of others”).

#### (c) The Court’s assessment

54. The Court is not satisfied that the penalty imposed on the applicant was aimed at protecting “national security” and “public safety”. In any

event it must be pointed out that the domestic authorities did not institute criminal proceedings against the applicant or third parties for offences or crimes consisting in activities which posed a threat to those interests. It is true that criminal proceedings based on Article 293 of the Criminal Code may involve issues relating to "national security" and "public safety". However, the Court points out that the Zürich District Court, in its judgment of 22 January 1999, accepted that there had been extenuating circumstances, taking the view that the disclosure of the confidential paper had not undermined the country's very foundations. Moreover, these concepts need to be applied with restraint and to be interpreted restrictively and should be brought into play only where it has been shown to be necessary to suppress release of the information for the purposes of protecting national security and public safety (see, along the same lines, the observations of the United Nations Human Rights Committee, paragraph 42 above).

55. As to the "protection of the reputation or rights of others", it should be noted that no criminal proceedings were instituted against the applicant for offences against honour, notably for insult or defamation.

56. On the other hand, the Court shares the Government's view that the applicant's conviction pursued the aim of preventing the "disclosure of information received in confidence" within the meaning of Article 10 § 2.

57. The Court considers it appropriate to deal here with a question of interpretation which, although not raised by the parties to the present case, is apt to give rise to confusion.

58. Whereas the French wording of Article 10 § 2 of the Convention talks of measures necessary "*pour empêcher la divulgation d'informations confidentielles*", the English text refers to measures necessary "for preventing the disclosure of information received in confidence". The latter wording might suggest that the provision relates only to the person who has dealings in confidence with the author of a secret document and that, accordingly, it does not encompass third parties, including persons working in the media.

59. The Court does not subscribe to such an interpretation, which it considers unduly restrictive. Given the existence of two texts which, although equally authentic, are not in complete harmony, it deems it appropriate to refer to Article 33 of the 1969 Vienna Convention on the Law of Treaties, the fourth paragraph of which reflects international customary law in relation to the interpretation of treaties authenticated in two or more languages (see the *LaGrand* case, International Court of Justice, 27 June 2001, I.C.J. Reports 2001, § 101).

60. Under paragraph 3 of Article 33, "the terms of the treaty are presumed to have the same meaning in each authentic text". Paragraph 4 states that when a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and

purpose of the treaty, is to be adopted (see, in this regard, The Sunday Times *v. the United Kingdom (no. 1)*, 26 April 1979, § 48, Series A no. 30, and *James and Others v. the United Kingdom*, 21 February 1986, § 42, Series A no. 98).

61. The Court accepts that clauses which allow interference with Convention rights must be interpreted restrictively. Nevertheless, in the light of paragraph 3 of Article 33 of the Vienna Convention, and in the absence of any indication to the contrary in the drafting history of Article 10, the Court considers it appropriate to adopt an interpretation of the phrase "preventing the disclosure of information received in confidence" which encompasses confidential information disclosed either by a person subject to a duty of confidence or by a third party and, in particular, as in the present case, by a journalist.

62. In view of the foregoing, the Court considers that the Government were entitled to invoke the legitimate aim of preventing the "disclosure of information received in confidence".

### 3. *"Necessary in a democratic society"*

#### (a) The Chamber judgment

63. In the light of the Court's case-law and taking into account among other considerations the interest of any democratic society in guaranteeing freedom of the press, the limited margin of appreciation left to States when information of public interest was at stake, the media coverage of the issue of unclaimed assets, the relatively low level of classification ("confidential") and the fact that disclosure of the document in question was not, even in the estimation of the Swiss courts, likely to undermine the foundations of the State, the Chamber found that the applicant's conviction had not been reasonably proportionate to the legitimate aim pursued (see paragraphs 44 to 59 of the Chamber judgment).

#### (b) The parties' submissions

##### *(i) The applicant*

64. The applicant argued that the purely formal notion of secrecy, on which Article 293 of the Criminal Code was based and which had been confirmed by the Federal Court, had adverse consequences for freedom of expression. According to that provision, the publishing by an official of any document, regardless of its content, which had been declared secret or confidential had to be punished, without it being possible to review the compatibility of the penalty imposed with Article 10 of the Convention. In the applicant's view, such a definition of secrecy was clearly at odds with the requirements of the Convention.

65. The applicant further maintained that the Swiss courts had punished the wrong person, since he had been penalised, as a journalist, for disclosing a report which he had obtained as the result of a leak by a government agent who enjoyed immunity from prosecution in the present case.

66. In addition, the applicant considered that Article 293 of the Criminal Code had always been applied selectively by the relevant authorities with the aim of preventing the disclosure of information concerning culpable conduct on the part of State officials or agents or problems in public administration. The provision in question had become an anachronism with the entry into force on 1 July 2006 of the Federal Administrative Transparency Act (see paragraph 37 above).

67. In the applicant's submission, Article 293 of the Criminal Code should be repealed, given that disclosure of the most sensitive information could be prosecuted on the basis of Article 276 of the Criminal Code (provocation and incitement to breach of military duty) or Article 86 (espionage and treason on account of a breach of military secrecy) and Article 106 (breach of military secrecy) of the Military Criminal Code. Finally, journalists could also be convicted under Articles 24 and 320 of the Criminal Code of instigating a breach of official secrecy.

68. The applicant did not question the principle that the activities of the diplomatic corps merited protection. However, he considered it dangerous to confer absolute immunity on the members of the diplomatic corps in relation to all types of information. He referred to the proceedings based on Article 293 of the Criminal Code currently being brought against journalists in Switzerland accused of having disclosed information from the Swiss secret services concerning the existence of secret CIA detention centres in Europe.

69. In the applicant's opinion, only State secrets considered to be of particular importance could take precedence over freedom of expression within the meaning of Article 10. That certainly did not apply in the present case. He doubted whether the content of the paper had been liable to reveal a State secret whose disclosure might compromise "national security" or "public safety" in Switzerland. The views set forth in the two articles had been of too general a nature to weaken the position of the Swiss delegation in its talks with the Jewish organisations.

70. The applicant further submitted that disclosure of the report had sparked a useful debate as to whether Mr Jagmetti was the right person to be conducting the negotiations with representatives of the Jewish organisations. Moreover, the publication of the report had been the reason for the ambassador's resignation the following day. Publication had clearly contributed to the adoption of a more sensitive approach by the Swiss authorities towards the delicate issue of unclaimed assets. At the same time, it had demonstrated that the Swiss authorities had no clear and coherent

position at that stage as to Switzerland's responsibility in the matter and the precise strategy to be adopted in respect of the claims which had arisen.

71. The applicant was of the opinion that, in view of the importance and topical nature of the negotiations on the issue of unclaimed assets, the public had an interest in receiving more information about how those dealing with the issue in the Department of Foreign Affairs intended to conduct the negotiations with a view to an agreement on the subject of complaints against Swiss banks and financial institutions. In that connection, he considered the attitude and views of Mr Jagmetti, who he argued had occupied a key role in relation to the unclaimed assets, to be particularly revealing.

72. As far as journalists' ethical responsibilities were concerned, the applicant did not deny that the articles could have been presented in a more balanced manner. At the same time, he made the point that he had not had much time to write the articles and had to comply with certain requirements concerning their length. He had therefore decided to concentrate on the way in which the ambassador had expressed himself rather than on the content of the report. This was, moreover, perfectly in line with the commentary by the newspaper's editor published in the same newspaper.

73. While the articles may have appeared shocking in places, the aim had been precisely to highlight the language used by Mr Jagmetti in his report, which, in the applicant's view, was unfitting for a senior representative of the Swiss Confederation and scarcely compatible with official Swiss foreign policy.

74. In addition, the applicant considered it essential to highlight the nature and functions of the Press Council, which was a private-law body created by four associations of journalists, the aim of which was to supervise the conduct of persons working in the media in the light of the ethical standards it had devised. The Press Council had no powers of investigation or prosecution and, consequently, any negative findings it made were in no way binding on the criminal courts.

75. The applicant also noted that, while the offence for which the fine had been imposed was merely a "minor offence", it was nonetheless punishable by imprisonment. Although the fine he had been ordered to pay might appear to be small, it damaged his reputation as a journalist and might prevent him in the future from performing the vital role of watchdog played by the press in a democratic society.

*(ii) The Government*

76. In the Government's submission, the decisive factors in assessing the respondent State's margin of appreciation were the political context, the fact that the document in question had been written by an official who had assumed that it would remain confidential, the form in which it had been

published, the reasons given by the applicant for the latter, and the nature and severity of the penalty imposed.

77. It also had to be borne in mind that the domestic courts had subjected this delicate and sensitive case to close scrutiny and that the Federal Court, after holding a hearing, had delivered two judgments, including the judgment concerning the appeal on grounds of nullity which had been published in the Federal Court Reports (BGE 126 IV 236-55). When it came to assessing the extent of the authorities' margin of appreciation, the fact that the matter had been examined in depth at the domestic level should also be taken into account. Such examination was vital to the operation of the principle of subsidiarity, a fact which should prompt the Court to show restraint.

78. The Government argued that the crucial factor determining the margin of appreciation of the domestic authorities was not the nature and importance of the position held by the author of the document containing confidential information, but whether the person concerned had knowingly laid himself open to close scrutiny of his every word and deed, as was the case with politicians. In the instant case it was clear that Ambassador Jagmetti had quite reasonably assumed that his report would remain confidential.

79. The Government further pointed out that the confidentiality of all diplomatic correspondence was enshrined in Articles 24 to 27 of the Vienna Convention on Diplomatic Relations of 18 April 1961 as an absolute principle of international customary law. Although the Treaty did not provide for any criminal penalties to be imposed for a breach of its articles, the principle of *pacta sunt servanda* and the rules on States' international liability for unlawful acts meant that the States party to the 1961 Vienna Convention were obliged to honour the undertakings entered into under that instrument.

80. In the Government's view, the applicant had covered only the "deal" option in his two articles. It was vital to ensure that negotiations of that nature, like any negotiations concerning a friendly settlement, could be prepared in a climate of strict confidentiality. In addition, the applicant's articles had been published only five weeks after Mr Jagmetti's report was written, at a time when the talks between the different parties had already begun.

81. The ambassador's remarks had been made against a highly sensitive political background. Their disclosure had jeopardised Switzerland's position and had threatened, in particular, to compromise the negotiations in which it was engaged at the time on the delicate issue of unclaimed assets.

82. Publication of Mr Jagmetti's report had taken place at a particularly delicate juncture. The applicant had, in biased and incomplete fashion, disclosed one of the options for defending the national interest being proposed in confidence to the Federal Council and the task force. At the

time of its publication, the document was already more than a month old and talks had already begun on setting up a fund for Holocaust victims. Publication of the document had therefore been liable to cause serious damage to the country's interests.

83. In the Government's view, the chief intention of the applicant – who had himself described the content of the strategy paper as "unremarkable" – had not been to contribute to a debate of public interest, but to cause a sensation centred first and foremost on Ambassador Jagmetti. Hence, the domestic courts had not accepted the existence of reasons, not prescribed by law, which might have justified disclosure in breach of Article 293 of the Criminal Code on the grounds of "protecting legitimate interests".

84. The Government pointed out that the editors of the *Sonntags-Zeitung* had themselves acknowledged that it would have been preferable to publish the text of the document in full, but had claimed that it had not been possible for technical reasons, an argument which the Press Council had considered "spurious". In the Government's view, the Chamber had not explained with sufficient clarity why the principle of publication in full, the importance and value of which were firmly established in the Court's case-law, had not been applied in the instant case.

85. In addition, the effect produced by publishing only certain extracts from the paper in isolation from their context had been heightened by the tone and presentation of the applicant's articles. The Press Council had stated that "the newspaper unnecessarily made the affair appear shocking and, by its use of the headline 'Ambassador Jagmetti insults the Jews', misled the reader and made it appear that the remarks had been made the previous day". The applicant's duties and responsibilities as a journalist meant that he should have made clear that the document was already five weeks old.

86. The Government also considered it revealing that it had been the Press Council, a private, independent body set up by the press, which had criticised the applicant for a lack of professionalism and for acting in breach of the "Declaration on the rights and responsibilities of journalists". Moreover, other newspapers had distanced themselves from the articles written by the applicant, both in formal terms, by publishing the strategy paper in its near-entirety, and in terms of substance, by criticising vehemently the publication of a confidential document.

87. With regard to the nature and severity of the penalty imposed, the Government pointed to the Chamber's finding that, although the offence had been a minor one and the fine had been small (CHF 800), what mattered was not the mildness of the penalty but the fact that the applicant had been convicted at all. In the Government's view, these two elements were difficult to reconcile.

**(c) The submissions of the third-party interveners**

*(i) The French Government*

88. The French Government shared the Swiss Government's view and expressed surprise that the case-law developed by the Court in relation to politicians, which was justified by the willingness of the latter to lay themselves open to press criticism, should be applied to an official writing a confidential report. They considered that ambassadors did not inevitably and knowingly lay themselves open to close scrutiny of their every word and deed by both journalists and the population at large, still less so in the context of a confidential report.

89. They shared the view of the Chamber's minority that there was no country in which diplomatic reports were not confidential. They further argued that ambassadors abroad should be able to communicate with their governments and express themselves freely and without constraints, without having to use with their own authorities the "diplomatic language" which was essential in relations between countries.

90. Moreover, if the approach taken by the Chamber judgment were followed, and diplomats were to run the risk of finding the memoranda they had written to their governments printed in the newspapers, they would most likely limit their communications either in substance or in form; this would inevitably distort the information received by States through these channels and hence detract from the quality and relevance of their foreign policies. Consequently, in the French Government's view, disclosures of this kind undoubtedly undermined the authority of diplomats posted abroad and, as a result, affected relations between States.

91. The French Government were not convinced by the Chamber's argument that the question whether the matter was of public interest should be assessed in the context of the "media coverage of the issue concerned" (see paragraph 49 of the Chamber judgment). In their view, this reasoning was flawed on two counts. Firstly, that would mean that the press itself, through its coverage of an issue, would determine the limits of its own freedom of expression; secondly, there were very few reports from ambassadors to their governments which did not deal with subjects of public interest.

92. In the view of the French Government, the Chamber had made a clear finding in the instant case that the requirements of journalistic ethics had not been complied with, as observed by the Press Council, but had not drawn the appropriate conclusions.

93. The French Government contended that the reasons given for the Chamber's decision had rendered nugatory the examination of the proportionality of the interference. This was all the more open to criticism since the aim pursued by States in seeking to protect the confidentiality of certain documents, and in particular diplomatic papers, was to safeguard not

individual private interests but the wider interests of the State and the harmony of international relations.

*(ii) The Slovakian Government*

94. In the view of the Slovakian Government, Article 10 § 2 also covered information classified merely as “confidential”, and hence of a lesser degree of confidentiality according to the Court’s case-law.

95. The Slovakian Government were of the opinion that no legal system allowed journalists access to diplomatic papers. Hence, refusing to grant a request for access could not amount to a violation of Article 10.

96. They further argued that diplomatic correspondence enabled diplomatic services to exchange information on developments occurring in international relations or domestically which had implications for the country’s foreign policy.

97. They did not share the Chamber’s view that publication of a confidential document should be allowed if it did not jeopardise “national security” or “public safety” or undermine the country’s very foundations.

98. The Slovakian Government took the view that the applicant had published only extracts from the paper in which the ambassador had expressed himself in non-neutral terms, thus making the articles shocking and sensational.

99. In the Slovakian Government’s view, the applicant had clearly been aware that he had obtained a copy of the confidential document purely as a result of a breach of official secrecy by a third party.

100. They considered that the breach of journalistic rules found by the Chamber needed to be examined more closely by the Grand Chamber. Furthermore, the Chamber judgment, which had given inadequate consideration to the breach of those rules, pushed the boundaries of freedom of expression too far and was liable to have considerable negative repercussions in the future.

**(d) The Court’s assessment**

*(i) Principles developed by the Court*

101. The main issue to be determined is whether the interference was “necessary in a democratic society”. The fundamental principles in that regard are well established in the Court’s case-law and have been summed up as follows (see, for example, *Hertel v. Switzerland*, 25 August 1998, § 46, *Reports of Judgments and Decisions* 1998-VI, and *Steel and Morris v. the United Kingdom*, no. 68416/01, § 87, ECHR 2005-II):

> “(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive

> or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no ‘democratic society’. As set forth in Article 10, this freedom is subject to exceptions, which ... must, however, be construed strictly, and the need for any restrictions must be established convincingly ...
>
> (ii) The adjective ‘necessary’, within the meaning of Article 10 § 2, implies the existence of a ‘pressing social need’. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a ‘restriction’ is reconcilable with freedom of expression as protected by Article 10.
>
> (iii) The Court’s task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was ‘proportionate to the legitimate aim pursued’ and whether the reasons adduced by the national authorities to justify it are ‘relevant and sufficient’ ... In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts ...”

102. The Court further reiterates that all persons, including journalists, who exercise their freedom of expression undertake “duties and responsibilities”, the scope of which depends on their situation and the technical means they use (see, for example, *Handyside v. the United Kingdom*, 7 December 1976, § 49 *in fine*, Series A no. 24). Thus, notwithstanding the vital role played by the press in a democratic society, journalists cannot, in principle, be released from their duty to obey the ordinary criminal law on the basis that Article 10 affords them protection. Paragraph 2 of Article 10 does not, moreover, guarantee a wholly unrestricted freedom of expression even with respect to press coverage of matters of serious public concern (see, for example, Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, § 65, ECHR 1999-III, and *Monnat v. Switzerland*, no. 73604/01, § 66, ECHR 2006-X).

103. Hence, the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith and on an accurate factual basis and provide “reliable and precise” information in accordance with the ethics of journalism (see, for example, *Fressoz and Roire v. France* [GC], no. 29183/95, § 54, ECHR 1999-I; *Monnat*, cited above, § 67; and *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, § 78, ECHR 2004-XI).

104. These considerations play a particularly important role nowadays, given the influence wielded by the media in contemporary society: not only

do they inform, they can also suggest by the way in which they present the information how it is to be assessed. In a world in which the individual is confronted with vast quantities of information circulated via traditional and electronic media and involving an ever-growing number of players, monitoring compliance with journalistic ethics takes on added importance. (As regards the principle, well established in the Court's case-law, whereby the Convention must be interpreted in the light of present-day conditions, see, for example, *Tyrer v. the United Kingdom*, 25 April 1978, § 31, Series A no. 26; *Airey v. Ireland*, 9 October 1979, § 26, Series A no. 32; *Vo v. France* [GC], no. 53924/00, § 82, ECHR 2004-VIII; and *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 121, ECHR 2005-I.)

105. Where freedom of the "press" is at stake, the authorities have only a limited margin of appreciation to decide whether a "pressing social need" exists (see, by way of example, *Editions Plon v. France*, no. 58148/00, § 44, third sub-paragraph, ECHR 2004-IV).

106. Furthermore, there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate of questions of public interest (see, for example, *Wingrove v. the United Kingdom*, 25 November 1996, § 58, *Reports* 1996-V). The most careful scrutiny on the part of the Court is called for when, as in the present case, the measures taken or sanctions imposed by the national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern (see, for example, Bladet Tromsø *and Stensaas*, cited above, § 64, and *Jersild v. Denmark*, 23 September 1994, § 35, Series A no. 298).

107. However, while it appears that all the member States of the Council of Europe have adopted rules aimed at preserving the confidential or secret nature of certain sensitive items of information and at prosecuting acts which run counter to that aim, the rules vary considerably not just in terms of how secrecy is defined and how the sensitive areas to which the rules relate are managed, but also in terms of the practical arrangements and conditions for prosecuting persons who disclose information illegally (see the comparative study by Mr Christos Pourgourides, paragraph 44 above). States can therefore claim a certain margin of appreciation in this sphere.

*(ii) Application of those principles to the present case*

(α) The issue at stake in the present case: dissemination of confidential information

108. In the present case the domestic courts ordered the applicant to pay a fine of CHF 800 for having made public "secret official deliberations" within the meaning of Article 293 of the Criminal Code. In the view of the Swiss courts, the applicant had committed an offence by virtue of having

published in a weekly newspaper a confidential report written by Switzerland's ambassador to the United States. The report had dealt with the strategy to be adopted by the Swiss government in the negotiations between, among others, the World Jewish Congress and Swiss banks concerning compensation due to Holocaust victims for unclaimed assets deposited in Swiss banks.

109. Hence, the issue under consideration is the dissemination of confidential information, a sphere in which the Court and the Commission have already had occasion to rule, albeit in circumstances often different to those in the instant case (see, in particular, *Z. v. Switzerland*, no. 10343/83, Commission decision of 6 October 1983, Decisions and Reports 35, p. 224; *Weber v. Switzerland*, 22 May 1990, Series A no. 177; Observer *and* Guardian *v. the United Kingdom*, 26 November 1991, Series A no. 216; *Open Door and Dublin Well Woman v. Ireland*, 29 October 1992, Series A no. 246-A; *Hadjianastassiou v. Greece*, 16 December 1992, Series A no. 252; *Vereniging Weekblad* Bluf! *v. the Netherlands*, 9 February 1995, Series A no. 306-A; *Fressoz and Roire*, cited above; *Editions Plon*, cited above; *Tourancheau and July v. France*, no. 53886/00, 24 November 2005; *Dammann v. Switzerland*, no. 77551/01, 25 April 2006; and *Leempoel & S.A. ED. Ciné Revue v. Belgium*, no. 64772/01, 9 November 2006).

110. The Court confirms at the outset the applicability of the above-mentioned principles to the present case. Press freedom assumes even greater importance in circumstances in which State activities and decisions escape democratic or judicial scrutiny on account of their confidential or secret nature. The conviction of a journalist for disclosing information considered to be confidential or secret may discourage those working in the media from informing the public on matters of public interest. As a result, the press may no longer be able to play its vital role as "public watchdog" and the ability of the press to provide accurate and reliable information may be adversely affected (see, *mutatis mutandis*, *Goodwin v. the United Kingdom*, 27 March 1996, § 39, *Reports* 1996-II).

111. This is confirmed in particular by the principle adopted within the Council of Europe whereby publication of documents is the rule and classification the exception (see paragraph 41 above and Resolution 1551 (2007) of the Parliamentary Assembly of the Council of Europe on fair-trial issues in criminal cases concerning espionage or divulging State secrets, paragraph 40 above). Similarly, the Inter-American Commission on Human Rights has taken the view that the disclosure of State-held information should play a very important role in a democratic society because it enables civil society to control the actions of the government to which it has entrusted the protection of its interests (see the submissions to the Inter-American Court of Human Rights in the *Claude Reyes et al. v. Chile* case, 19 September 2006, paragraph 43 above).

112. In order to ascertain whether the impugned measure was none the less necessary in the present case, a number of different aspects must be examined: the interests at stake (β), the review of the measure by the domestic courts (γ), the conduct of the applicant (δ) and whether the penalty imposed was proportionate (ε).

(β) The interests at stake

*The nature of the interests*

113. The present case differs from other similar cases in particular by virtue of the fact that the content of the paper in question had been completely unknown to the public (see, in particular, *Fressoz and Roire*, cited above, § 53; Observer *and* Guardian, cited above, § 69; *Weber*, cited above, § 49; *Vereniging Weekblad* Bluf!, cited above, §§ 43 et seq.; *Open Door and Dublin Well Woman*, cited above, § 76; and *Editions Plon*, cited above, § 53).

114. In this context the Court shares the opinion of the Swiss and French Governments that the margin of appreciation of the domestic authorities in this case should not be determined by the nature and importance of the position held by the author of the document, in this instance a senior civil servant, given that the ambassador had assumed that the content of his report would remain confidential.

115. In addition, it should be noted that in the instant case, unlike other similar cases, the public's interest in being informed of the ambassador's views had to be weighed not against a private interest – since the report did not relate to the ambassador as a private individual – but against another public interest (see, conversely, *Fressoz and Roire*, cited above, § 53, on the subject of the declared income of a company's managing director and hence involving fiscal confidentiality). Finding a satisfactory solution to the issue of unclaimed funds, in which considerable sums of money were at stake, was not only in the interests of the government and the Swiss banks but, since it related to compensation due to Holocaust victims, also affected the interests of survivors of the Second World War and their families and descendants. In addition to the substantial financial interests involved, therefore, the matter also had a significant moral dimension which meant that it was of interest even to the wider international community.

116. Accordingly, in assessing in the instant case whether the measure taken by the Swiss authorities was necessary, it must be borne in mind that the interests being weighed against each other were both public in nature: the interest of readers in being informed on a topical issue and the interest of the authorities in ensuring a positive and satisfactory outcome to the diplomatic negotiations being conducted.

*The public interest in publication of the articles*

117. In the Court's view, the manner of reporting in question should not be considered solely by reference to the disputed articles in the *Sonntags-Zeitung*, but in the wider context of the media coverage of the issue (see, *mutatis mutandis*, Bladet Tromsø *and Stensaas*, cited above, § 63).

118. In this regard the Court shares the view of the Chamber that the information contained in the Swiss ambassador's paper concerned matters of public interest (see paragraph 49 of the Chamber judgment). The articles were published in the context of a public debate about a matter which had been widely reported in the Swiss media and had deeply divided public opinion in Switzerland, namely the compensation due to Holocaust victims for unclaimed assets deposited in Swiss bank accounts. The discussions on the assets of Holocaust victims and Switzerland's role in the Second World War had, in late 1996 and early 1997, been very heated and had an international dimension (see, *mutatis mutandis*, Bladet Tromsø *and Stensaas*, cited above, §§ 63 and 73).

119. The recent *Monnat* judgment (cited above), moreover, demonstrates the importance of the public debate and the deep divisions in Swiss public opinion on the question of the role actually played by Switzerland during the Second World War (ibid., § 59). The Court notes that, in *Monnat*, the television documentary in question, which provoked such strong feeling and criticism among the Swiss public, was broadcast on 6 and 11 March 1997, that is, less than two months after the articles in the present case had been published on 26 January 1997 (ibid., § 6). It should be pointed out that the Court found the admission of viewers' complaints by the Federal Court to be in breach of Article 10 of the Convention (ibid., § 69).

120. In short, there can be no doubting the public interest in the issue of unclaimed funds, which was the subject of impassioned debate in Switzerland, especially around the time when the applicant's articles were published.

121. It is also important, in the Court's view, to examine whether the articles in question were capable of contributing to the public debate on this issue.

122. Like the Press Council, the Chamber took the view that publication of the document in question had revealed, among other things, that the persons dealing with the matter had not yet formed a clear idea as to Switzerland's responsibility and what steps the government should take. The Chamber acknowledged that the public had a legitimate interest in receiving information about the officials dealing with such a sensitive matter and their negotiating style and strategy (see paragraph 49 of the Chamber judgment), such information affording the public one of the means of discovering and forming an opinion of the ideas and attitudes of political

leaders (see, *mutatis mutandis*, in relation to politicians, *İbrahim Aksoy v. Turkey*, nos. 28635/95, 30171/96 and 34535/97, § 68 *in fine*, 10 October 2000, and *Lingens v. Austria*, 8 July 1986, § 42, Series A no. 103).

123. The Grand Chamber shares this view. In his report, the ambassador analysed the situation with regard to unclaimed assets and proposed some practical solutions. As the report covered a number of aspects, the fact that the applicant chose to concentrate almost exclusively on the personality of the ambassador and his individual style does not mean that his articles were of no relevance in the context of the public debate. In other words, the applicant could argue with some degree of legitimacy that it was important to inform the public of the bellicose language used by Ambassador Jagmetti, a major player in the negotiations, in order to contribute to the debate on the question of unclaimed funds.

124. In the Court's view, the impugned articles were capable of contributing to the public debate on the issue of unclaimed assets.

*The interests the domestic authorities sought to protect*

Confidentiality

125. The report in question was written by a high-ranking diplomat. In that connection, the Chamber explicitly acknowledged the interest in protecting diplomatic activity against outside interference.

126. The Court agrees with the Government and the third-party interveners that it is vital to diplomatic services and the smooth functioning of international relations for diplomats to be able to exchange confidential or secret information (see also paragraph 5 of the opinion of the Press Council, paragraph 24 above). Admittedly, the disclosure in issue is not covered by the provisions on the inviolability of archives and documents contained in the Vienna Convention on Diplomatic Relations (Articles 24 et seq.), referred to by the Government (see paragraph 79 above), which are designed to protect the archives and documents of the accredited State against interference from the receiving State or persons or entities under its jurisdiction. Nevertheless, the principles derived from those provisions demonstrate the importance of confidentiality in this sphere.

127. The Court also attaches some importance to the Government's argument, based on the opinion of the Press Council, that the publishing of a report written by an ambassador and classified as "confidential" or "secret" might not only have an adverse and paralysing effect on a country's foreign policy, but might also make the official concerned almost automatically *persona non grata* in the host country (see paragraph 5 of the opinion of the Press Council, paragraph 24 above). The fact that Ambassador Jagmetti resigned following publication of his report attests to this.

128. At the same time the Court would reiterate the principle whereby the Convention is intended to guarantee rights that are not theoretical or

illusory, but practical and effective (see, for example, *Artico v. Italy*, 13 May 1980, § 33, Series A no. 37). This principle must also be adhered to when it comes to assessing interference with a right. Consequently, in order to appear legitimate, the arguments relied on by the opposing party must also address in a practical and effective manner the grounds set forth in the second paragraph of Article 10. As exceptions to the exercise of freedom of expression, these must be subjected to close and careful scrutiny by the Court. In other words, while the confidentiality of diplomatic reports is justified in principle, it cannot be protected at any price. Furthermore, like the Press Council, the Court takes the view that the media's role as critic and watchdog also applies to the sphere of foreign policy (see paragraph 5 of the opinion of the Press Council, paragraph 24 above). Accordingly, preventing all public debate on matters relating to foreign affairs by invoking the need to protect diplomatic correspondence is unacceptable.

129. Consequently, in weighing the interests at stake against each other, the content of the diplomatic report in question and the potential threat posed by its publication are of even greater importance than its nature and form.

Repercussions in the circumstances of the case

130. The Court notes that the Government did not succeed in demonstrating that the articles in question had actually prevented the Swiss government and Swiss banks from finding a solution to the problem of unclaimed assets which was acceptable to the opposing party. Nevertheless, that fact in itself cannot be a determining factor in the present case. What is important is to ascertain whether the disclosure of the report and/or the impugned articles were, at the time of publication, capable of causing "considerable damage" to the country's interests (see, *mutatis mutandis*, *Hadjianastassiou*, cited above, § 45 *in fine*, for a case concerning military interests and national security in the strict sense).

131. News is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest (see, for example, Observer *and* Guardian, cited above, § 60; The Sunday Times *v. the United Kingdom (no. 2)*, 26 November 1991, § 51, Series A no. 217; and *Association Ekin v. France*, no. 39288/98, § 56, ECHR 2001-VIII). Consequently, a journalist cannot in principle be required to defer publishing information on a subject of general interest without compelling reasons relating to the public interest or protection of the rights of others (see, for example, *Editions Plon*, cited above, § 53, with further references). The Court must determine whether this was the case here.

132. In that connection the Court is of the opinion that the disclosure of the extracts in question from the ambassador's report at that point in time could have had negative repercussions on the smooth progress of the negotiations in which Switzerland was engaged on two counts. Here, a

distinction must be made between the content of the ambassador's remarks and the way in which they were presented.

133. Firstly, with regard to the content of the report, it should be observed that at the time the applicant's articles were published in the *Sonntags-Zeitung* the Swiss government had been engaged for several weeks in difficult negotiations aimed at finding a solution to the sensitive issue of unclaimed assets. The Court shares the view of the Swiss courts that the content of the document written by the ambassador was of some importance since it amounted to an assessment of the delicate situation which Switzerland would have to deal with at the end of 1997. The document proposed various strategies aimed at helping the respondent State find a way out of its predicament. It was thus intended to help the head of the task force to form his opinion and hence to influence the country's handling of the issue of unclaimed assets. As the Press Council rightly pointed out, reporting on what the ambassador thought and on what he based his opinions was very relevant (see paragraph 6 of the opinion of the Press Council, paragraph 24 above).

134. As to the formal aspect of the report, the language used by its author is clearly a consideration. While this may appear to be of secondary importance, the Court notes its case-law, according to which even factors which appear relatively unimportant may have serious consequences and cause "considerable damage" to a country's interests (see, *mutatis mutandis*, *Hadjianastassiou*, cited above, § 45).

135. In the present case the vocabulary used – which was considered bellicose by, among others, the Press Council – was clearly liable to provoke a negative reaction from the other parties to the negotiations, namely the World Jewish Congress and its American allies, and, in consequence, to compromise the successful outcome of negotiations which were regarded as difficult and which related to a particularly sensitive subject. Suffice it to note, by way of example, that the ambassador expressed the view in his report that Switzerland's partners in the negotiations were "not to be trusted" but that it was just possible that "an actual deal might be struck" with them. What is more, he described them as "adversaries".

136. In view of the foregoing, the Court is of the opinion that the disclosure – albeit partial – of the content of the ambassador's report was capable of undermining the climate of discretion necessary to the successful conduct of diplomatic relations in general and of having negative repercussions on the negotiations being conducted by Switzerland in particular. Hence, given that they were published at a particularly delicate juncture, the articles written by the applicant were liable to cause considerable damage to the interests of the respondent party in the present case.

(γ) The review of the measure by the domestic courts

137. It is not for the Court to take the place of the States Parties to the Convention in defining their national interests, a sphere which traditionally forms part of the inner core of State sovereignty. However, considerations concerning the fairness of proceedings may need to be taken into account in examining a case of interference with the exercise of Article 10 rights (see, *mutatis mutandis*, *Steel and Morris*, cited above, § 95). Consequently, the Court must determine whether the purely formal notion of secrecy underlying Article 293 of the Criminal Code is compatible with the requirements of the Convention. In other words it must examine whether, in the instant case, this purely formal notion was binding upon the courts to the extent that they were prevented from taking into consideration the substantive content of the secret document in weighing up the interests at stake, as an inability to take that into consideration would act as a bar to their reviewing whether the interference with the rights protected by Article 10 of the Convention had been justified.

138. In its judgment of 5 December 2000 on the applicant's appeal on grounds of nullity, the Federal Court reaffirmed the formal definition of the notion of secrecy. At the same time that judgment makes clear that, since the introduction of paragraph 3 of Article 293 of the Criminal Code in 1997, the court hearing a criminal case must determine in advance whether the "secret" classification appears justified in the light of the purpose and content of the disclosed documents; the cantonal authorities complied with that requirement in the instant case (see, in particular, paragraph 8 of the Federal Court judgment, paragraph 33 above). In that regard the Federal Court explicitly acknowledged that Article 293 of the Criminal Code allowed the court to weigh up the interests at stake, even if this did not have a bearing on the essential elements of the offence, and also to accept a possible extra-legal justification based on the protection of legitimate interests. In the instant case, however, the Federal Court found that no such justification existed, with the result that it was not required to answer the question whether the interest in maintaining the confidentiality of the strategy paper took precedence over the public interest in being informed of the extracts published in the newspapers. Nevertheless it considered that the substantive conclusions drawn by the cantonal authorities in that regard had been coherent and well-founded (see, in particular, paragraph 9 of the Federal Court judgment, paragraph 33 above).

139. In conclusion, given that the Federal Court verified whether the "confidential" classification of the ambassador's report had been justified and weighed up the interests at stake, it cannot be said that the formal notion of secrecy on which Article 293 of the Criminal Code is based prevented the Federal Court, as the court of final instance, from determining in the instant case whether the interference in issue was compatible with Article 10.

(δ) The conduct of the applicant

140. As far as the ethics of journalism are concerned, a distinction must be made between two aspects in the instant case: the manner in which the applicant obtained the report in question and the form of the impugned articles.

*The manner in which the applicant obtained the report*

141. The Court considers that the manner in which a person obtains information considered to be confidential or secret may be of some relevance for the balancing of interests to be carried out in the context of Article 10 § 2. In that regard, the applicant submitted that the Swiss authorities had prosecuted and convicted the wrong person, since he had never been accused of having obtained the document in question by means of trickery or threats (see, *mutatis mutandis*, *Dammann*, cited above, § 55 *in fine*) and the officials responsible for the leak were never identified or punished.

142. It should be noted in that regard that the applicant was apparently not the person responsible for leaking the document. In any event, no proceedings were instituted on that basis by the Swiss authorities.

143. Furthermore, it is primarily up to States to organise their services and train staff in such a way as to ensure that no confidential or secret information is disclosed (see *Dammann*, cited above, § 55). In that regard, the authorities could have opened an investigation with a view to prosecuting those responsible for the leak (see, *mutatis mutandis*, *Craxi v. Italy (no. 2)*, no. 25337/94, § 75, 17 July 2003).

144. Nevertheless, the fact that the applicant did not act illegally in that respect is not necessarily a determining factor in assessing whether or not he complied with his duties and responsibilities. In any event, as a journalist, he could not claim in good faith to be unaware that disclosure of the document in question was punishable under Article 293 of the Criminal Code (see, *mutatis mutandis*, *Fressoz and Roire*, cited above, § 52).

*The form of the articles*

145. In the present case, the question whether the form of the articles published by the applicant was in accordance with journalistic ethics carries greater weight. In this regard the opinion of the Press Council, a specialised and independent body, is of particular importance.

146. The Court reiterates at the outset that Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed. Consequently, it is not for this Court, nor for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists

(see, for example, *Jersild*, cited above, § 31, and *De Haes and Gijsels v. Belgium*, 24 February 1997, § 48, *Reports* 1997-I).

147. Nevertheless, like the Press Council, the Court observes a number of shortcomings in the form of the published articles. Firstly, the content of the articles was clearly reductive and truncated. The Court has already observed that the applicant was entitled to concentrate in the articles on the ambassador's personality (see paragraphs 122-24 above); however, it cannot overlook the fact that the articles quoted at times isolated extracts from the report in question, taken out of context, and that they focused on only one of the strategies outlined by the ambassador, namely that of a "deal".

It would have been possible to accompany the articles in the *Sonntags-Zeitung* with the full text of the report, as the *Tages-Anzeiger* and the *Nouveau Quotidien* largely did the following day, and thus to allow readers to form their own opinion (see, *mutatis mutandis*, *Lopes Gomes da Silva v. Portugal*, no. 37698/97, § 35, ECHR 2000-X). The Court is not persuaded by the arguments advanced by the editors of the *Sonntags-Zeitung* that, on 25 January 1997, it would have been virtually impossible to add another page to the newspaper and that plans to publish the full text on the Internet were abandoned owing to technical problems.

148. Secondly, the vocabulary used by the applicant tends to suggest that the ambassador's remarks were anti-Semitic. Admittedly, freedom of the press covers possible recourse to a degree of exaggeration, or even provocation (see, for example, *Prager and Oberschlick v. Austria*, 26 April 1995, § 38, Series A no. 313). The fact remains that the applicant, in capricious fashion, started a rumour which related directly to one of the very phenomena at the root of the issue of unclaimed assets, namely the atrocities committed against the Jewish community during the Second World War. The Court reiterates the need to deal firmly with allegations and/or insinuations of that nature (see, *mutatis mutandis*, *Lehideux and Isorni v. France*, 23 September 1998, § 53, *Reports* 1998-VII, and *Garaudy v. France* (dec.), no. 65831/01, ECHR 2003-IX). Moreover, the rumour in question most likely contributed to the ambassador's resignation.

149. Thirdly, the way in which the articles were edited seems hardly fitting for a subject as important and serious as that of the unclaimed funds. The sensationalist style of the headings and sub-headings is particularly striking ("Ambassador Jagmetti insults the Jews – Secret document: Our adversaries are not to be trusted" and "The ambassador in bathrobe and climbing boots puts his foot in it – Swiss Ambassador Carlo Jagmetti's diplomatic blunderings"; for the German titles, see paragraphs 18 and 19 above). In the Court's view, it is of little relevance whether the headings were chosen by the applicant or the newspaper's editors. The picture on page 7 of the *Sonntags-Zeitung* of 26 January 1997 accompanying the second article, which showed the ambassador in a bathrobe (see paragraph 19 above), seems to confirm the trivial nature of the applicant's

articles, in clear contrast to the seriousness of the subject matter. Moreover, the headings, sub-headings and picture in question have no obvious link to the subject matter but have the effect of reinforcing the reader's impression of someone ill-fitted to hold diplomatic office.

150. Fourthly, the articles written by the applicant were also inaccurate and likely to mislead the reader by virtue of the fact that they did not make the timing of the events sufficiently clear. In particular, they created the impression that the document had been written on 25 January 1997, whereas in fact it had been written over four weeks earlier on 19 December 1996 (see also the criticism made by the Press Council in paragraph 7 of its opinion, paragraph 24 above).

151. In view of the above considerations, and having regard also to the fact that one of the articles was placed on the front page of a Swiss Sunday newspaper with a large circulation, the Court shares the opinion of the Government and the Press Council that the applicant's chief intention was not to inform the public on a topic of general interest but to make Ambassador Jagmetti's report the subject of needless scandal. It is therefore easy to understand why the Press Council, in its conclusions, criticised the newspaper clearly and firmly for the form of the articles as being in clear breach of the "Declaration on the rights and responsibilities of journalists" (see paragraph 7 of the opinion of the Press Council and point 5 of its findings, paragraph 24 above).

152. Accordingly, the Court considers that the truncated and reductive form of the articles in question, which was liable to mislead the reader as to the ambassador's personality and abilities, considerably detracted from the importance of their contribution to the public debate protected by Article 10 of the Convention.

(ε) Whether the penalty imposed was proportionate

153. The Court reiterates that the nature and severity of the penalty imposed are further factors to be taken into account when assessing the proportionality of interference (see, for example, *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 64, second sub-paragraph, ECHR 1999-IV, and *Chauvy and Others v. France*, no. 64915/01, § 78, ECHR 2004-VI).

154. Furthermore, the Court must be satisfied that the penalty does not amount to a form of censorship intended to discourage the press from expressing criticism. In the context of a debate on a topic of public interest, such a sanction is likely to deter journalists from contributing to public discussion of issues affecting the life of the community. By the same token, it is liable to hamper the press in performing its task as purveyor of information and public watchdog (see, *mutatis mutandis*, *Barthold v. Germany*, 25 March 1985, § 58, Series A no. 90; *Lingens*, cited above, § 44; and *Monnat*, cited above, § 70). In that connection, the fact of a person's conviction may in some cases be more important than the minor nature of

the penalty imposed (see, for example, *Jersild*, cited above, § 35, first sub-paragraph; *Lopes Gomes da Silva*, cited above, § 36; and *Dammann*, cited above, § 57).

155. On the other hand, a consensus appears to exist among the member States of the Council of Europe on the need for appropriate criminal sanctions to prevent the disclosure of certain confidential items of information (see paragraph 44 above).

156. In the instant case it should be observed that the penalty imposed on the applicant could hardly be said to have prevented him from expressing his views, coming as it did after the articles had been published (see, by converse implication, Observer *and* Guardian, cited above, § 60).

157. In addition, the amount of the fine (CHF 800, or approximately EUR 476 at the current exchange rate) was relatively small. Moreover, it was imposed for an offence coming under the head of "minor offences" within the meaning of Article 101 of the Criminal Code as in force at the relevant time, which constituted the lowest category of acts punishable under the Swiss Criminal Code. More severe sanctions, even going as far as a custodial sentence, apply to the same offence both under Article 293 of the Criminal Code and in the laws of other Council of Europe member States (see paragraph 59 of the comparative study by Mr Christos Pourgourides, paragraph 44 above).

158. The Zürich District Court, in its judgment of 22 January 1999, also accepted the existence of extenuating circumstances and took the view that the disclosure of the confidential paper had not undermined the very foundations of the State.

159. It is true that no action was taken to prosecute the journalists who, the day after the applicant's articles appeared, published the report in part and even in full, and therefore, on the face of it, revealed much more information considered to be confidential. However, that fact in itself does not make the sanction imposed on the applicant discriminatory or disproportionate. Firstly, the applicant was the first to disclose the information in question. Secondly, the principle of discretionary prosecution leaves States considerable room for manoeuvre in deciding whether or not to institute proceedings against someone thought to have committed an offence. In a case such as the present one they have the right, in particular, to take account of considerations of professional ethics.

160. Lastly, as regards the possible deterrent effect of the fine, the Court takes the view that, while this danger is inherent in any criminal penalty, the relatively modest amount of the fine must be borne in mind in the instant case.

161. In view of all the above factors, the Court does not consider the fine imposed in the present case to have been disproportionate to the aim pursued.

*(iii) Conclusion*

162. Having regard to the foregoing, the Court is of the view that, in weighing the interests at stake in the present case against each other in the light of all the relevant evidence, the domestic authorities did not overstep their margin of appreciation. Accordingly, the applicant's conviction can be said to have been proportionate to the legitimate aim pursued. It follows that there has been no violation of Article 10 of the Convention.

## FOR THESE REASONS, THE COURT

*Holds* by twelve votes to five that there has been no violation of Article 10 of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 10 December 2007.

Vincent Berger
Jurisconsult

Jean-Paul Costa
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Judge Ziemele;

(b) dissenting opinion of Judge Zagrebelsky joined by Judges Lorenzen, Fura-Sandström, Jaeger and Popović.

J.-P.C.
V.B.

# CONCURRING OPINION OF JUDGE ZIEMELE

I voted with the majority in favour of finding that there has been no violation of Article 10 in the circumstances of this case. However, I do not share the reasoning of the majority on one specific point.

Beginning in paragraph 125 of the judgment, the Court looks in great detail at the interests which the domestic authorities sought to protect in this case. The first interest is the protection of the confidentiality of information within diplomatic services so as to ensure the smooth functioning of international relations. The Court takes the opportunity to articulate a very important principle as regards the role that Article 10 plays in international relations and foreign policy decisions of States Parties, namely, that "preventing all public debate on matters relating to foreign affairs by invoking the need to protect diplomatic correspondence is unacceptable" (see paragraph 128). Certain well-known foreign policy decisions of the last few years, for example those which led to complex international events and developments, demonstrate the importance of debate and transparency in this field.

Subsequently, the majority of the Court addresses the question of the repercussions that the published articles concerning Ambassador Jagmetti and his confidential report had on the negotiations between Switzerland and the World Jewish Congress and the other interested parties on the subject of compensation due to Holocaust victims for unclaimed assets deposited in Swiss bank accounts (see paragraphs 130-36). The majority of the Court firstly notes that the Government did not show that the published articles had actually prevented Switzerland and the banks in question from finding a solution to the problem (see paragraph 130). Nevertheless, the majority decides to assess whether, at the moment of their publication, the articles were such as to damage the interests of the State. It comes to the conclusion that "... the disclosure – albeit partial – of the content of the ambassador's report was capable of undermining the climate of discretion necessary to the successful conduct of diplomatic relations in general and of having negative repercussions on the negotiations being conducted by Switzerland in particular. Hence, given that they were published at a particularly delicate juncture, the articles written by the applicant were liable to cause considerable damage to the interests of the respondent party in the present case" (see paragraph 136).

I disagree that the Court of Human Rights should single out the interests of the respondent party in these negotiations. The negotiations involved several parties but, above all, they related to a particularly difficult and delicate general interest and had implications extending beyond the Swiss public. The judgment points out elsewhere that "[t]he discussions on the assets of Holocaust victims and Switzerland's role in the Second World War had, in late 1996 and early 1997, been very heated and had an international

dimension" (see paragraph 118). Indeed, discussions about the State's responsibilities under international law came up in this context.

The Court should instead have considered whether the partial disclosure of the report at that time was likely to contribute to the resolution of a long-standing, important international issue or, on the contrary and to the detriment of all parties, was likely to make matters even more difficult.

The case under consideration shows that, in today's globalised world, national audiences may not be the only public interests to be served by the media and others.

# DISSENTING OPINION OF JUDGE ZAGREBELSKY JOINED BY JUDGES LORENZEN, FURA-SANDSTRÖM, JAEGER AND POPOVIĆ

*(Translation)*

I regret that I am unable to subscribe to the reasoning and conclusion adopted by the majority in the present case.

Until they reach paragraph 147 of the judgment, readers could easily believe that the Court is heading towards finding a violation of Article 10 of the Convention. It is only from that point on that the majority reveals the real reason for its negative assessment of the articles published by the applicant. But this seems to me to be a dangerous and unjustified departure from the Court's well-established case-law concerning the nature and vital importance of freedom of expression in democratic societies.

My reasons for saying so are as follows. In paragraphs 54 to 62 the Court quite rightly excludes the possibility that, in the present case, the interference with the applicant's exercise of his freedom of expression under Article 10 of the Convention could be justified by any aim other than preventing the disclosure of confidential information. The Court finds the other aims mentioned by the Government, namely protection of national security, public safety and the reputation or rights of others, to be without relevance in the case. The only remaining justification therefore is protection of secret information.

In that connection it should be noted that the protection of confidential information, unlike any other aim mentioned in Article 10 § 2, is functional in nature. If information which falls within the sphere of individual privacy is disregarded, it does not represent a value in itself (I am more inclined to say that the opposite is true, in a democratic society, at least as far as information regarding public authority is concerned). On the contrary, it is taken into consideration only because it serves to protect those values and interests which do merit protection at the expense of freedom of expression. It seems to me therefore that – for the purposes of Article 10 – the legitimacy of classifying a document or information as "confidential" cannot be assessed, nor can the value of such classification be "weighed" against the fundamental freedom of expression, without identifying and "weighing up" the underlying value or interest for the protection of which the information must remain confidential.

But the majority, after stating that "the confidentiality of diplomatic reports is justified in principle, [but] cannot be protected at any price" (see paragraph 128), and that "the Government did not succeed in demonstrating that the articles in question actually prevented the Swiss government and Swiss banks from finding a solution to the problem of unclaimed assets which was acceptable to the opposing party" (see paragraph 130), ultimately

takes into consideration merely the "confidentiality" of the document, publication of which quite obviously undermined "the climate of discretion necessary to the successful conduct of diplomatic relations in general" (see paragraph 136). What follows, in the same paragraph, which states that publication was capable of "having negative repercussions on the negotiations being conducted by Switzerland" and that "given that they were published at a particularly delicate juncture, the articles written by the applicant were liable to cause considerable damage to the interests of the respondent party", is merely a hypothesis, if not a *petitio principii*. In sum, this reasoning renders meaningless the principle whereby any interference with the right of free expression must be properly justified.

However, even if one follows the majority's reasoning, it seems clear to me that any damage sustained must have been very minor when judged against everything the Court has said in numerous judgments about the importance of freedom of expression, particularly where it is a question of unmasking and criticising the conduct of the public authorities and those through whom public authority is mediated. It is worth pointing out in this regard that the issue at stake was the publication of a few passages from a letter which the Swiss ambassador in Washington had sent to more than twenty individuals and offices; moreover, no proceedings were instituted against the other newspapers which published the document virtually in full (and obviously knew about it). The criticism of the applicant for having published only a few extracts from the document relating specifically to the way in which the ambassador expressed himself becomes, paradoxically, a factor which counts against him, and the majority goes so far as to suggest that it would have been wiser to publish the document in full (see paragraph 147 of the judgment). In my view, therefore, this interest in discretion could not on its own justify restricting the exercise of journalistic freedom in a public-interest context (see paragraphs 113-24).

I can see no reason to depart from the Court's case-law to the effect that the criterion for assessing whether interference is necessary in a democratic society must be whether it corresponds to a "pressing social need", that "the authorities have only a limited margin of appreciation" in this sphere (see paragraph 105) and that "[t]he most careful scrutiny on the part of the Court is called for when, as in the present case, the measures taken ... by the national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern" (paragraph 106) (see, among other authorities, *Handyside v. the United Kingdom*, 7 December 1976, § 48, Series A no. 24; The Sunday Times *v. the United Kingdom (no. 1)*, 26 April 1979, § 59, Series A no. 30; *Lingens v. Austria*, 8 July 1986, §§ 39-41, Series A no. 103; Observer *and* Guardian *v. the United Kingdom*, 26 November 1991, § 59, Series A no. 216; *Hertel v. Switzerland*, 25 August 1998, § 46, *Reports of Judgments and Decisions* 1998-VI; and

*Steel and Morris v. the United Kingdom*, no. 68416/01, § 87, ECHR 2005-II).

In its judgment in *Dupuis and Others v. France* (no. 1914/02, 7 June 2007), where the applicants were journalists convicted of breaching the secrecy of a criminal investigation, the Court stated as follows: “Where the press is concerned, as in the present case, the national power of appreciation conflicts with a democratic society’s interest in securing and maintaining freedom of the press. Considerable weight should likewise be attached to that interest when it is a matter of determining, as required by the second paragraph of Article 10, whether the restriction was proportionate to the legitimate aim pursued”. It is regrettable in my opinion that the Grand Chamber, instead of developing and applying these principles, should be tending in the opposite direction, particularly at a time when a series of episodes in the democratic world has shown that, even in the sphere of foreign policy, democratic scrutiny is possible only after confidential documents have been leaked and made public.

However, the judgment does not accept the necessity in a democratic society of the interference in question solely on the basis of the authorities’ interest in discretion. On the contrary, in paragraph 147 of the judgment, the majority addresses what appears to me to be the real reason for its criticism of the journalist, one which, in its view, justifies his conviction, namely the “form of the articles”.

The judgment reiterates that Article 10 protects the substance of the ideas and information expressed and the form in which they are conveyed. “Consequently, it is not for this Court, nor for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists” (see paragraph 146 of the judgment). Having said that, the majority seems to me to contradict itself by stating in the following paragraph: “Nevertheless, like the Press Council, the Court observes a number of shortcomings in the form of the published articles.” The judgment does not give any reason for this surprising “nevertheless”, which introduces an element of censure regarding the form chosen by the journalist and leads the Court to endorse the wholly different position of a private body concerned with journalistic ethics. Moreover, the majority does not ultimately attach any weight to the purpose of the applicant’s articles, which, as it itself acknowledges in paragraph 123, clearly related to the ambassador’s controversial handling of several episodes, and in particular of the issue of unclaimed assets lodged by Holocaust victims in Swiss bank accounts. This issue obviously provided the backdrop to the articles; however, the latter clearly targeted the personality, as well as the character and attitudes, of an ambassador who was an important player in the negotiations. And in my opinion, the judgment falls into a trap on account of the fact that, at the domestic level, criminal proceedings for disclosure of a confidential document were

brought in place of defamation proceedings, which were not instituted at any point (see paragraph 152 of the judgment).

This case, however, relates solely to a criminal prosecution for publication of official deliberations within the meaning of Article 293 of the Criminal Code.

Let me now turn to my conclusions. In my opinion the authorities' interest in discretion referred to in paragraph 136 of the judgment is not sufficient in this case to outweigh the journalist's freedom. The examination and criticism of the form of the articles seem to me unduly harsh in view of the fact that the journalist focused his remarks on the ambassador (who did not complain as a result). In any event, it is my opinion that the majority's criticism concerning the form of the applicant's articles is not relevant from the Court's perspective.

As to the penalty imposed and its potentially adverse effect on the exercise of journalistic freedom, I subscribe to the conclusions of the Chamber in this case and those of the *Dupuis and Others* judgment, cited above.

The Court has consistently held that freedom must be construed broadly and that any restrictions must, by contrast, be applied restrictively. In the light of this guiding principle, it seems clear to me that the Court should have found a violation of the right to freedom of expression.