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

COURT (CHAMBER)

CASE OF S. v. SWITZERLAND

(Application no. 12629/87; 13965/88)

JUDGMENT

STRASBOURG

28 November 1991

In the case of S. v. Switzerland*,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention")** and the relevant provisions of the Rules of Court***, as a Chamber composed of the following judges:

Mr J. CREMONA, *President*,
Mr Thór VILHJÁLMSSON,
Mrs D. BINDSCHEDLER-ROBERT,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Mr B. WALSH,
Mr R. BERNHARDT,
Mr J. DE MEYER,
Mrs E. PALM,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 27 June and 25 October 1991,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 8 October 1990 and by the Government of the Swiss Confederation ("the Government") on 12 December 1990, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in two applications (nos. 12629/87 and 13965/88) against Switzerland lodged with the Commission under Article 25 (art. 25) by S., a Swiss national, on 18 November 1986 and 28 May 1988. The applicant requested the Court not to disclose his identity.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Switzerland recognised the compulsory

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* The case is numbered 48/1990/239/309-310. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

** As amended by Article 11 of Protocol No. 8 (P8-11), which came into force on 1 January 1990.

*** The amendments to the Rules of Court which came into force on 1 April 1989 are applicable to this case.

jurisdiction of the Court (Article 46) (art. 46); the Government's application referred to Articles 45, 47 and 48 (art. 45, art. 47, art. 48). The object of the request and of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of the requirements of Article 6 para. 3 (b) and (c) and Article 5 para. 4 (art. 6-3-b, art. 6-3-c, art. 5-4).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30).

3. The Chamber to be constituted included ex officio Mrs D. Bindschedler-Robert, the elected judge of Swiss nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 26 October 1990, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr J. Cremona, Mr Thór Vilhjálmsson, Mr F. Matscher, Mr B. Walsh, Sir Vincent Evans, Mr J. De Meyer and Mrs E. Palm (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the Government, the Delegate of the Commission and the lawyer for the applicant on the need for a written procedure (Rule 37 para. 1). In accordance with the order made in consequence, the Registrar received the applicant's memorial and the Government's memorial on 30 April 1991. On 10 June the Secretary to the Commission informed him that the Delegate would submit his observations at the hearing.

5. Having consulted, through the Registrar, those who would be appearing before the Court, the President had directed on 11 February 1991 that the oral proceedings should open on 24 June 1991 (Rule 38).

6. Mr Ryssdal and Sir Vincent Evans were subsequently unable to take part in the further consideration of the case; the former was therefore replaced as President of the Chamber by Mr Cremona, Vice-President of the Court, the latter by Mr F. Gölcüklü, substitute judge. Mr Cremona was himself replaced as a member of the Chamber by Mr R. Bernhardt, also a substitute judge (Rule 21 para. 3 (b) and para. 5 and Rules 22 para. 1 and 24 para. 1).

7. The hearing took place in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Mr O. JACOT-GUILLARMOD, Assistant Director of the Federal Office of Justice, Head of the International Affairs Division, *Agent*,

Mr R. HAUSER, Professor Emeritus

of Criminal Law at the University of Zürich,
Mr F. SCHÜRMANN, Technical Assistant
in the Federal Office of Justice, *Counsel*;
- for the Commission
Mr S. TRECHSEL, *Delegate*;
- for the applicant
Mr J.-P. GARBADE, avocat, *Counsel*,
Mr M.-P. HONEGGER, avocat, *Adviser*.

The Court heard addresses by Mr Jacot-Guillarmod for the Government, Mr Trechsel for the Commission and Mr Garbade for the applicant, as well as their replies to its questions.

AS TO THE FACTS

8. S. is a mason and lives in Zürich.

9. In autumn 1980 a protest movement broke out in the town of Winterthur (Canton of Zürich) directed against the sale of nuclear power stations to a Latin American country then under a military regime. It continued in 1981 in the form of demonstrations against the holding of an international arms fair, and writing graffiti and occupying buildings as a protest against the housing shortage. In 1983 and 1984 there was a series of cases of arson and attacks using explosives, causing damage to several public and private buildings including the house of Mr Friedrich, who was then a Cabinet Minister (Bundesrat) and head of the Department of Justice and Police.

On 20 July 1984 the Winterthur police set up a special unit with the task of co-ordinating the hunt for those responsible for these crimes. It shadowed the members, tapped the telephones and regularly emptied the dustbins of a commune which was thought to be sheltering the criminals.

On 20 November, the police arrested twenty-seven persons and seized numerous documents at the same time. Ten of these persons were released again on the same day. The others were detained in solitary confinement, without being able to correspond freely with their lawyers, and each was the subject of a separate procedure.

10. S. was suspected of being involved in the above-mentioned crimes. He was arrested at his home in Geneva on 21 November 1984 but succeeded in escaping. He was arrested again on 30 March 1985 and charged with the use of explosives in connection with the attack on Mr Friedrich's house.

11. On 2 and 4 April 1985 the Federal Public Prosecutor (Bundesanwalt) sent the Geneva authorities various documents implicating the applicant. On

10 April he was questioned by members of the Federal Public Prosecutor's Office on the accusations against him, but exercised his right to silence.

A. The investigative stage

12. The investigation became the responsibility of the Winterthur District Attorney's Office (Bezirksanwaltschaft) on 22 May 1985, and S. was taken to Winterthur prison.

After questioning him on 28 May 1985 the District Attorney (Bezirksanwalt) accused him of having caused an explosion at Mr Friedrich's house and started a fire at a civil defence centre. He again remanded him in custody on the grounds of the risk of flight and of collusion with his co-accused. On 7 June 1985 he further accused him of arson at two rifle ranges, flooding business premises and criminal damage to property by means of graffiti. According to S.'s lawyer all these charges were based on graphological reports which had been drawn up on the basis of documents seized by the police on 20 November 1984 (see paragraph 9 above).

13. On 19 July 1985 the Geneva authorities sent the Winterthur District Attorney's Office the results of their investigations.

1. The surveillance of the applicant's contacts and correspondence with his lawyer

14. In April 1985 the applicant had asked his mother to ask Mr Rambert, the lawyer representing one of the other accused, W., to take on his defence too. Mr Rambert declined to do this and on 1 May 1985 S. instructed Mr Garbade. On 10 June the President of the Indictments Division (Anklagekammer) of the Zürich Court of Appeal (Obergericht) designated him as court-appointed defence counsel with retrospective effect from 4 May.

15. On 8 May 1985, while still in custody in Bern, the applicant had been able to confer freely with Mr Garbade for about half an hour. From 15 May, on the other hand, visits took place under the supervision of a police official. Three of the applicant's letters to his lawyer, dated 4, 6 and 21 May, were intercepted and were later used for the purpose of graphological reports.

After being transferred to Winterthur prison S. continued to be subject to surveillance of his correspondence and his lawyer's visits. He was, however, able on 29 May to have a meeting with no witness present with Mr H., a lawyer who had been approached by his mother to undertake his defence.

16. On 31 May 1985 the applicant spoke with Mr Garbade in the presence of a policeman who took notes and stopped the interview after an

hour, on the grounds that they were no longer speaking about the case and he had other business to see to.

17. In a letter of 12 June 1985 the Winterthur District Attorney informed the Zürich Principal Public Prosecutor (Staatsanwalt) that he considered these measures necessary in view of the risk that the applicant's lawyer might collude with other lawyers or other co-accused. He relied on the second paragraph of Article 18 of the Zürich Criminal Procedure Code (Strafprozessordnung), according to which:

> "An accused who is held in custody shall be permitted written and oral contact with defence counsel, in so far as the purpose of the investigation is not jeopardised.
>
> Once his detention has exceeded fourteen days, an accused must not be refused permission to consult defence counsel freely and without supervision, unless there are special reasons, in particular a danger of collusion. After the close of the investigation, an accused shall have this right without restriction.
>
> (...)."

18. The Indictments Division of the Zürich Court of Appeal gave S.'s lawyer permission on 27 June 1985 to examine three police reports and several transcripts of statements by the co-accused at the registry of the Court, but not to take copies of them. From that date until January 1986 (see paragraph 33 below) Mr Garbade did not have access to any other documents in the case-file.

19. There were numerous disputes between the lawyer and those carrying out the surveillance, notably on 23 August 1985 when the lawyer wanted to give his client several decisions and letters from the District Attorney and a copy of the memorial for the public-law appeal of 19 August 1985 (see paragraph 27 below). The latter document was seized by the officer and sent to the District Attorney.

20. On application by the Winterthur District Attorney's Office the President of the Indictments Division of the Zürich Court of Appeal extended the applicant's detention on remand until 12 September 1986, in order to prevent him colluding with his co-accused, who had meanwhile been released, and tampering with evidence.

21. In October 1985 Mr Garbade saw some extracts from the final police report of 8 August 1985, but he did not have access to the case-file until January 1986.

2. The first series of appeals against the surveillance measures

22. On 3 June 1985 the applicant appealed to the Indictments Division of the Zürich Court of Appeal, complaining of the surveillance of the interview of 31 May (see paragraph 16 above), and supplemented the appeal on 14 June following other visits on 7 and 14 June.

23. The Indictments Division dismissed S.'s appeal on 27 June. It pointed out that he was suspected of having committed the crimes in question and said that in view of the complexity and extent of the authorities' investigation there was a serious risk of collusion; because the accused had refused to make a statement, it would have been easy for him to tamper with the evidence, as his co-accused had been released, apart from W. He had also kept in close contact with them, and was accused of serious offences which had constituted attacks on public and social order. There was also a risk of unintentional collusion on the part of Mr Garbade in view of his contacts with the lawyers representing the other accused, especially counsel for W. As for the conduct of the policeman responsible for surveillance of the interview of 31 May 1985 (see paragraph 16 above), this could be justified.

24. The applicant appealed against this decision to the Civil Division of the Zürich Court of Appeal; on 26 July 1985 that court upheld the decision. The court found that a danger that the applicant would collude with his co-accused followed from his refusal to make a statement, and it could be supposed that he would use every effort to make their respective statements agree with each other (abstimmen). Mr H. had indeed been able to confer freely with him, but the Civil Division did not find credible Mr Garbade's assertions that his contacts with the lawyers representing the other accused were no closer than Mr H.'s; further, counsel for W. had advised the District Attorney's Office that the lawyers had all agreed to co-ordinate their strategy.

The court added:

> "Acting in such a way is not inadmissible, but it must, however, be compatible with the duty to ascertain the material truth (Gebot der materiellen Wahrheitsfindung). As the accused represented by Mr Garbade and Mr Rambert are exercising their right to refuse to make any statements, one cannot ignore the risk that defence counsel will not only co-ordinate their tactical and legal way of proceeding but may also, intentionally or not, adversely affect the ascertainment of the material truth. In these circumstances, precisely in the case of offences of this type which must be regarded as attacks on public and social order, there are sufficient indications pointing to a danger of collusion in the person of defence counsel."

25. On 10 June 1985 the applicant had also challenged a decision by the President of the Indictments Division extending his detention on remand. He complained that he had not been able to examine all the documents in the case-file, and that the proceedings had been entirely written. On 18 July 1985 the Indictments Division dismissed the appeal and confirmed the further remand until 12 September 1985, on the grounds that there was still a danger of collusion and flight.

26. S. then brought two public-law appeals before the Federal Court on 19 and 27 August.

27. In the first appeal, which was directed against the decision of 18 July 1985 (see paragraph 25 above), he relied on Article 6 para. 3 (b) in

conjunction with Article 5 para. 4 (art. 6-3-b, art. 5-4) of the Convention. He alleged that the surveillance of the interviews made his right to take proceedings within the meaning of Article 5 para. 4 (art. 5-4) illusory, and that his right to a fair hearing was deprived of substance as regards the review of the lawfulness of his detention on remand; in particular, the aforesaid surveillance prevented any confidential conversation with his lawyer aimed at refuting the evidence collected during the investigation. Further, he did not have access to the case-file and his lawyer was unable to take a copy of it.

The second appeal challenged the decisions of 27 June and 26 July 1985 (see paragraphs 23 and 24 above) and put forward essentially the same complaints.

28. On 15 October 1985 the Federal Court dismissed the appeal of 19 August (see paragraph 27 above). It found inter alia that Mr Garbade, whose task it was to draw up the application for release from detention, had had access to the case file, so that the applicant's rights in the proceedings on the extention of his pre-trial detention had not been infringed. The court added that counsel would, at the preparation for trial at the latest, have the right to a copy of the case-file for his client if he asked for this.

29. The appeal of 27 August 1985 (see paragraph 27 above) suffered the same fate on 4 December. The Federal Court held that only Article 4 of the Federal Constitution and Article 6 para. 3 (c) (art. 6-3-c) of the Convention (as interpreted by the European Commission of Human Rights) were relevant, and not Article 6 para. 3 (b) (art. 6-3-b), as the surveillance had not prejudiced preparation for the trial.

The authorities had not been arbitrary in describing the offences in question as systematic attacks on public and social order. The accused appeared to be extremely dangerous and it was reasonable to suppose that they would have resorted to illegal methods even during the judicial proceedings. Consequently, regardless of Mr Garbade's personal qualities, surveillance of his contacts with his client was in accordance with the Constitution and the European Convention.

In the event of irregular actions on the part of a lawyer, it was in the first place up to the disciplinary authorities to impose penalties on him. A lawyer could intentionally or unintentionally become the accomplice of an accused. This was the case in particular with Mr Garbade, who was in close contact with Mr Rambert, whose client W. had been allowed to communicate freely with him. However, the applicant could not claim to be the victim of discrimination, as W. had been in custody for much longer and was accused of additional offences.

3. The second series of appeals against the surveillance measures

30. The surveillance had not been relaxed in the meantime. The police officer in charge of it had drawn up reports on 23 August, 11 October, 21

October and 18 December; these were subsequently added to the case-file. It was apparent from the first report that Mr Garbade had had to show him the documents he was studying with his client.

31. In a letter of 15 October 1985 the Winterthur District Attorney's Office had informed the Principal Public Prosecutor that the surveillance was aimed at eliminating all risk of collusion; he considered, however, that it was unlikely that a conversation listened to could be used in evidence against S. in any way.

32. On 21 October 1985 the Winterthur District Attorney notified Mr Garbade that he would end the surveillance as soon as he had heard the applicant's statement on the accusations brought against him. Mr Garbade replied that S. would refuse to make any statement as long as the surveillance continued.

33. The surveillance of visits and correspondence was ended on 10 January 1986 following an interrogation lasting a day and a half. On that occasion the District Attorney asked the applicant to make a statement, but he exercised his right to silence. After this he was able to confer with his counsel in the prison library with no glass screen or any other restriction.

34. On 20 December 1985 the applicant had brought an appeal inter alia against the surveillance of visits and the fact that he was not allowed to consult the case-file.

On 8 January 1986 the Indictments Division of the Zürich Court of Appeal had adjourned a decision on the first point, on the grounds that the District Attorney's Office was about to discontinue the surveillance. On the second point the court had found that S. was still suspected of the offences in question and the length of the investigation was caused by his insistence on remaining silent.

On 10 July 1986 the court found that the complaint on which it had adjourned a decision on 8 January was no longer a live issue now that the surveillance measures had ended (see paragraph 33 above). In order to decide whether the applicant was liable for costs or was entitled to damages, it assessed what chances of success the appeal would have had if the surveillance had continued. It noted that the circumstances referred to in the Federal Court's decision of 4 December 1985 (see paragraph 29 above) had not changed by 20 December, the date of the appeal, and the restrictions on free communication between the applicant and his lawyer thus remained justified; it therefore did not award him any pecuniary compensation.

35. S. appealed against this decision to the Civil Division of the Zürich Court of Appeal, which upheld the decision on 19 January 1987, again on the grounds that the appeal of 20 December 1985 would probably have failed.

36. S. finally brought a public-law appeal on 27 February 1987. The Federal Court dismissed it on 30 November 1987. Restricting itself to examining whether the refusal to award compensation was tainted by

arbitrariness, it found that there had been a danger of collusion and in essence approved the findings of the Indictments Division (see paragraph 34 above).

B. The indictment and the proceedings in the Zürich Court of Appeal

37. In a report drawn up for the Winterthur District Attorney's Office on 26 March 1986, the Zürich police had expressed the opinion that some of the anonymous letters which had been sent shortly after the offences in question undoubtedly came from the applicant.

38. The final interrogation took place on 28 July 1986. According to the record, S. refused to answer the accusations brought against him, and his lawyer attributed those accusations to the fact that his client was thought to have anarchist opinions.

39. The Winterthur District Attorney's Office's final report (Schlussbericht) of 21 August 1986, comprising 235 pages, accused the applicant of nineteen offences and attempted offences of arson, participation in three attacks with explosives, various thefts and offences of criminal damage, including damage to a railway line; the damage amounted to approximately 7,670,000 Swiss francs. The report was forwarded to the Zürich Public Prosecutor's Office.

40. On 12 September, 6 October and 22 December 1986 the applicant made unsuccessful requests to the Public Prosecutor's Office to reopen the investigation. He applied again on 1 April 1987.

41. In accordance with paragraph 3 (c) of Article 198 a of the Zürich Criminal Procedure Code he left it to the Indictments Division to decide which court would try him. The Division decided to commit him for trial by the Court of Appeal rather than the Court of Assizes (Geschworenengericht), as it considered that his interests would be better protected in that way, especially with regard to his youth.

42. The trial was due to start on 14 January 1988 but the applicant did not appear. The Court of Appeal therefore adjourned the hearing.

A fresh hearing took place on 11 December 1989, in the absence, for which no reason had been given, of S. who had been provisionally released on 15 September 1988. The Court of Appeal found him guilty inter alia of manufacturing explosives, arson, theft and criminal damage and sentenced him to seven years' imprisonment - the 1,291 days spent in custody on remand being deducted - and to payment of costs and expenses.

The applicant appealed. A new trial took place on 8 February 1990, again in his absence. After hearing his counsel and the representative of the Zürich Principal Public Prosecutor, the Court of Appeal upheld its judgment of 11 December 1989. He appealed to the Court of Cassation of the Canton of Zürich, and enforcement of the judgment was suspended by the appeal.

PROCEEDINGS BEFORE THE COMMISSION

43. In his applications of 18 November 1986 (no. 12629/87) and 28 May 1988 (no. 13965/88) S. complained that he had not been allowed to communicate with his lawyer freely and without supervision; in this respect he relied on Article 6 para. 3 (b) and (c) (art. 6-3-b, art. 6-3-c) of the Convention. He also claimed that the surveillance in question had made his right to bring proceedings before a Court within the meaning of Article 5 para. 4 (art. 5-4) illusory. Finally, he alleged that there had been a violation of Article 13 (art. 13), on the grounds that the Federal Court had restricted itself to examining whether the Zürich courts had acted arbitrarily in deciding that the appeal of 20 December 1985 would have been dismissed (see paragraph 34 above).

44. On 12 December 1988 the Commission ordered the applications to be joined, pursuant to Rule 29 of its Rules of Procedure.

On 9 November 1989 it declared the complaint based on Article 13 (art. 13) inadmissible as being manifestly ill-founded but found the complaints relating to Article 5 para. 4 and Article 6 para. 3 (b) and (c) (art. 5-4, art. 6-3-b, art. 6-3-c) admissible. In its report of 12 July 1990 (made under Article 31) (art. 31) it concluded that:

(a) there had been a violation of Article 6 para. 3 (c) (art. 6-3-c) in that the applicant had from 31 May 1985 to 10 January 1986 been unable to converse freely with his lawyer (fourteen votes to one);

(b) no separate issue was raised with reference to Article 6 para. 3 (b) (art. 6-3-b) (fourteen votes to one) and Article 5 para. 4 (art. 5-4) (unanimously).

The full text of the Commission’s opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment*.

GOVERNMENT’S FINAL SUBMISSIONS TO THE COURT

45. In their memorial the Government asked the Court "to hold that Switzerland [had] not violated the European Convention on Human Rights on account of the circumstances which gave rise to the two applications lodged by S.".

* Note by the Registrar: For practical reasons this annex will appear only with the printed version of the judgment (volume 220 of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 PARA. 3 (c) (art. 6-3-c)

46. S. claimed that there had been a violation of Article 6 para. 3 (c) (art. 6-3-c), which reads as follows:

> "Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (c) to defend himself in person or through legal assistance of his own choosing ..."

He criticized the Swiss authorities for having exercised surveillance of his meetings with Mr Garbade and for having authorised Mr Garbade to consult only a minute fraction of the case-file, with the alleged effect that it had been difficult for him to challenge the decisions by which his detention on remand was extended. The Government apparently failed to recognize the purpose of the guarantees provided in the Convention and confused the protected rights' efficacy with their successful exercise. Now these rights - in particular the right to legal assistance - were not exclusive to those who knew how to benefit from them or enjoyed the services of a good lawyer; they were intended to ensure equality of arms. Free communication between a lawyer and his detained client was a fundamental right which was essential in a democratic society, above all in the most serious cases. There was thus a contradiction between naming a court-appointed defence counsel at the start of an investigation because of the seriousness of the alleged offences and preventing him from carrying out his task freely.

47. The Government, praying in aid the Commission's report, pointed out that an accused's right to communicate with his counsel without hindrance, insofar as it was implicitly guaranteed by Article 6 para. 3 (c) (art. 6-3-c), might call for such regulation as to restrict the exercise of the right in certain cases.

The "particularly drastic" restriction imposed in this case was justified, according to the Government, by the exceptional circumstances of the case. The grounds for the decisions of the Swiss courts, which were best in a position to assess the situation, provided two decisive arguments in support of the "very unusual" length of the surveillance: firstly, the "extraordinarily dangerous" character of the accused, whose methods had features in common with those of terrorists, and the existence of systematic offences against public and social order, and secondly the risk of collusion between Mr Garbade and the co-accused. As the Indictments Division of the Zürich Court of Appeal stated on 27 June 1985, such a risk was increased when a defendant exercised his right to silence, as the applicant did. Finally, S. had

not in any way shown that the surveillance complained of by him had adversely affected his defence.

48. The Court notes that, unlike some national laws and unlike Article 8 para. 2 (d) of the American Convention on Human Rights, the European Convention does not expressly guarantee the right of a person charged with a criminal offence to communicate with defence counsel without hindrance. That right is set forth, however, within the Council of Europe, in Article 93 of the Standard Minimum Rules for the Treatment of Prisoners (annexed to Resolution (73) 5 of the Committee of Ministers), which states that:

> "An untried prisoner shall be entitled, as soon as he is imprisoned, to choose his legal representative, or shall be allowed to apply for free legal aid where such aid is available, and to receive visits from his legal adviser with a view to his defence and to prepare and hand to him, and to receive, confidential instructions. At his request he shall be given all necessary facilities for this purpose. In particular, he shall be given the free assistance of an interpreter for all essential contacts with the administration and for his defence. Interviews between the prisoner and his legal adviser may be within sight but not within hearing, either direct or indirect, of a police or institution official."

In another context, the European Agreement Relating to Persons Participating in Proceedings of the European Commission and Court of Human Rights, which is binding on no less than twenty member States, including Switzerland from 1974, provides in Article 3 para. 2:

> "As regards persons under detention, the exercise of this right [the right 'to correspond freely with the Commission and the Court' - see paragraph 1 of the Article] shall in particular imply that:
>
> ...
>
> c. such persons shall have the right to correspond, and consult out of hearing of other persons, with a lawyer qualified to appear before the courts of the country where they are detained in regard to an application to the Commission, or any proceedings resulting therefrom."

The Court considers that an accused's right to communicate with his advocate out of hearing of a third person is part of the basic requirements of a fair trial in a democratic society and follows from Article 6 para. 3 (c) (art. 6-3-c) of the Convention. If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective (see inter alia the Artico judgment of 13 May 1980, series A no. 37, p. 16, para. 33).

49. The risk of "collusion" relied on by the Government does, however, merit consideration.

Accordingly to the Swiss courts there were "indications pointing to" such a risk "in the person of defence counsel"; there was reason to fear that Mr Garbade would collaborate with W.'s counsel Mr Rambert, who had

informed the Winterthur District Attorney's Office that all the lawyers proposed to co-ordinate their defence strategy (see paragraph 24 above).

Such a possibility, however, notwithstanding the seriousness of the charges against the applicant, cannot in the Court's opinion justify the restriction in issue and no other reason has been adduced cogent enough to do so. There is nothing extraordinary in a number of defence counsel collaborating with a view to co-ordinating their defence strategy. Moreover, neither the professional ethics of Mr Garbade, who had been designated as court-appointed defence counsel by the President of the Indictments Division of the Zürich Court of Appeal (see paragraph 14 above), nor the lawfulness of his conduct were at any time called into question in this case. Furthermore, the restriction in issue lasted for over seven months (31 May 1985 to 10 January 1986).

50. The argument that the applicant was not prejudiced by the measures in question as he was in fact able to make several applications for provisional release must also be dismissed. A violation of the Convention does not necessarily imply the existence of damage (see, among many other authorities, the Alimena judgment of 19 February 1991, series A no. 195-D, p. 56, para. 20).

51. There has therefore been a violation of Article 6 para. 3 (c) (art. 6-3-c).

II. ALLEGED VIOLATION OF ARTICLE 6 PARA. 3 (b) (art. 6-3-b)

52. S. originally also prayed in aid paragraph (b) of Article 6 para. 3 (art. 6-3-b), claiming that the surveillance of his conferences with his lawyer had deprived him of his right "to have adequate time and facilities for the preparation of his defence". However, he no longer relied on this provision before the Court and there is no need for the Court to consider the question of its own motion.

III. ALLEGED VIOLATION OF ARTICLE 5 PARA. 4 (art. 5-4)

53. As an alternative complaint the applicant alleged that the impossibility of conferring freely with his defence counsel had rendered illusory his right to challenge the extension of his detention, thereby entailing a breach of the requirements of Article 5 para. 4 (art. 5-4), which reads as follows:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

Having regard to the conclusion in paragraph 51 above, the Court sees no need to consider the matter from the point of view of Article 5 para. 4 (art. 5-4).

IV. APPLICATION OF ARTICLE 50 (art. 50)

54. Under Article 50 (art. 50),

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

55. The applicant firstly claimed compensation for non-pecuniary damage, and left it to the Court to assess the amount. This was to compensate for the feeling of frustration and the deterioration of his health which resulted from the surveillance of his lawyer's visits.

The Government considered that a finding of a violation would in this case constitute sufficient satisfaction. If, however, the Court were to award pecuniary compensation, they asked it to take into account all the circumstances of the case, in particular the amount of damage caused by the applicant.

The Delegate of the Commission recommended an award of 2,500 Swiss francs.

The Court considers that S. must have suffered some non-pecuniary damage. Making an assessment on a equitable basis as required by Article 50 (art. 50), it awards him 2,500 Swiss francs under this head.

B. Costs and expenses

56. The applicant also claimed 1,000 Swiss francs in respect of the fees and costs which the Zürich courts ordered him to pay in the context of his appeals against the surveillance measures, and also 14,000 Swiss francs in respect of fees and costs relating to the proceedings at Strasbourg.

The Government stated that they were prepared to reimburse the costs relating only to the domestic court decisions which were relevant from the point of view of Article 6 para. 3 (c) (art. 6-3-c), and 2,000 Swiss francs for the European proceedings; on this last point they note the lack of a hearing before the Commission.

On the basis of the evidence in its possession, the observations of the participants in the proceedings, and its own relevant case-law, the Court considers it equitable to award 12,500 Swiss francs.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a violation of paragraph 3 (c) of Article 6 (art. 6-3-c);

2. Holds that it is not necessary to examine the case from the point of view of paragraph 3 (b) of Article 6 (art. 6-3-b), or of Article 5 para. 4 (art. 5-4);

3. Holds that the respondent State is to pay the applicant within three months 2,500 (two thousand five hundred) Swiss francs for non-pecuniary damage and 12,500 (twelve thousand five hundred) Swiss francs for costs and expenses;

4. Dismisses the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 28 November 1991.

John CREMONA
President

Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the separate opinions of Mr Matscher and Mr De Meyer are annexed to this judgment.

J.C.
M.-A.E

SEPARATE OPINION OF JUDGE MATSCHER

(Translation)

I voted with the majority in respect of the violation of Article 6 para. 3 (b) (art. 6-3-b), but I wish to make the following points:

1. I acknowledge that, in principle, it must be possible for a defendant to communicate with his defence counsel freely and without surveillance.

2. However, this is not an absolute principle; there are exceptional situations where surveillance of the defendant's communications with his counsel may be necessary and hence compatible with the principle stated above. That this may be a real necessity is shown by the not so infrequent cases of serious collusion between lawyers and persons in custody which have occurred in several countries in recent years.

My criticism of the reasoning of the present judgment is that it - correctly - sets out the principle but - wrongly - does not explicitly state the possibility of exceptions, which in my opinion is an essential corollary of the principle, both being necessary in the interests of the proper administration of justice.

I voted in favour of a violation in the present case, on the ground that, on the facts, the conditions for invoking the exception mentioned at point 2 above were not satisfied.

CONCURRING OPINION OF JUDGE DE MEYER

(Translation)

I consider it advisable to emphasise that the freedom and inviolability of communications between a person charged with a criminal offence and his lawyer are among the fundamental requirements of a fair trial. They are inherent in the right to legal assistance and are essential for the effective exercise of that right*.

The same applies to communications between a lawyer and his colleagues. It is perfectly legitimate for him to act in concert with them. The fact that this may lead to a coordination of defence strategy cannot - even or especially in the case of serious offences - be used as a pretext for the restriction or surveillance of communications between a lawyer and his client.

I do not think that there can be any exceptions to these principles**.

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* It is not enough to say that communications must take place "out of hearing of a third person", as there are too many other ways of violating their confidential nature for one to be content with formulae of this kind.

** Security checks may be admissible, but only to the extent that they do not prejudice the freedom and inviolability of the communications in question.