APPLICATION 8463/78

Gabriele KRÖCHER and Christian MÜLLER

against

SWITZERLAND

I. REPORT OF THE COMMISSION.

INTRODUCTION

1. An outline of the case as it has been submitted by the parties to the European Commission of Human Rights is set out below, followed by an account of the proceedings.

The substance of the applicants' complaints

2. The applicants, Gabriele KRÖCHER and Christian MÖLLER were born on 18 May 1951 and 18 October 1949 respectively. Both have German nationality.

On 20 December 1977 they were arrested not far from the Franco-Swiss border after an exchange of gun-shots with customs officers. Although they were holding German identity cards bearing assumed names, their true identities were soon established. On 21 December 1977, the investigating judge at Porrentruy issued warrants for their arrest and instituted proceedings against them, in particular for attempted murder. The applicants were placed in detention on remand and transferred to the Amtshaus at Berne.

3. The applicants remained in detention on remand from 21 December 1977 to 30 June 1978, on which date they were sentenced by the Court of Assizes of the Fifth District of the Canton of Berne, sitting at Porrentruy, to 11 and 15 years severe imprisonment, principally for attempted murder and violence and threats against officials of the Confederation.

On 21 December 1977, the investigating judge verbally instructed the governor of Berne prison to take special security measures. These measures were confirmed in a letter of 27 December 1977.

From 30 June 1978 to 6 November 1978, that is to say until their appeal to have their judgment set aside was rejected by the Berne Supreme Court, the applicants were kept in preventive detention in the same prison and, by and large, in the same conditions.

4. Since 7 November 1978 the applicants have been serving their sentences. They have been moved on several occasions. The conditions of their detention have varied from one prison to another.

5. The applicants allege a violation of Article 3 of the Convention. They consider that the conditions of their imprisonment throughout the period of detention on remand constituted treatment prohibited by Article 3 of the Convention.

The introductory application concerned the conditions of their detention on remand. Later in their observations on admissibility the applicants maintained that the Commission was nevertheless competent to investigate the conditions of their detention subsequent to that period.

Proceedings before the Commission

6. The application (No. 8463/78) was lodged on 21 December and registered on 27 December 1978.

The applicants are represented before the Commission by Maître Bernard Rambert, a barrister practising at Zürich.

7. On 8 March 1979 the Commission decided to invite the Swiss Government, in accordance with Rule 42, paragraph 2 (a) of the Rules of Procedure, to provide information on the conditions of detention and produce any medical certificates that had been issued.

This information was communicated in several stages - 11 April, 13 August and 3 October 1979. The applicants' comments were forwarded to the Commission on 5 February 1980.

8. On 10 July 1980 the Commission decided to ask the parties to present written observations on the admissibility and merits of the applicants' complaints in respect of Article 3 and Article 6 of the Convention.

After an exchange of written observations submitted respectively on 30 September 1980 by the Swiss Government and on 27 December 1980 by the applicants' counsel, Maître B Rambert, the Commission decided on 19 March 1981 to hold a hearing in the presence of both parties on the application as a whole.

9. The applicants were granted legal aid by a decision of the Commission taken on 10 October 1980.

10. The hearing took place on 9 July 1981. The applicants were represented by Maître Bernard Rambert and Maître Jean-Pierre Garbade, barristers practising at Zürich.

The respondent government was represented by

- Mr Joseph Voyame, Director of the Federal Department of Justice, agent;
- Mr Walter Dubi, Secretary General of the Police Administration in Berne, counsel;
- Mr Franz Moggi, Inspector of Prisons of the Canton of Berne, counsel;
- Mr Olivier Jacot-Guillarmod, Federal Department of Justice, counsel.

11. After the hearing the Commission decided to declare the application admissible in so far as it impugned the conditions of the applicants' detention (Article 3 of the Convention) before they were finally sentenced, and to ask the parties to submit evidence and observations concerning the merits of the application in so far as it was declared admissible, in accordance with Rule 45, paragraph 2, of the Rules of Procedure.

12. In its decision on admissibility, the Commission declared inadmissible as manifestly ill-founded the applicants' complaints in respect of Article 6, relating to alleged interference with their right to correspond with their counsel; it declared inadmissible on grounds on non-exhaustion of domestic remedies the applicants' complaints in respect of Article 3 relating to the conditions in which they are now serving their sentences.

13. On 28 March 1982 Maître B Rambert presented his arguments, evidence and conclusions concerning the merits of the application. On 13 July 1982 the Swiss Government submitted its supplementary memorial on the merits of the said case.

13 bis. Having declared the application admissible, the Commission placed itself at the parties' disposal for the purpose of reaching a friendly settlement, in accordance with Article 28 (b) of the Convention. In view of the attitudes adopted by the parties, the Commission finds that there is no basis for such a settlement.

The present report

14. The present report has been drawn up by the Commission in pursuance of Article 31 of the Convention and after deliberations and votes in plenary session, the following members being present:

MM C A NØRGAARD, President
G SPERDUTI, first Vice-President
J A FROWEIN, second Vice-President
J E S FAWCETT
L KELLBERG
G TENEKIDES
S TRECHSEL
B KIERNAN
M MELCHIOR
J A CARRILLO
A GÖZÜBÜYÜK
A WEITZEL
J -C SOYER

The text of the report was adopted by the Commission on 16 December 1982 and will be transmitted to the Committee of Ministers in accordance with Article 31 (2) of the Convention.

As a friendly settlement has not been reached the purpose of the present report is, as provided in Article 31 (1):

1. to establish the facts

2. to state an opinion as to whether the facts found disclose a breach by the respondent government of its obligations under the Convention.

Appendices I and II contain a schedule summarising the proceedings before the Commission and the Commission's decision on the admissibility of the application lodged by G Kröcher and C Möller. The full text of the pleadings and of the memorials and documents produced by the parties in support of their submissions are held in the Commission's archives and may be made available to the Committee of Ministers on request.

PART I

ESTABLISHMENT OF THE FACTS AND SUBMISSIONS OF THE PARTIES

I. ESTABLISHMENT OF THE FACTS

15. It should be stated from the outset that the facts are generally not in dispute between the parties.

It appears from the file that the applicants, Gabriele Kröcher and Christian Möller, born on 18 May 1951 and 19 October 1949 respectively, have German nationality.

16. They were arrested on 20 December 1977 not far from the Franco-Swiss border after an exchange of gun-shots with the customs officers. Although they were holding German identity cards bearing assumed names, their true identities were soon estbalished.

They were placed in detention on remand on the following day after warrants for their arrest had been issued by the investigating judge at Porrentruy on a charge of attempted murder. They were immediately transferred to the prison at Berne.

A. Conditions of detention

a. Detention on remand: 21 December 1977 to 30 June 1978

17. On 21 December 1977 the investigating judge verbally instruced the governor of the prison of the district of Berne to take special security measures; these measures were confirmed in a letter of 27 December of which the purport is contained in the following passage:

> «I order the following measures (as an express derogation from the prison regulations of 7 September 1967):
>
> 1. The accused must in no event be allowed to have any direct or indirect contacts with each other.
>
> 2. The same applies to contacts with the outside world.
>
> 3. No visit shall be permitted without my written consent.
>
> 4. The authorised representative of the accused may not visit them without the written permission of the undersigned judge. Visits shall be made, without surveillance, via the special security room so that no object may be handed over.

5. No newspapers, radio or television.

6. Books may be read, but they must be destroyed afterwards.

7. Medical examinations whenever necessary, but as a rule twice a week. The accused must be regularly weighed.

8. An inventory must be made of each cell.

9. No dangerous object may be brought into the cells.

10. The cells adjoining those of the two prisoners must be evacuated.

11. The cells of the two prisoners, as well as their clothing, must be inspected daily.

12. Both prisoners must wear prisoners' clothing.

13. Mail concerning the two prisoners must be forwarded to me via the cantonal police command.

14. The two prisoners may not have any tobacco, matches or lighters on them.

15. The two prisoners may spend 20 minutes a day in a ventilated room, under constant surveillance. They may smoke during that time.

16. Security around the prison shall be the responsibility of the cantonal police.

I also confirm that Gabriele Kröcher-Tiedemann will be placed under constant surveillance by means of closed-circuit television in order to prevent any attempt at suicide. She may be transferred upstairs from the basement as soon as a new television system has been installed.»

18. Consequently, the applicants were locked up separately in two non-adjacent cells in the following conditions: there was no other prisoner on the same floor. The cells above and below theirs had been evacuated. Both applicants were soon placed under surveillance by closed-circuit television. A 60-watt lamp was continuously kept on in their cells. The cells were in every respect identical with the other cells of the Berne district prison except that the windows had been specially blocked to prevent the applicants from seeing outside. Artificial lighting was thus continuously necessary to make up for the lack of daylight.

The cells occupied by the applicants were 8.4 m² in area. The fittings were modern: each one was equipped with a washbasin with hot and cold water, a modern toilet, a bed, a table and a piece of furniture fixed to the ground and the walls containing shelves for books and clothing. Ventilation was provided by means of a fan.

19. Light exercise, for which the applicants were allowed 20 minutes at first, and 40 minutes from mid-March onwards, was taken from Mondays to Fridays in a room measuring 9.5 m by 5 m, in which one window was open. During weekends the applicants could not leave their cells at all. They had no newspapers, magazines, radio or television. Their watches and diaries had been taken away from them. They were deprived of any contact with each other as well as with other prisoners and could not be visited by their lawyers. They were kept in conditions of solitary confinement in the full sense of the term.

20. Subsequently these general conditions were altered as a result of various appeals and suits by the applicants or interventions by doctors.

Thus, as a result of a suit brought against the investigating judge on 29 December 1977 by the applicants' lawyers who complained of not being allowed contact with their clients, the indictments chamber of the Supreme Court of the Canton of Berne, while rejecting the suit, asked the investigating judge to allow the accused to communicate with their defence counsel (judgment of 17 January 1978). Two one-hour visits were, as a result, authorised each week. The lawyers unsuccessfully tried to have this visiting right extended (judgment of 3 February 1978 of the indictments chamber).

21. Christian Möller unsuccessfully appealed against the regime of isolation and the main conditions of his detention in a suit of 19 January 1978. This was rejected by the indictments chamber (judgment of 30 January 1978).

Night lighting was nevertheless discontinued between 11 pm and 6 am from 18 February 1978 onwards. This measure was taken by the investigating judge as a result of a recommendation by a doctor who, on 14 February 1978, had observed that the applicants were having difficulty in sleeping and were very tired. Continuous surveillance at night was made possible by the installation of an optical infra-red system in late March 1978.

22. In a further suit of 6 February 1978, the applicants' counsel requested the cancellation of the special measures taken by the investigating judge on 27 December 1977. In a judgment of 22 February 1978 rejecting the suit, the indictments chamber stated that the two «terrorists are trying to destroy the social system at any price and would without turning a hair kill anyone who could prevent them from escaping. They would even resort to suicide as an ultimate weapon.» The court therefore concluded that «it is necessary to take numerous measures to prevent any collusion, any possibility of escape, any attack on judicial or security personnel and any attempts at self-injury». It thus upheld the applicants' solitary confinement, their continuous surveillance in their cells, the prohibition on their access to newspapers, radio or television and the blacking-out of the windows. It did, however, ask the investigating judge to relax some of the measures by allowing the applicants to wear their own clothes, returning their watches to them, extending their exercise periods «if circumstances permit», and allowing them to smoke and order books.

23. The applicants' lawyers lodged three successive public law appeals against the judgments delivered on 17 January, 3 February and 22 February 1978 by the indictments chamber of the Supreme Court of the Canton of Berne. The appeals were joined together and rejected on 7 June 1978 by the public law chamber of the Swiss Federal Court with the following exceptions only: permission to listen to radio broadcasts on radio sets supplied by the prison, and permission to read one or two newspapers with any necessary excisions, particularly in the advertisement pages.

24. On 12 June, upon being informed of the Federal Court's judgment, the applicants began a hunger strike which was not discontinued until 29 June 1978, when they had obtained the following changes: cessation of the continuous surveillance by television monitor and transfer to a floor occupied by other persons.

These changes had been recommended by Doctor Seiler on 21 June 1978 in a letter to the members of the criminal chamber appointed to sit on the Court of Assizes to which the applicants had been committed on 21 March 1978. The same doctor had also recommended that the two applicants be allowed some contacts with each other, but this recommendation was not acted upon.

25. On 26 June 1978, the day on which proceedings began in the Court of Assizes of the Fifth District of the Canton of Berne, sitting at Porrentruy, the doctor of the local prison, to which the prisoners had been transferred, stated that the applicants were in a very weak - but not serious - condition and that fainting fits, «real or simulated», should be expected if they appeared in court. In fact the applicants were not required by the court to appear in person, as it decided that «they are not able to participate in the proceedings in a proper manner».

26. On 30 June 1978 the applicants, who were represented at the trial by court-appointed barristers, were sentenced to 11 and 15 years imprisonment, principally for attempted murder and violence and threats against officials of the Confederation.

b. Preventive detention: 30 June 1978 to 6 November 1978

27. Until their appeal to have their judgment set aside was rejected by the Court of Cassation at Berne on 6 November 1978, the applicants were kept in preventive detention in the same prison and, by and large, in the same conditions.

However, by an order (Verfügung) of 15 August 1978 the Court of Cassation of the Canton of Berne authorised the applicants to buy books, subscribe to the magazine «Der Spiegel», use a typewriter, receive visits from close relatives and correspond with persons other than their lawyers (four letters a week) under strict supervision.

28. The applicants lodged a public law appeal against this order with the Swiss Federal Court, relying on Article 4 of the Federal Constitution and Articles 3 and 6 of the Convention.

The Federal Court rejected this appeal on 19 December 1978.

B. Medical supervision

29. The applicants were placed under the medical supervision of the doctors and psychiatrists attached to the prisons, where they work part-time. For detailed examinations and specialist treatment, the doctors and psychiatrists may make use of the polyclinic of the University of Berne and the clinics of the Inselspital, which has a block for prisoner patients.

Several medical reports and sets of doctors' notes have been submitted to the Commission.

a. Letter of 14 February 1978 from Dr. A Seiler, specialist in internal medicine, senior doctor at Berne Inselspital.

30. The doctor recommended discontinuing the night lighting because the applicants had difficulty in sleeping and showed no suicidal tendencies. He also stated that he had not yet observed any serious health disorders.

b. Letter of 10 July 1978 from Dr. A Seiler.

31. In addition to discontinuing the television surveillance and the detention of the applicants in unoccupied wings of the prison, the doctor recommended authorising the applicants to meet at certain times in order to combat the psychological and physical effects of isolation. He considered them fit for detention on that basis.

c. Letter of 3 November 1978 from Dr. A Seiler.

32. The doctor had been appointed expert by the President of the Court of Cassation in order to establish whether the applicants were capable of following the judicial proceedings.

He concluded that the applicants were not capable of taking part in the proceedings (nicht verhandlungfähig) as, since being imprisoned, they had had increasing difficulty in concentrating, had easily become tired and had suffered from readily detectable headaches. The discernible manifestations of psychological deterioration should be examined by a psychiatrist.

On the other hand, the applicants were in a fit state to be transported and able to sit in a courtroom for a limited period.

II. SUBMISSIONS OF THE PARTIES

33. Before the Commission, the applicants complained of the conditions of their detention in general and alleged that this constituted a violation of Article 3 of the Convention. They considered that these conditions constituted treatment prohibited by that provision of the Convention. The salient features of such treatment were: total isolation, lack of physical exercise, continuous surveillance by television and the fact of being kept in cells not opening on to the outside world. The applicants refer in this connection to medical literature on sensory isolation. They also maintain that their situation has not altered to any appreciable extent, as their social isolation is still almost total. Despite a number of changes made to their conditions of detention, these continue to violate Article 3.

Referring to the doctors' letters submitted to the Commission, which they refuse to regard as medical reports, they argue that the establishment of lasting psychological and physical damage is not a precondition for establishing a violation of Article 3 to their detriment.

34. During the proceedings before the Commission the parties made the following submissions on the questions arising in the present case, in respect of Article 3 of the Convention.

35. As the Commission's decision on admissibility specifies the period at issue to be taken into account when examining the merits, the submissions of the parties are confined to the period from 21 October 1977 to 6 November 1978, which includes the period of detention on remand and the period of preventive detention.

A. As to the conditions of the applicants' detention on remand between 21 December 1977 and 6 November 1978.

36. The Government argues in the first place, that the special security measures ordered by the investigating judge are implicitly based on the provisions governing investigations in the Canton's Code of Criminal Procedure.

The main reasons for the adoption of these exceptional measures were the dangerous character of the applicants, as evidenced by the circumstances of their arrest, and the various links they maintained with terrorist circles. There was reason to fear that the applicants would try to continue their struggle from inside prison and would receive outside help. In addition, the applicants' arrest took place only two months after the suicide of Baader, Raspe and Ensslin at Stammheim.

37. Acknowledging that certain aspects of the applicants' isolation «were particularly severe and even reached the limit of what can be imposed for security reasons», the Government recalls and emphasises that the Swiss authorities assess the severity of a prisoner's detention according to a general principle which is that of proportionality, that of encroachment on personal freedom to the extent required by circumstances.

38. On the particular question of the applicants' alleged sensory and social isolation, the Government states that, from the very earliest days of their detention the applicants were subjected to regular medical examinations of reasonably long duration (between 30 minutes and one hour in certain cases). On the question of their lawyers' visits, they observe that the lawyers did not make full use of the visiting time accorded to them and that such visits could take place at regular intervals provided the arrangements laid down by the investigating judge were observed. Visits by close relatives were never refused: C Möller was visited by his brother on 7 February 1978; G Kröcher telephoned her mother on 15 March 1978 and was visited by her on 9, 10, and 11 October 1978. Such visits were infrequent, but the Swiss authorities cannot be held responsible for that.

39. From their very first days in detention, the applicants were allowed to read books. Their conditions of detention were gradually relaxed: they were allowed to read newspapers and listen to the prison's radio programme from 7 June 1978; the television monitor surveillance was abolished and the applicants were transferred to a different floor occupied by other prisoners (end of June 1978).

40. In addition, the applicants had contact on several occasions with persons other than doctors or lawyers, not least with the prison staff, and they declined to accept certain contacts with persons from outside, in particular the chaplain, the representative of the Prisoners' Aid authority responsible for maintaining contacts with prisoners, and also the head doctor of the Waldau university psychiatric clinic.

41. Lastly, the Government strongly contests the allegation that the applicants were subjected to conditions of «total acoustic isolation». It observes that the cells occupied by the applicants were in no way equipped with a special sound-proofing system. They were identical with other cells of the Berne district prison, except that the window had frosted-glass panes. It also contests the allegation that the security measures were intended to «enable /the applicants'/ personalities and behaviour to be constantly supervised and their integrity and identities to be destroyed».

Again, the Government emphasises that whenever the doctors recommended measures to relax the applicants' conditions of detention on health grounds, the competent Swiss authorities carried them out. It is true that the applicants were not allowed to come into contact with each other, but the Government quotes in this connection an excerpt from the judgment of the Federal Court of 7 June 1978: «It is furthermore appropriate to point out that, in the Canton of Berne (paragraph 16 of the order of 24 December 1954 concerning prisons) as in a number of other cantons, persons detained on remand are placed in solitary confinement. If the applicants are deprived of mutual contact, this is simply the result of applying the normal prison arrangements, and it is hard to see how they could demand different treatment more favourable than this normal arrangement, whose conformity with the Constitution they do not challenge».

42. Lastly, the Government makes the point that the «very weak» condition diagnosed by the prison doctor at Porrentruy on the morning of 26 June 1978 was not due to the applicants' conditions of detention but was the direct consequence of the hunger strike they had started two weeks previously.

43. Having regard to all the circumstances, and, in particular to the increasing and substantial efforts made to relax the conditions of the applicants' detention and having regard also to the behaviour of the applicants themselves, the Government therefore considers that the conditions of isolation did not attain a level of severity or cause physical and moral suffering of a kind that would constitute a violation of Article 3. The Government also observes that the period of detention on remand (six months and ten days) was short for so serious a case.

44. In this connection the respondent Government analyses the situation and interprets the concept of «inhuman treatment» in the light of the case-law of the organs of the Convention: Judgment of the court of 18 January 1978 in the case of Ireland v United Kingdom, Series A, No. 25, paragraph 162, page 65; Decision of application of McFeeley v United Kingdom of 15 May 1980, D & R 20, page 44 et seq; Report McVeigh v United Kingdom, page 45, paragraph 157; Decision X v United Kingdom, D & R 21, page 95 et seq.

45. Lastly, where the special security measures are concerned, namely the surveillance of the applicants by television monitor and the use of artificial lighting at night for a certain period of time, the Government admits that they were the most serious infringements of the applicants' personal liberty but states that nevertheless, in the circumstances of the case, these measures did not constitute inhuman treatment within the meaning of Article 3. The Government refers on this precise point to the Commission's decision in the case of De Courcy v United Kingdom of 16 December 1966 (Yearbook 10, 1967, page 369 et seq and 383 et seq).

46. The applicants maintain that the exceptional security measures ordered by the investigating judge were imposed by the Federal authorities or even by foreign authorities. They are thus, in their view, unlawful. They add that it is impossible to claim that the principle of proportionality was adhered to in their case: the measures were not intended to ensure security in the prison but to enable their personalities and behaviour to be constantly supervised and their integrity and identities to be destroyed. In the hearing of both parties, the applicants' lawyers gave the Commission a detailed description of the arrangements by which the Swiss authorities implemented the exceptional measures taken in regard to the applicants.

The Government has no grounds for claiming a risk of suicide, they maintain. Such a risk far from being proved, was denied by the doctors. Not accepting the theory that the Stammheim prisoners killed themselves, the applicants do not accept that these suicides can be used as a justification for the exceptional measures taken in their own case. If their own situation is compared with that of the three German applicants at Stammheim, as established by the Commission (Decision on applications Nos. 7572, 7586 and 7587/76 v FRG, D & R 14, pages 64 et seq) it must be concluded that theirs is much more severe and constitutes the social and sensory isolation regarded by the Commission as contrary in principle to Article 3.

Lastly, the attempt to justify the disputed conditions of detention by emphatic allusions to international terrorism (for example the Schleyer affair in 1977) and the inexperience of the Swiss authorities in this field, seems to the applicants both mistaken and out of place.

B. Evidence and offers to produce evidence

Medical reports

47. The Government states that the applicants repeatedly declined an invitation to undergo detailed medical examinations by the prison doctor or a specialist appointed by the authorities responsible for the execution of the sentences.

Neither Swiss law nor the Convention grants a prisoner the right to consult a doctor of his own choosing.

The Swiss Government indicated that it would be glad if the Commission would agree to offer its good offices to enable medical experts approved by the parties to be appointed. Also, if the Commission wished for further information concerning the medical examinations conducted between 21 December 1977 and 6 November 1978, the Berne authorities would be willing to ask the Inselspital in Berne to supply it.

48. The applicants maintain, in the first place, that the Government did not provide the Commission with all the medical documentation at its disposal. A number of medical reports, not least those of Dr Seiler, expressing concern at the effects of isolation, were partly held back or regarded as not binding on the administration. The recommendations made by the doctor, were, moreover, disregarded. The applicants state that they cannot, in such circumstances, place any trust in the administration's doctors and they suggest appointing independent specialists to prepare a medical report on the effects of isolation.

2. Places of detention

49. The Government states that the Berne authorities are prepared to receive a delegation of the Commission in their territory to make an on-the-spot assessment of the conditions of detention (for example the cells occupied by the applicants in the Berne district prison ...).

If the Commission wishes to make such a visit while the applicants are being detained in other cantons, the Swiss Government is prepared to approach the authorities of those cantons.

50. The applicants have accepted this offer of evidence, provided that it covers all the prisons in which they had been held in custody.

PART II

OPINION OF THE COMMISSION

51. Having regard to the facts as they have been established the Commission considers that it is required to decide whether the conditions of the applicants' detention ordered by the Swiss authorities in this case is compatible with the terms of Article 3 of the Convention, where it is stated:

> «No one shall be subjected to torture or to inhuman or degrading treatment or punishment.»

52. In its decision on admissibility, the Commission has defined the period at issue which must be taken into account when examining the conditions of detention imposed on the applicants. This period includes the applicants' detention on remand and preventive detention. It starts on 21 December 1977, the day after their arrest, and extends until 6 November 1978, the date on which their application to have the judgment set aside was rejected by the Court of Cassation at Berne, and marks the beginning of the execution of their sentence.

I. General characteristics of the conditions of detention imposed on the applicants in this case

1. Circumstances of the case

53. Having regard, firstly, to the circumstances in which the applicants were arrested close to the Franco-Swiss border and, secondly, to the life history of the two applicants, especially the fact that one of the applicants Gabriele Kröcher, released under duress in 1977 in connection with the Lorentz case, was under serious suspicion of having taken part in the events in Vienna in 1976 on the occasion of the OPEC Conference, there were undoubtedly compelling reasons in this case for holding both applicants in conditions more especially geared to security considerations.

54. As it is clear from the establishment of the facts (1), the applicants' isolation - in particular their accommodation in non-adjacent cells on a floor not occupied by other prisoners and with no opening on to the outside world - the constant artificial lighting, permanent surveillance by closed-circuit television, the denial of access to newspapers and radio and the lack of physical exercise, were the most striking characteristics of the prison conditions imposed upon them.

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(1) See paragraph 17-19 of this report

55. It is true that these general conditions were subsequently altered as a result of various appeals and suits by the applicants or interventions by doctors (1).

For example, the prohibition of all communication with the applicants was lifted on 17 January 1978; the constant lighting between 11 pm and 6 am was discontinued from 18 February 1978 onwards; from the end of February the measures taken by the investigating judge were relaxed on some points: the applicants were allowed to wear their own clothes, their watches were returned to them and light exercise periods were extended. Following the judgment of 7 June 1978 of the public law chamber of the Swiss Federal Court, permission to read newspapers and listen to the radio was given. Lastly, after a hunger strike begun by the applicants on 12 June 1978 the continuous supervision by television monitor was stopped and the applicants were transferred to a floor occupied by other persons, although contacts between the applicants themselves were still prohibited.

After the period of detention on remand which ended on 30 June 1978 when sentence was passed, the applicants were held in preventive detention in the same prison and, by and large, in the same conditions; however, further measures were taken on 15 August 1978 to relax those conditions (2).

2. Reason for the conditions of detention imposed on the applicants

56. The respondent Government has repeatedly stated that the sole purpose of the special conditions of detention to which the applicants were subjected was to ensure security inside and outside the prison. The applicants were dangerous people and it was accepted from the start that there was a risk of escape and collusion. These specific measures were not therefore taken with punitive intent, nor were they intended, as the applicants maintain, «to enable their personalities and behaviour to be constantly supervised and their integrity and identities to be destroyed»,

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(1) See paragraphs 20-24 of this report.

(2) See paragraphs 27 and 28 of this report.

Having regard to the particular circumstances mentioned above (paragraph 53), these specific measures were taken immediately after the applicants' arrest and then were notified to them in writing. Also, it should be noted that the applicants have at no time alleged that measures other than those ordered by the investigating judge at the same time of their arrest were taken, whether for the conduct of the inquiries or for any other purpose.

57. The question that arises is whether the balance between the requirements of security and basic individual rights was not disrupted to the detriment of the latter. The Commission is therefore required to examine the security measures one by one and the effect produced or likely to be produced by their temporary or long-term combination, so that it can judge whether these measures, which the Swiss authorities gradually altered, were likely to create conditions of detention attaining a level of severity that could constitute a violation of Article 3 of the Convention.

58. In other words the Commission must decide whether the prison conditions imposed on the applicants, in which they were undeniably held in almost total isolation, constituted treatment that could be described as inhuman or degrading.

II. As to Article 3 of the Convention

59. Article 3 of the Convention states: «No one shall be subjected to torture or to inhuman or degrading treatment or punishment».

With regard to the definition of these terms, the parties referred the Commission to its own case-law and that of the Court.

1. Conditions of prison isolation in the case-law of the organs of the Convention.

60. The Commission recalls that the period of detention to be examined in connection with Article 3 extends from 21 December 1977 to 6 November 1978, that is to say ten and a half months, including six months and ten days of detention on remand and four months and six days of detention under security conditions.

The applicants were held in «isolation», throughout that period, although the conditions were gradually altered.

In this respect the Commission has already had occasion to recall that the segregation of a prisoner from the prison community does not in itself constitute a form of inhuman treatment. In many States Parties to the Convention, more stringent security measures exist for dangerous prisoners. These arrangements (strict isolation, removal of association, dispersal in special, very small units, etc), which are intended to prevent the risk of escape, attack or disturbance of the prison community, are based on separation of the prison community together with tighter controls (Decision of Applications Nos. 7572/76, 7586/76 and 7587/76, Ensslin, Baader, Raspe v FRG, D & R 14, pp 64, 109).

61. The Commission has already been confronted with a number of such cases of prison isolation of varying duration and severity (cf Decisions on Applications No. 1392/62 v FRG, Coll 17, p 1; No. 5006/71 v UK, Coll 39, p 91; No. 2749/66 v UK, Yearbook X, p 382; No. 6038/73 v FRG, Coll 44, p 115; No. 4448/70 «Second Greek Case», Coll 34, p 70; No. 7854/77 v Switzerland, D & R 12, p 185; No. 8317/78 McFeeley and others v UK, D & R 20, p 44). It has stated on several occasions that prolonged solitary confinement is undesirable, especially where the person is detained on remand (cf Decision on Application No. 6948/73 v FRG, Coll 44, p 115).

62. It has on other occasions stated that complete sensory isolation coupled with total social isolation, can destroy the personality and constitutes a form of treatment which cannot be justified by the requirements of security or any other reason. It has moreover drawn a distinction between this and removal from association with other prisoners for security, disciplinary or protective reasons, and has not considered that this form of segregation from the prison community amounts to inhuman or degrading treatment or punishment (cf Report of the Commission on Application No. 5310/71. Ireland v UK, p 379; Decision on the above applications of Ensslin, Baader, Raspe, p 109; Decision on the above-mentioned application of McFeeley and others, page 82).

In making an assessment in a given case, regard must be had to the surrounding circumstances including the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned (ibid).

2. Analysis of the situation in the light of the above criteria

63. With regard to the special conditions, the Commission has already made the point that the applicants were without doubt subjected to exceptional detention arrangements characterised by their exclusion from the prison community and their confinement to a security area with very strict controls. The respondent Government has explained the security requirements which governed the devising of these arrangements: the applicants were dangerous; they had used firearms at the time of their arrest; and there was evidence of their having taken part in terrorist actions in the past.

The general situation that the climate of terrorism had reached in the autumn of 1977 also needs to be emphasised. The facts relating to the present application were preceded by dramatic events, not least the kidnapping and assassination of Mr Schleyer in the Federal Republic of Germany and the hi-jacking of an aircraft at Mogadiscio. In this context the Commission recalls the deaths of Gundrun Esslin, Andreas Baader and Jan Raspe. The circumstances of their deaths had given rise to vigorous controversy and it was even being alleged that these prisoners had been assassinated. It follows that the attitude of the Swiss authorities, in particular their concern to keep the applicants under extremely close supervision, has also to be seen in this respect as a measure to protect their lives and physical integrity.

64. The Commission is convinced that there were in this case serious grounds for ordering stringent conditions of detention. However a conspectus of the measures ordered on the first day invites the question: to what extent were they, or some of them at least, justified in the light of the explanations given by the respondent Government?

65. The applicants draw particular attention to their alleged sensory plus accoustic isolation, coupled with social isolation.

66. With regard to the practical measures ordered for the applicants' detention, it is true that their cell was located on a floor which was empty at the time. The occupants of the cells above and below theirs had been removed. However the applicants' statement that they were kept in total acoustic isolation in a «lifeless wing» is untrue.

A further point to make is that the applicants were at no time placed in cells isolated from all outside noise. The cells they occupied were not equipped with any special form of soundproofing. Moreover the applicants do not allege that special steps had been taken to soundproof their cells.

The cells were identical in every respect with those of the Berne District Prison, except that the windows of the applicants' cells had frosted glass panes. A further detail in this connection is that the panes of all the windows are of frosted glass with the exception of one small rectangle approximately fifteen centimetres high. The only distinguishing feature of the applicants' cells in this respect was that this transparent glass rectangle had been painted over like the rest of the window.

This measure had also been taken for security reasons, as the Swiss authorities wished to prevent any visual contact with the neighbouring buildings.

Lastly, the area of the cells occupied by the applicants was 8.4 m^2. As the photographs show, the cells were arranged in an up-to-date way, with a wash-basin (hot and cold water), modern toilets, a bed, a table and a piece of furniture containing shelves for books and clothing.

67. In view of the above considerations, the Commission cannot conclude that the prison, the part of the building in which the applicants were held or their individual cells could have given rise to sensory isolation amounting to a form of treatment which could not be justified by the security requirements.

68. With regard to the alleged social isolation the Commission observes that it appears from information made available to it that the applicants were subjected, in the first days of their detention, to regular medical examinations of variable duration (between 30 minutes and one hour). Furthermore the applicants were able to receive regular visits from their lawyers, subject of course to the conditions laid down by the investigating judge; the first such visit took place on 24 January 1978. In addition, the Swiss authorities never refused the applicants permission to see their close relatives in prison, and cannot be held responsible for the fact that such visits were a rarity. There was, moreover, a substantial exchange of correspondence between the applicants and the outside world. Also the applicants were able to read books from the very start of their period of detention. Lastly, the point must be made that the applicants had numerous contacts with persons other than doctors and lawyers, but that they also refused certain outside contacts; for instance, they refused to engage in any talks with the chaplain or with the representative of the Prisoners' Aid Committee responsible for contact with prisoners, and each in turn refused to be examined by the head doctor of the Waldau University Psychiatric Clinic.

69. As regards the severity of the measures ordered, the Commission would point out that the applicants were placed in isolation only for the first month of their detention. From the end of January onwards they were able to confer with their lawyers and see their families.

70. A further fact to emphasise is that the Swiss authorities gradually relaxed the conditions in which the applicants were detained (see paragraph 55 above). In particular, the measure relating to continuous artificial lighting was very quickly revoked, and the ban on newspapers and radio was lifted after the Federal Court, in its judgment of 7 June 1978, had declared this measure illegal.

The only contacts that continued to be disallowed were those between the applicants themselves. On this point it is of relevance to quote a passage from the judgment of the Federal Court of 7 June 1978 from which it is clear that this was not an exceptionally severe measure as the applicants suggest, but part of normal prison conditions: «It is furthermore appropriate to point out that, in the Canton of Berne (paragraph 16 of the order of 24 December 1954 concerning prisons) as in a number of other cantons, persons detained on remand are placed in solitary confinement. Thus if the applicants are deprived of mutual contact, this is simply the result of applying the normal prison arrangements, and it is hard to see how they could demand different treatment more favourable than this normal arrangement, - whose conformity with the Constitution they do not challenge».

71. If, as the doctors have found, the applicants were in a «very weak condition», in particular on the morning of 26 June 1978, the day when the hearing opened, there is every reason to suppose that this was the direct consequence of the hunger strike they started two weeks previously rather than of the severity of the conditions of detention described above.

72. With regard to the duration of their detention on remand and detention under security conditions, the Commission finds that each of these periods was fairly brief considering the circumstances of the case. As to the special isolation measures to which the applicants were subjected, neither the duration nor the severity of these exceeded the legitimate requirements of security. In any case, the applicants' exclusion from the prison community was not prolonged excessively.

73. With regard to the objective pursued by the measures that were taken, it has already been noted that security was the sole consideration. On the effects of the conditions of detention, the Commission cannot, in the light of the information available to it and in particular the medical reports, conclude that those conditions could, according to the Commission's agreed criteria, «destroy the personality and cause severe mental and physical suffering» to the applicants (cf X v the United Kingdom, D & R 21, p 99).

The Commission considers that there is no doubt but that the applicants had been provided with the medical care which the state of their health demanded.

74. It is true that, to support their allegations, the applicants referred to certain medical reports which appear to cast doubt on the compatibility of the state of their health with their detention, and in particular with certain of the measures that were ordered. It is sufficient to mention one of these measures, namely their subjection to constant artificial lighting. This was discontinued on 18 February 1978, four days after the doctors had found that the continuous lighting of the cells was causing the applicants to have difficulty in sleeping. The measure was nevertheless replaced by closed-circuit television surveillance involving the use of an infra-red device: this continued until 30 June 1978. In its judgment of 7 June 1978, the Federal Court stated that this measure «is justified from the standpoint of personal freedom and in regard to Article 3 of the Convention. However, even taking account of the exceptional circumstances, the measure is only just within the limits of what is acceptable».

75. The Commission for its part expresses serious concern with the need for such measures, their usefulness and their compatability with Article 3 of the Convention.

The Commission recalls, however, that a form of treatment must attain a minimum level of severity before a breach of Article 3 can be established, and that the assessment of this minimum is, in the nature of things, relative, depending as it does on all the circumstances of the case.

76. Having regard to all the circumstances of the case and in particular to the fact that the Swiss authorities saw fit gradually to relax the arrangements for the applicants' detention, and to the behaviour of the latter in refusing certain opportunities for contact, the Commission is unable to affirm that the applicants were subjected to a form of physical or moral suffering designed to punish them, destroy their personality or break their resistance (see European Court HR, Case of Ireland v United Kingdom, Judgment of 18 January 1978, paragraph 167).

77. The Commission therefore considers that the special conditions imposed on the applicants could not be construed as inhuman or degrading treatment within the meaning of Article 3 of the Convention.

CONCLUSION

78. In the light of the above considerations, the Commission expresses the view, by eight votes to five, that there was no violation of Article 3 of the Convention in this case.

Secretary to the Commission — President of the Commission

(H C KRÜGER) — (C A NØRGAARD)

DISSENTING OPINION OF MM TENEKIDES, MELCHIOR, SAMPAIO and WEITZEL

We belong to the minority which considers that there was a violation of Article 3 of the Convention in this case.

The majority's case appears to rest on the following argument: firstly, it is noted that the conditions of detention imposed on the applicants were particularly severe during the first month and that measures were taken subsequently to relax these arrangements one by one. The comments of the Commission are mainly concerned with these measures and prompt it to express the opinion that there was no violation of Article 3.

Our position is that closer attention should have been paid to the situation imposed on the applicants during the first month of their detention and to consider this in the light of Article 3. From this standpoint we consider that if the criteria that emerge from the case-law of the Commission and the Court are applied to this period alone, then the situation in question must be regarded as contrary to Article 3. We do not think that conditions of detention of such severity have ever been brought to the Commission's notice in the past. The fact that a situation prohibited by Article 3 was gradually relaxed does not mean that that situation can be justified retroactively in regard to that provision.

It is clear that new threats to public order, the State and even individuals have arisen in our communities in modern times, and that these threats are unacceptable in a democratic framework. Consequently, it is vital that new measures be taken to defend the State, the individual and, more generally, the very essence of a democratic state.

These requirements demand a new approach: the State and the authorities must cope with (or must have the means to cope with) such problems, but we consider that the manner in which this is done must be compatible with the legitimate object of these measures (or this approach), in the light of the Convention and the fundamental principles of our democracies: the purpose of taking these measures (or having the means to take these measures) is to defend a democratic state and the rights of other individuals, but they may not be ordered or implemented in such a way that the rights of offenders, as set out in the Convention, are not or cannot be respected.

It is clear that the applicants were particularly dangerous people and that particularly rigorous arrangements had to be made for their detention in order to ensure the security of the prison authorities and the physical integrity of the applicants, to eliminate any risk of escape and guarantee their appearance before the investigating and prosecuting authorities.

The security measures adopted in regard to them no doubt comply with these objectives which are in themselves legitimate. However we consider that there has to be proportionality between the satisfaction of these demands and the respect due to every human being, however dangerous.

In our opinion, this balance was not achieved in the circumstances of the present case. The measures initially adopted and the arrangements subsequently made, although having the effect of relaxing the initial conditions of detention, cannot be justified under the Convention. Neither the fact that, in the case of the applicants, Switzerland was confronted with terrorists for the first time, nor the publicity surrounding the deaths of G Esslin, A Baader and J Raspe, can justify these measures even though they help to explain the reaction of the Swiss authorities.