



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

FOURTH SECTION

CASE OF STOLL v. SWITZERLAND

(Application no. 69698/01)

JUDGMENT

STRASBOURG

25 April 2006

**THIS CASE WAS REFERRED TO THE GRAND CHAMBER,
WHICH DELIVERED JUDGMENT IN THE CASE ON
10 DECEMBER 2007**

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

In the case of Stoll v. Switzerland,

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

Sir Nicolas BRATZA, *President*,

Mr J. CASADEVALL,

Mr L. WILDHABER,

Mr M. PELLONPÄÄ,

Mr R. MARUSTE,

Mr J. BORREGO BORREGO,

Mr J. ŠIKUTA, *judges*,

and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 28 March 2006,

Delivers the following judgment, which was adopted on that 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 Mr S. Canonica, a lawyer practising in Zürich. The Swiss Government (“the Government”) were represented by their Agent, Mr P. Boillat, Head of the Human Rights and Council of Europe Section, 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).

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. By a decision of 3 May 2005, the Court declared the application admissible.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. 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.

8. 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, who was the head of the task force that had been set up to deal with the question within the Federal Department of Foreign Affairs in Berne. Copies were sent to nineteen other individuals and to the Swiss diplomatic missions in Tel Aviv, New York, London, Paris and Bonn.

9. The applicant obtained a copy. It seems clear that he could not have acquired possession of the document without a breach of professional confidence by a person whose identity remains unknown. On Sunday 26 January 1997 the Zürich Sunday newspaper the *Sonntags-Zeitung* published the following article by the applicant (*translation*):

“*Mr Carlo Jagmetti insults the Jews*

Secret document: 'Our adversaries are not to be trusted'

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 the 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 Jewish organisations and Senator D'Amato must be placated as a matter of urgency'. He uses the word 'deal' in this context. Ambassador Jagmetti suggests 'payment of a lump sum' in order to settle 'all Jewish claims once and for all'. Then, he writes, 'everyone will be happy'.

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 launched] 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.

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

“The ambassador in bathrobe and climbing boots puts his foot in it again

An unusual public display for a diplomat ... and the strategy paper on unclaimed assets

By [the applicant]

Berne/Washington – Swiss ambassador Carlo Jagmetti constantly gets himself noticed on the diplomatic stage. 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 may, of course, be wrongly 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 the 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 *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 had been pictured [in an article in the magazine *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 agreeing 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 recent successful 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."

11. 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". On Monday 27 January 1997 the Zürich daily the *Tages-Anzeiger* reproduced lengthy extracts from the strategy paper in an article entitled "The finishing touches!". Subsequently, another newspaper, the *Nouveau Quotidien*, also published extracts from the paper.

12. On 5 November 1998 the Zürich District Office (*Statthalteramt des Bezirkes Zürich*) fined the applicant 4,000 Swiss francs (CHF) for contravening Article 293 of the Swiss Criminal Code (see "Domestic law and practice" below) in publishing the articles entitled "Mr Carlo Jagmetti insults the Jews" and "The ambassador in bathrobe and climbing boots puts his foot in it again".

13. 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 amount of the fine to CHF 800.

14. In its decision the District Court, noting that prior to its publication by the applicant, the strategy paper had not been in the public domain, found that the issue of whether the content of the paper should ultimately be divulged was irrelevant. The document had been far from insignificant, as it contained an assessment of the delicate foreign-policy situation in which Switzerland found itself in relation to the assets of Holocaust victims deposited in Swiss banks. It outlined various strategies open to Switzerland in order to deal with this difficult situation. The District Court held that carefully worded evaluations and assessments, provided on a regular basis, were an essential part of the exchange and formation of opinion among ambassadors. That being so, even dissenting points of view were circulated internally. Article 293 of the Swiss Criminal Code was designed to ensure freedom to form opinions without undue outside influence. In the instant case, the document in question had been aimed at assisting the head of the task force set up by the Government to form his opinion, and would therefore have influenced the country's handling of the issue concerned. Given its nature, publishing an internal document of that kind could have devastating consequences.

15. As to the applicant's argument that the public had the right to be informed of points of view which were at variance with the official Swiss position, the District Court considered that the applicant had in reality sought to report on a document whose style he found offensive. He could have started a public debate on the issue without contravening Article 293 of the Swiss Criminal Code. Lastly, the District Court considered that this was not a matter of "minor importance" within the meaning of the third paragraph of that Article. By publishing the paper, the applicant had jeopardised Swiss foreign policy.

16. In determining the amount of the fine, the District Court took mitigating circumstances into account, notably the fact that the disclosure of the confidential document had not undermined Switzerland's very foundations. In addition, the applicant had published the article with the approval of his editor and the newspaper's legal department, and with the intention of starting an open debate on the subject.

17. 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.

18. The applicant lodged an appeal on grounds of nullity and a public-law appeal (*staatsrechtliche Beschwerde*) with the Federal Court (*Bundesgericht*). He complained 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 the remarks made by the Swiss ambassador and the role of journalists as watchdogs in a democratic society.

19. 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. The Federal Court considered in particular that the applicant, in submitting that Article 293 of the Swiss Criminal Code should apply only to breaches of confidentiality in matters of major importance, was in fact requesting that the legislative provision in question be amended. That was not within the jurisdiction of the Federal Court. Whether or not a fact was confidential depended not on the degree of public interest in the information, but on the content and subject matter of the fact in question.

20. Meanwhile, the Swiss Federal Council (*Bundesrat*) had requested the Swiss Press Council (*Presserat*) to examine the case.

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.

Below is its opinion (*Stellungnahme*) of 4 March 1997 concerning the present case (no. 1/97, C.J./*Sonntags-Zeitung*) (*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 the sources of their 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 to 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.

Conversely, the representatives of the media argue that the function of the media as critic and watchdog is much the same in the foreign policy sphere as in other spheres. The tendency to invoke the national interest is particularly marked where foreign policy is concerned. This happened in Switzerland in the case of the closure of the Novosti agency and the revelations concerning the defects in the Panzer 68 tanks, and in the United States in the case of the Watergate and Pentagon Papers scandals. However, Swiss foreign policy is not a reserved area. When the media bow to the wishes of the Government, we are dangerously close to the kind of artificial neutrality we had during the Second World War. In all spheres, including foreign policy, it is argued, reforms occur only when the veil of secrecy is lifted.

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. Revelations 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 revelations 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 revelations 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 in law, 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 the assets of the Holocaust victims and the way Switzerland was coming to terms with its past, and the 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. The representatives of other media also recognised the fact that Mr Jagmetti's paper was of public interest, as it shed important light on the Delamuraz affair. The television channels or the *Tages-Anzeiger*, for example, would have reported on the document in the same way had they happened on it first.

Those critical of the publication of Mr Jagmetti's paper, on the other hand, take the view that the public interest of information not intended for public consumption is invariably defined by the media themselves, and that other factors should be considered, such as confidentiality, personality rights, the national interest, the foreseeable consequences of disclosure and the motives and interests of those providing the information. In the present case, so the argument runs, Ambassador Jagmetti's report was of limited public interest, since prior to publication it had been a non-event, it was already five weeks old and it could not be made public without damaging Swiss interests. In that respect, the *Sonntags-Zeitung* undermined Swiss foreign policy in a foreseeable and serious manner which was not justified in the public interest. According to this line of argument, the Jagmetti report should properly have been dealt with as a background document in the classic sense and should not have been published, either in full or in part.

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 approach'. 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, as only as a result of its publication did it become clear that those in charge still had no very 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 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 viewed. 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 the 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 "Mr Carlo 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 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 media's role as critic and watchdog 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 rightly confidential, 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, by printing the strategy paper in truncated form and failing to make the timing of the events sufficiently clear, made Mr Jagmetti's views appear shocking and scandalous. 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 by reproducing the document in its near-entirety.”

II. RELEVANT DOMESTIC LAW

21. Article 293 of the Swiss Criminal Code, entitled “Publication of secret official deliberations”, reads as follows:

“1. Anyone who, without being entitled to do so, makes public all or part of the proceedings of an investigation or of the 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.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

22. The applicant alleged that his conviction for publication of “secret official deliberations” amounted to interference with his 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

23. In the Court's view, it is clear that the applicant's conviction amounts to “interference” with the exercise of his freedom of expression. This, moreover, has not been disputed.

B. Whether the interference was justified

24. 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”

25. The applicant did not dispute that the fine imposed on him had been “prescribed by law” within the meaning of Article 10 § 2.

26. The respondent Government submitted that the applicant's conviction had been based on Article 293 of the Criminal Code (see “Relevant domestic law” above).

27. The Court sees no reason to adopt a different stance.

2. Legitimate aims

28. 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 Government's view that publication of the paper had undermined “national security” and “public safety”; on the contrary, the applicant considered that the impugned articles had been likely to spark a useful debate on whether Ambassador Jagmetti should be given responsibility for the sensitive issue of unclaimed assets.

29. In the Government's view, the applicant's conviction had pursued a number of the aims referred to in paragraph 2 of Article 10.

30. The fine imposed on the applicant was a penalty aimed at “preventing the disclosure of information received in confidence”, since Mr Jagmetti's report had been classified as “confidential” and had been intended for a very limited number of individuals in senior positions within the Swiss Confederation.

31. In the Government's view, the obligation not to disclose the “strategy paper” and the applicant's conviction for failing to comply with that obligation also pursued the interests of “national security” and “public safety”, given that the author's remarks had been made against a highly sensitive political background. Their publication had undermined

Switzerland's position and had threatened, in particular, to compromise the negotiations it was engaged in at the time on the delicate issue of unclaimed assets.

32. The Court merely notes that the parties agreed that the impugned measure had been designed to prevent the “disclosure of information received in confidence”; accordingly, it does 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.

3. “*Necessary in a democratic society*”

(a) **The parties' submissions**

i. *The applicant*

33. The applicant did not dispute that the paper in question had been classified as “confidential” and had not been published previously. However, referring to the case of *Fressoz and Roire v. France* ([GC], no. 29183/95, ECHR 1999-I), he submitted that only State secrets considered to be of particular importance could take precedence over freedom of expression within the meaning of Article 10 of the Convention. That certainly did not apply in the present case. He doubted whether the content of the paper was liable to reveal a State secret whose disclosure might have compromised “national security” or “public safety” in Switzerland. The arguments published in the two articles had been of too general a nature to weaken the position of the Swiss delegation in its talks with Jewish organisations.

34. The applicant was further 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 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.

35. Hence, the applicant contended 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. In the applicant's view, publication had clearly contributed to the adoption of a more sensitive approach by the Swiss authorities towards the delicate issue of unclaimed funds. At the same time, it had demonstrated that no clear and coherent position existed 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.

36. As to the argument based on the reprimand issued by the Press Council, the applicant maintained that, while the Council had observed some degree of exaggeration, it had not considered the publication to be abusive or defamatory in itself. While the articles may have appeared shocking in places, the aim of publication 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 hardly compatible with official Swiss foreign policy.

37. Lastly, the applicant noted that, while the offence for which the fine had been imposed was merely a "minor offence", it was nonetheless punishable by a fine or even imprisonment. Any conviction under the relevant provision must at all events satisfy the requirements of Article 10 of the Convention.

ii. The respondent Government

38. The respondent Government challenged the applicant's arguments. They considered it vital to examine the nature and strategic importance of the report in question. The document had contained a detailed analysis, from Mr Jagmetti's perspective, of the situation facing Switzerland with regard to the claims made by several Jewish organisations in respect of "unclaimed assets". Hence, it had been aimed at contributing to the formation of a coherent position on the proper response of the Swiss Government to those claims. There had therefore been an overriding interest in preventing disclosure of the document.

39. In that connection, the Government stressed that the report in question had been an internal document which had not been available to the public and had been classified as "confidential". The document had come into the applicant's possession only as the result of a breach of official secrecy by a person whose identity remained unknown. Only a handful of individuals in very senior positions within the Swiss Confederation had known of it. As a result, a clear distinction needed to be made between the present case and other cases raising similar issues (the Government cited the cases of *Observer and Guardian v. the United Kingdom*, judgment of 26 November 1991, Series A no. 216, p. 34, § 69, and *Weber v. Switzerland*, judgment of 22 May 1990, Series A no. 177, pp. 22 et seq., § 49).

40. In that context, the Government also pointed out that publication of the extracts from the report had taken place at a particularly delicate moment. The biased and incomplete disclosure of a number of options for defending the national interest, which were being proposed to the Federal Council and the task force in confidence, had been liable to cause serious damage to the country's interests. At the same time, it had been likely to undermine the credibility of the Swiss representative to the United States in

the eyes of his negotiating partners, as confirmed by Mr Jagmetti's resignation on the day following publication.

41. The Government further observed that, when it came to balancing the interests at stake in the case, the public interest in being informed had been diminished by the aim pursued. Taking into account the tone used in the publication, the comments made in the two articles and the reprimand issued by the Press Council, they took the view that the applicant's intentions had been purely "sensationalist". In such circumstances, when the discussion of a topic of public interest appeared to be a secondary consideration for the author, there were greater grounds for regarding a penalty as "necessary".

42. Lastly, the offence in question was characterised under domestic law as a "minor offence" (*Übertretung*), and the applicant had merely been ordered to pay a fine of CHF 800 (approximately EUR 520). The penalty imposed on the applicant had therefore not been disproportionate to the legitimate aims pursued.

(b) The Court's assessment

i. General principles

43. 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*, judgment of 25 August 1998, *Reports of Judgments and Decisions* 1998-VI, § 46; *Jersild v. Denmark*, judgment of 23 September 1994, Series A no. 298, pp. 23 et seq., § 31; 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”

ii. Application of the above principles to the present case

44. The Swiss courts ordered the applicant to pay a fine of CHF 800 (approximately EUR 520) for having made public “secret official deliberations” within the meaning of Article 293 of the Swiss Criminal Code. In the view of the Swiss courts, the applicant had committed an offence by virtue of having published in a Swiss 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.

45. As freedom of the press was thus at stake, the Swiss authorities had only a limited margin of appreciation to decide whether there was a “pressing social need” to take the measures in question against the applicant (see *Editions Plon v. France*, no. 58148/00, § 44, third paragraph, ECHR 2004-IV). The Court must therefore determine whether such a need existed.

46. The Court further reiterates that 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 *Wingrove v. the United Kingdom*, judgment of 25 November 1996, *Reports* 1996-V, p. 1957, § 58; *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103, p. 26, § 42; *Castells v. Spain*, judgment of 23 April 1992, Series A no. 236, p. 23, § 43; and *Thorgeir Thorgeirson v. Iceland*, judgment of 25 June 1992, Series A no. 239, p. 7, § 63). 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 *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 64, ECHR 1999-III, and *Jersild*, cited above, pp. 25-26, § 35).

47. It is also clear from the Court's case-law that civil servants acting in an official capacity are, like politicians, subject to wider limits of acceptable criticism than private individuals. However, it cannot be said that civil

servants knowingly lay themselves open to close scrutiny of their every word and deed to the extent to which politicians do and should therefore be treated on an equal footing with the latter when it comes to the criticism of their actions (see *Oberschlick v. Austria (no. 2)*, judgment of 1 July 1997, *Reports* 1997-IV, p. 1275, § 29, third paragraph, and *Janowski v. Poland [GC]*, no. 25716/94, § 33, ECHR 1999-I).

In the instant case, the criticism expressed in the impugned articles directly targeted a senior official, namely a member of the diplomatic corps with the rank of ambassador, who was in charge of a particularly important mission in the United States. The margin of appreciation of the Swiss courts was therefore narrower than in the case of a “private” individual.

48. The Court considers that the confidentiality of diplomatic reports is justified in principle, but cannot be protected at any price. Moreover, the role of the media as critic and watchdog also applies to matters of foreign policy.

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

On this subject the Court agrees with the applicant that the information contained in the paper written by the Swiss ambassador to the United States was of a kind that raised matters of public interest. The articles were published in the context of a public debate about compensation due to Holocaust victims for unclaimed assets lodged in Swiss banks, a matter which had been widely reported in the Swiss media and had deeply divided public opinion in Switzerland, particularly as the discussions about 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). The Swiss ambassador in Washington was to play an important role in the forthcoming discussions.

Publication of the document in question revealed, among other things, that the persons dealing with the matter had not yet formed a very clear idea as to Switzerland's responsibility and what steps the Government should take.

In that context, the Court acknowledges also 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.

50. The nature and content of the document in question also need to be taken into account in weighing up the interests at stake. The Court notes that an immediate distinguishing feature of the present case is that the public had previously been unaware of the tenor of the document of which extracts were published, whereas the cases that have raised similar issues concerned

information which was already largely in the public domain (see, in particular, *Fressoz and Roire*, cited above, § 53; *Observer and Guardian*, cited above, p. 34, § 69; *Weber*, cited above, § 49; *Vereniging Weekblad Bluf! v. the Netherlands*, judgment of 9 February 1995, Series A no. 306-A, p. 16, §§ 44 et seq.; *Open Door and Dublin Well Woman v. Ireland*, judgment of 29 October 1992, Series A no. 246-A, p. 31, § 76; and *Editions Plon*, cited above, § 53).

In the instant case it is apparent that the report in question was an internal document, not publicly available and classified as “confidential”. Only a handful of individuals in senior positions in the Confederation knew of it. It should nevertheless be noted that the applicant was apparently not the person responsible for leaking the document. In any event, no proceedings were instituted on that ground by the Swiss authorities. Moreover, the document in question was marked simply “Confidential”, which, according to the Court's case-law, represents a low degree of secrecy (see *Vereniging Weekblad Bluf!*, cited above, p. 15, § 41).

51. At the same time, it is open to question whether the information contained in Mr Jagmetti's report actually related to vital interests. The respondent Government contended that the published extracts had been liable to reveal possible means of defending the national interest and were capable of damaging the country's interests substantially. According to the Press Council, Mr Jagmetti had made an overall analysis of the situation in his paper, outlining two “extreme” options, one involving some kind of deal and the other a legal approach. It was clear from the paper that the author's chief concern had been to arrive at the truth, find an appropriate financial solution and, at the same time, protect Swiss interests and the country's good relations with the United States.

52. The Court fully recognises the importance of protecting the work of the diplomatic corps from outside interference. However, it considers that the present case differs, in terms of the nature of the information disclosed, from other cases raising similar issues, in that it does not concern the proper functioning of the State bodies responsible for “national security” and “public safety” in the strict sense, as maintained by the Government (see, conversely, *Vereniging Weekblad Bluf!*, cited above, § 40, and *Observer and Guardian*, cited above, §§ 61 et seq.; see also *Hadjianastassiou v. Greece*, judgment of 16 December 1992, Series A no. 252, pp. 17-19, §§ 38-47). Regard being had to the fact that exceptions to freedom of expression must be strictly construed, the Court is not persuaded that the disclosure of aspects of the strategy to be adopted by the Swiss Government in the negotiations concerning the assets of Holocaust victims and Switzerland's role in the Second World War was capable of prejudicing interests that were so important that they outweighed freedom of expression in a democratic society. The Zürich District Court, moreover, held on 22 January 1999 that there had been mitigating circumstances, thus

acknowledging explicitly that disclosure of the confidential document had not undermined the country's very foundations.

53. The Court further reiterates that people exercising freedom of expression, including journalists, undertake “duties and responsibilities” the scope of which depends on their situation and the technical means they use (see, *mutatis mutandis*, *Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A no. 24, p. 23, § 49, third paragraph). Hence, while recognising the vital role played by the press in a democratic society, the Court stresses that 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 *Bladet Tromsø and Stensaas*, cited above, § 65).

54. Hence, the Court reiterates that, by reason of the “duties and responsibilities” inherent in the exercise of freedom of expression, 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 in order to provide accurate and reliable information in accordance with the ethics of journalism (see *Goodwin v. the United Kingdom*, judgment of 27 March 1996, *Reports* 1996-II, § 39, and *Fressoz and Roire*, cited above, § 54).

55. With regard to the form of the published articles, it is true that the Press Council considered that, owing to the fact that the report had been abridged and had not been placed sufficiently in context, the ambassador's remarks had been made, in irresponsible fashion, to appear sensational and shocking. The Court is mindful of the fact that 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 on 27 January 1997, and thus to allow readers to form their own opinions. The Court has attached great importance to this aspect in other cases (see *Lopes Gomes da Silva v. Portugal*, no. 37698/97, § 35, second paragraph, ECHR 2000-X). At the same time, it considers that freedom of the press affords the public one of the means of discovering and forming an opinion of the ideas and attitudes of their political leaders, and also covers possible recourse to a degree of exaggeration, or even provocation (see *Lopes Gomes da Silva*, cited above, § 34, and *Prager and Oberschlick v. Austria*, judgment of 26 April 1995, Series A no. 313, p. 19, § 38).

56. Moreover, the Court observes that the applicant's conviction was based solely on his publication of secret official deliberations. There was no mention of any offence against honour, such as defamation (Article 173 of the Criminal Code) or insult (Article 177). It does not share the Government's view that the way in which the information is presented

should be a decisive factor in assessing newspaper articles which give rise to penalties for disclosure of information considered to be secret.

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

In that connection, it notes that, while the penalty imposed on the applicant was relatively light (a fine of CHF 800 – approximately EUR 520), what matters is not that the applicant was sentenced to a minor penalty, but that he was convicted at all (see *Jersild*, cited above, pp. 25-26, § 35, and *Lopes Gomes da Silva*, cited above, § 36).

58. Furthermore, while the penalty did not prevent the applicant from expressing himself, his conviction nonetheless amounted to a kind of censorship which was likely to discourage him from making criticisms of that kind again in the future. In the context of a political debate such a conviction 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 the performance of its task of purveyor of information and public watchdog (see, *mutatis mutandis*, *Barthold v. Germany*, judgment of 25 March 1985, Series A no. 90, p. 26, § 58, and *Lingens v. Austria*, cited above, p. 27, § 44).

59. Having regard to the above considerations, the journalist's conviction was not reasonably proportionate to the legitimate aim pursued, in view of the interest of a democratic society in ensuring and maintaining the freedom of the press.

Accordingly, there has been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

60. Article 41 of the Convention provides:

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

A. Damage

61. The applicant did not claim to have sustained any pecuniary damage as a result of his conviction. He considered the finding of a violation sufficient compensation for the non-pecuniary damage he had sustained.

62. Accordingly, the Court does not award any sum under this head.

B. Costs and expenses

63. The applicant said that the fees incurred for his defence before the domestic courts and in Strasbourg had been paid in full by his employer.

64. The Court therefore does not make any award in this respect.

FOR THESE REASONS, THE COURT

1. *Holds*, by four votes to three, that there has been a violation of Article 10 of the Convention;
2. *Holds* unanimously that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant.

Done in French, and notified in writing on 25 April 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Mr Wildhaber, joined by Mr Borrego Borrego and Mr Šikuta, is annexed to this judgment.

N.B.
M.O'B.

DISSENTING OPINION OF JUDGE WILDHABER, JOINED
BY JUDGES BORREGO BORREGO AND ŠIKUTA

(Translation)

This is a difficult case. In the midst of an impassioned debate concerning Switzerland's past during and after the Second World War, its policy of neutrality, its policy towards refugees, the extent of anti-Semitism, the assets and gold of Holocaust victims deposited in Swiss banks and public and private responsibility for actions and omissions past and present, the Swiss newspaper the *Sonntags-Zeitung* on 26 January 1997 published extracts, in an article signed by the applicant, from a confidential strategy paper by the Swiss ambassador to the United States, Carlo Jagmetti. Given that the ambassador sent the report to the Department of Foreign Affairs, to nineteen named individuals and to five other Swiss diplomatic missions, it is generally acknowledged, although not established, that it reached the press as the result of a leak. The report 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. The published extracts gave an overall assessment of the situation which, although unsurprising, was couched in robust – some might even say bellicose – language. A number of the recommendations made in the report were to be acted upon subsequently. The *Sonntags-Zeitung* published the extracts under the headings “Mr Carlo Jagmetti insults the Jews”, “Our adversaries are not to be trusted” and “The ambassador in bathrobe and climbing boots puts his foot in it again”. The applicant was ordered to pay a fine of around EUR 500 for having published secret official documents in breach of Article 293 of the Criminal Code.

The Court has always attached great importance to freedom of the press and to the vital role played by the press when it comes to raising, analysing and making public matters of public interest, even those liable to cause displeasure to the Government, the persons concerned and the prevailing majority. I subscribe fully to this view of the role of the media. It is clear from our case-law (and from the reasoning of the majority in this case, see paragraph 53 of the judgment) that it is accepted that journalists have certain “duties and responsibilities”. However, reiterating general assertions on the important role of the press and the responsibilities of journalists does not absolve us from proper and critical examination of the numerous aspects of the two arguments expounded in the instant case.

Article 10 § 2 of the Convention permits restrictions on freedom of the press aimed at preventing confidential information from being made public. In practice, I am not aware of any country where diplomatic reports are not confidential. That demonstrates how important it is for each State party to the Convention that the exchange of information between high-ranking diplomats should operate smoothly, free from any outside interference. The nature and content of the paper in question therefore merit protection. Publication of an ambassador's report which has been classified as confidential may not only have a damaging and paralysing effect on a country's foreign policy; it may also make the official concerned, almost automatically, *persona non grata* in the host country. Such documents, which are also read and analysed abroad are, as a rule, more sensitive than reports on domestic policy matters.

If, despite everything, diplomatic reports are leaked to the press and published, the various public and private interests at stake must be weighed with care. In relation to this balancing exercise, I have no great difficulty in endorsing the position adopted by the Press Council on 4 March 1997, in which it states that the confidentiality of diplomatic reports is justified but should not be protected at all costs, and that the role of the media as critic and watchdog applies also to the foreign policy sphere.

The present case can be distinguished at the outset from similar cases involving information whose content was already in the public domain (see, in particular, *Fressoz and Roire v. France* [GC], no. 29183/95, § 53, ECHR 1999-I; *Observer and Guardian v. the United Kingdom*, judgment of 26 November 1991, Series A no. 216, § 69; *Weber v. Switzerland*, judgment of 22 May 1990, Series A no. 177, § 49; and *Vereniging Weekblad Bluf! v. the Netherlands*, judgment of 9 February 1995, Series A no. 306-A, §§ 44 et seq.). In the present case, it must be said that the report in question was an internal document, not available to the public and classified as “confidential”. Only a handful of individuals in senior positions within the Confederation knew of it. The applicant, given that he is a journalist and only obtained the document following a leak by an unidentified person could not, in view of the nature and classification of the document, have been unaware that its disclosure was an offence under Article 293 of the Swiss Criminal Code (see, *mutatis mutandis*, *Fressoz and Roire*, cited above, § 52).

I do not dispute the applicant's argument that the information contained in the document was in principle of a kind that raised matters of public interest. The articles published in the *Sonntags-Zeitung* were written in the context of a public debate on an issue of general interest which had been widely reported in the Swiss media and which deeply divided public opinion in Switzerland, namely the compensation to be paid to Holocaust victims for unclaimed assets deposited in Swiss bank accounts (see, in the same vein, *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93,

§ 63 *in fine*, ECHR 1999-III). In that context, it may also be acknowledged that the public has an interest in receiving information about the officials dealing with the matter and their negotiating style and strategy.

Publication of the extracts from the Jagmetti report was less urgent in a democratic society than it would have been had it been aimed at criticising reprehensible conduct on the part of the Government (as was the case in the United States with the Watergate scandal or the Pentagon Papers on the Vietnam war) or at publicising criminal acts committed by agents answerable to the Government (see, conversely, *Thorgeir Thorgeirson v. Iceland*, judgment of 25 June 1992, Series A no. 239, concerning a publication dealing with police brutality).

By reason of the “duties and responsibilities” inherent in the exercise of freedom of expression, 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 in order to provide accurate and reliable information in accordance with the ethics of journalism (see *Goodwin v. the United Kingdom*, judgment of 27 March 1996, *Reports* 1996-II, § 39, and *Fressoz and Roire*, cited above, § 54). The Court, understandably, has always hesitated to indicate to the press how it should perform its tasks, what matters it should investigate or how far it should go in its criticism. However, this case highlights in striking fashion the growing tendency to trivialise extremely serious issues. The Swiss Press Council, which is not a Government agency but a body set up by the press to supervise press activity, criticised the *Sonntags-Zeitung* report for a lack of professionalism. It concluded that the newspaper had “... in irresponsible fashion ...made [Mr Jagmetti's views] appear shocking and scandalous”, in breach of journalistic ethics. That finding is all the more interesting given that the Press Council simultaneously approved the publication of extracts from Mr Jagmetti's report in the *Tages-Anzeiger* and the *Nouveau Quotidien*. I agree with the Press Council's assessment. We cannot allow leaks, regardless of the subject concerned or how they are presented, to be automatically regarded as forming part of the legitimate exercise of freedom of the press and overriding all public or private interests.

I am conscious of the fact that freedom of the press affords the public one of the means of discovering and forming an opinion of the ideas and attitudes of political leaders and, in that connection, also covers possible recourse to a degree of exaggeration, or even provocation (see *İbrahim Aksoy v. Turkey*, nos. 28635/95, 30171/96 and 34535/97, § 52 *in fine*, 10 October 2000). Nevertheless, I feel that the extracts of the report which were published convey only a fragmented picture of the complex and highly controversial issue of unclaimed assets. Even if full publication was impossible in this case, presenting the “strategy paper” in abridged form was not capable of contributing constructively to a well-informed public debate. Nor did the *Sonntags-Zeitung* make a useful contribution to the

debate concerning the substance of the various arguments put forward in the ambassador's report.

In conclusion, it is not disproportionate, in my view, to consider that the confidential diplomatic report in question should not have been made available to the public at the time and in the form chosen by the applicant – in a manner which, in the view of the members of the Swiss Press Council, was “irresponsible” and “misled the reader”.