CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

COURT (PLENARY)

CASE OF SUTTER v. SWITZERLAND

(Application no. 8209/78)

JUDGMENT

STRASBOURG

22 February 1984

In the Sutter case,

The European Court of Human Rights, taking its decision in plenary session in pursuance of Rule 48 of the Rules of Court* and composed of the following judges:

Mr. R. RYSSDAL, *President*,
Mr. J. CREMONA,
Mr. Thór VILHJÁLMSSON,
Mr. W. GANSHOF VAN DER MEERSCH,
Mrs. D. BINDSCHEDLER-ROBERT,
Mr. L. LIESCH,
Mr. F. GÖLCÜKLÜ,
Mr. F. MATSCHER,
Mr. J. PINHEIRO FARINHA,
Mr. L.-E. PETTITI,
Mr. B. WALSH,
Mr. R. MACDONALD,
Mr. C. RUSSO,
Mr. R. BERNHARDT,
Mr. J. GERSING,

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

Having deliberated in private on 24 March and 25 October 1983 and 23 January 1984,

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

PROCEDURE

1. The present case was referred to the Court by the European Commission of Human Rights ("the Commission") and the Government of the Swiss Confederation ("the Government"). The case originated in an application (no. 8209/78) against Switzerland lodged with the Commission in 1978 under Article 25 (art. 25) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Swiss national, Mr. Peter Sutter.

2. The Commission's request and the Government's application were lodged with the registry of the Court within the period of three months laid down by Articles 32 para. 1 and 47 (art. 32-1, art. 47) - the former on 17

* Note by the registry: In the version of the Rules applicable when proceedings were instituted. A revised version of the Rules entered into force on 1 January 1983, but only in respect of cases referred to the Court after that date.

May and the latter on 8 July 1982. The request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the Swiss Confederation recognised the compulsory jurisdiction of the Court (Article 46) (art. 46) and the application to Articles 45, 47 and 48 (art. 45, art. 47, art. 48). The request and the application sought a decision from the Court as to the existence of violations of Article 6 para. 1 (art. 6-1).

3. The Chamber of seven judges to be constituted included, as ex officio members, Mrs. D. Bindschedler-Robert, the elected judge of Swiss nationality (Article 43 (art. 43) of the Convention), and Mr. G. Wiarda, the President of the Court (Rule 21 para. 3 (b) of the Rules of Court). On 28 May 1982, the President drew by lot, in the presence of the Registrar, the names of the five other members, namely Mr. W. Ganshof van der Meersch, Mr. L. Liesch, Mr. E. García de Enterría, Sir Vincent Evans and Mr. R. Bernhardt (Article 43 in fine (art. 43) of the Convention and Rule 21 para. 4).

4. Mr. Wiarda, who had assumed the office of President of the Chamber (Rule 21 para. 5), ascertained, through the Registrar, the views of the Agent of the Government and the Delegates of the Commission regarding the procedure to be followed. On 22 June, he decided that the Agent should have until 30 September 1982 to file a memorial and that the Delegates should be entitled to reply in writing within two months from the date of the transmission of the Government's memorial to them by the Registrar.

5. On 29 June 1982, the Chamber decided under Rule 48 to relinquish jurisdiction forthwith in favour of the plenary Court.

6. The Government's memorial was received at the registry on 30 September. On 10 November, the Secretary to the Commission informed the Registrar that the Delegates would submit their own observations at the hearings. On 20 December, he transmitted to the Registrar the applicant's claims under Article 50 (art. 50).

7. After consulting, through the Registrar, the Agent of the Government and the Delegates of the Commission, the President directed on 20 December 1982 that the oral proceedings should open on 21 March 1983.

8. Mr. Wiarda being unable to attend, Mr. Ryssdal, the Vice-President of the Court, assumed the office of President (Rule 9, read in conjunction with Rules 24 para. 1 and 48 para. 3).

9. The hearings were held in public at the Human Rights Building, Strasbourg, on 21 March. Immediately before they opened, the Court had held a preparatory meeting; it had authorised the person assisting the Delegates of the Commission to use the German language (Rule 27 para. 3).

There appeared before the Court:

- for the Government:

Mr. J. VOYAME, Director
of the Federal Office of Justice, *Agent*,
Mr. G. MESSMER, Judge

at the Federal Court,
Mr. R. BARRAS, Chief Military Prosecutor,
Mr. O. JACOT-GUILLARMOD, Federal Office of Justice,
Mr. M. RUSCA, Federal Office of Justice, *Counsel*;
- for the Commission:
Mr. S. TRECHSEL,
Mr. A. WEITZEL, *Delegates*,
Mr. L. MINELLI, the applicant's representative
before the Commission, assisting the Delegates (Rule 29 para. 1, second sentence, of the Rules of Court).

The Court heard addresses by Mr. Trechsel, Mr. Weitzel and Mr. Minelli for the Commission and by Mr. Voyame and Mr. Barras for the Government, as well as their replies to its questions and a question put by one of its members. On 15 December 1983, the Commission filed two documents which the Registrar, acting on the President's instructions, had asked it to produce.

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

10. At the time of the events giving rise to this case, Mr. Peter Sutter, a Swiss national born in 1949, was a student and resident in Basel.

11. During refresher courses (Wiederholungskurse) organised in 1974 and 1975 as part of ordinary military obligations, he was subjected to five and seven days' strict arrest for refusing to comply with Article 203 bis of the service regulations, relating to hair-cuts.

12. Shortly before the beginning of the 1976 refresher course, the applicant received a registered letter from his unit commander instructing him to report for the course with a regulation hair-cut. He nevertheless presented himself on 28 August 1976 with his hair longer than authorised and refused to obey the officer's verbal order to have it cut.

13. On 8 November 1976, the Military Prosecutor (auditeur militaire) drew up a "bill of indictment" (Anklageschrift) against Mr. Sutter, charging him with repeated insubordination and, subsidiarily, failure to observe service regulations (Articles 61 and 72 of the Military Criminal Code).

14. On 16 May 1977, at the close of a public hearing, Divisional Court no. 5 delivered in public a judgment sentencing the applicant to ten days' imprisonment for the two offences.

Mr. Sutter's defence counsel had unsuccessfully requested the Divisional Court to decline jurisdiction on the ground that it lacked the independence

and impartiality required by Article 6 (art. 6) of the Convention; he had also applied, in vain, for a supplementary enquiry into the futility, or indeed abusive nature, of the regulations on hair-cuts.

A copy of the decision was sent to the applicant on 23 June 1977.

15. Having been duly informed by the grand juge (President of the Divisional Court) that he could appeal on points of law within twenty-four hours from delivery of the judgment, Mr. Sutter had immediately given notice of appeal to the Registrar (section 189 para. 2 of the Federal Army (Constitution of Courts and Criminal Procedure) Act of 28 June 1889 - "the 1889 Act").

On 2 July 1977, within the prescribed period of ten days from service of the judgment, the applicant filed a memorial containing a "final" statement (section 189 para. 3 of the 1889 Act) of his grounds of appeal.

He submitted that the decision appealed against had infringed the law (section 188 para. 1, no. 1, of the 1889 Act) by applying regulations that were incompatible with Article 8 (art. 8) of the Convention; that the Divisional Court had not been composed in the manner prescribed by law (ibid., no. 2), four of the six judges being substitutes for the ordinary judges and the grand juge having been appointed by the Chief Military Prosecutor (auditeur en chef); that the Divisional Court had erred in not declining jurisdiction to hear the case on the merits (ibid., no. 3), since the military courts were not tribunals within the meaning of Article 6 (art. 6); and that the refusal to order a supplementary enquiry had prejudiced the defence on decisive points (ibid., no. 6) concerning the application of Article 8 (art. 8) and in particular paragraph 2 (art. 8-2) thereof.

Mr. Sutter also drew the attention of the Military Court of Cassation to the fact that it was not consonant with Article 6 (art. 6) to conduct proceedings entirely in writing; he therefore requested it to hold at least one hearing and to pronounce its judgment publicly.

16. The grand juge transmitted the appeal to the Military Prosecutor, in his capacity as respondent; the latter was entitled to "submit his observations" within ten days (section 189 para. 3 of the 1889 Act), but chose not to do so.

The grand juge afterwards sent the appeal and the papers in the case, without appending "his report on the matters in dispute" (ibid.), to the Chief Military Prosecutor.

The latter forwarded the documents to the Military Court of Cassation. He could himself have filed observations if he had thought fit, but - like the Military Prosecutor and the grand juge - he confined himself to submitting that the appeal should be dismissed.

17. The President of the Military Court of Cassation requested a judge whom he had designated from amongst his colleagues to draft a report containing a reasoned proposal. This document was circulated, together with the papers in the case, amongst the other members. On 21 October

1977, the Court of Cassation deliberated on the matter in camera and dismissed the appeal. It thus did not rule on the merits of the case; according to the provisions then in force (section 194 of the 1889 Act), it could have done so only if the judgment had been quashed and the sole ground for the quashing had been misapplication of the law. This power the Military Court of Cassation no longer enjoys (see paragraph 19 below).

The operative provisions of the judgment were immediately served on Mr. Sutter in writing. He received the full text on 24 January 1978 (section 197 of the 1889 Act). The reasons covered twenty pages and concerned mainly Mr. Sutter's submissions as to the incompatibility of the 1889 Act with Articles 6 and 8 (art. 6, art. 8) of the Convention. As to the composition of the Divisional Court, the judgment stated that the substitute judges had the same legal status as the ordinary judges, and that the Chief Military Prosecutor had not infringed the law by appointing the grand juge - who had the status of an ordinary judge - to sit on the case, the ordinary president being unable to take part as he had had to deal with the matter at a previous stage as Military Prosecutor.

II. DOMESTIC LAW

18. At the time of the facts giving rise to the present case, military criminal procedure was governed by the 1889 Act (see paragraph 15 above). As regards the public character of the proceedings, this Act drew a distinction according to the level of the court concerned.

The Divisional Courts, which heard military-law cases at first instance, were required to give their decisions after holding public hearings and to pronounce their judgments in open court.

On the other hand, proceedings before the Military Court of Cassation were conducted entirely in writing and its judgments were not delivered in public. Concerning the latter point, section 197 of the Act laid down merely that "an extract" of the judgment had to be communicated to the Chief Military Prosecutor, the accused and the grand juge.

19. The 1889 Act was repealed by the Federal Military Criminal Procedure Act of 23 March 1979 ("the 1979 Act"), which entered into force on 1 January 1980.

The existing system was maintained for proceedings before the Divisional Courts, and was extended to the Courts of Appeal which were set up by the same statute.

As regards the Military Court of Cassation, the 1979 Act provides that "There shall be no oral hearings" (section 189 para. 1). The Act did, however, make two innovations: in future, the Court of Cassation was to deliver judgment in open court (sections 48 para. 3 and 194 para. 1) and could in no circumstances itself rule on the merits of the case.

20. As was also the case in the past, the judgments of the Military Court of Cassation are collected together annually in a provisional form (roneotyped). Anyone who can establish an interest may consult or obtain a copy of the full text on application to the Chief Military Prosecutor or the military court registries.

If judgments contain features that are novel or of importance for the interpretation of the law, they are subsequently published in printed form.

The Sutter judgment of 21 October 1977 appeared in 1983 in volume 9 (covering the years 1973 to 1979) of the judgments of the Military Court of Cassation, under the number 136.

PROCEEDINGS BEFORE THE COMMISSION

21. In his application lodged with the Commission on 17 April 1978 (no. 8209/78), Mr. Sutter complained that the military courts were not independent and impartial. He added that the proceedings before the Military Court of Cassation were conducted in writing and not in public and, furthermore, that it did not deliver its judgments in open court but only served them on the parties. Finally, he contended that the principle of equality of arms had been infringed since he had had access neither to the report of the grand juge nor to the submissions of the Chief Military Prosecutor; the prosecution had thus had the last word in the case, and he had not even been notified of the arguments which it had presented to the Military Court of Cassation. On these various points, he relied on Article 6 para. 1 (art. 6-1) of the Convention.

Mr. Sutter also claimed to be the victim of a violation of Article 8 (art. 8): he asserted that the regulations on hair-cuts prevented a Swiss citizen, for a period of thirty years, from wearing his hair as he chose and constituted an unjustified interference with the right to respect for private life.

22. On 1 March 1979, the Commission adjourned its examination of the case in so far as it concerned the absence of oral proceedings and of public pronouncement of the judgments of the Military Court of Cassation; it declared the other complaints inadmissible as being manifestly ill-founded.

On 11 July 1979, the Commission declared the remainder of the application admissible. In its report of 10 October 1981 (Article 31 (art. 31) of the Convention), it expressed the opinion by ten votes to eight that there had been no violation of Article 6 para. 1 (art. 6-1).

The report contains two separate opinions, one being dissenting.

FINAL SUBMISSIONS MADE TO THE COURT BY THE GOVERNMENT

23. In their memorial and at the close of the hearings on 21 March 1983, the Government invited the Court "to hold that Switzerland has not violated Article 6 para. 1 (art. 6-1) of the Convention".

AS TO THE LAW

24. The applicant complained of the fact that the Military Court of Cassation had dismissed his appeal without previously holding a public hearing and had not pronounced its judgment of 21 October 1977 publicly (see paragraph 17 above). He alleged that there had been a violation of Article 6 para. 1 (art. 6-1) of the Convention, which reads:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... by [a] ... tribunal .... Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

The Government contended, on the contrary, that this two-fold absence of publicity did not contravene the Convention. A majority of the Commission was of the same opinion, whereas a minority of eight of its members agreed with Mr. Sutter.

25. In the present case, only the cassation proceedings are in issue. Mr. Sutter’s complaints, in so far as they were declared admissible by the Commission, did not concern the earlier procedure, Divisional Court no. 5 having pronounced judgment publicly following hearings conducted in public (see paragraph 14 above).

I. PRELIMINARY OBSERVATIONS

26. The public character of proceedings before the judicial bodies referred to in Article 6 para. 1 (art. 6-1) protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts, superior and inferior, can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6 para. 1 (art. 6-1), namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention (see the Pretto and others judgment of 8 December 1983, Series A no. 71, p.

11, para. 21, and the Axen judgment of 8 December 1983, Series A no. 72, p. 12, para. 25).

27. Whilst the member States of the Council of Europe all subscribe to this principle of publicity, their legislative systems and judicial practice reveal some diversity as to its scope and manner of implementation, as regards both the holding of hearings and the "pronouncement" of judgments. The formal aspect of the matter is, however, of secondary importance as compared with the purpose underlying the publicity required by Article 6 para. 1 (art. 6-1). The prominent place held in a democratic society by the right to a fair trial impels the Court, for the purposes of the review which it has to undertake in this area, to examine the realities of the procedure in question (see notably the two above-mentioned judgments, Series A no. 71, p. 12, para. 23, and Series A no. 72, p. 12, para. 26).

28. The applicability of Article 6 (art. 6) to the present facts was not disputed and, moreover, is to be inferred from the established case-law of the Court (see notably the Delcourt judgment of 17 January 1970, Series A no. 11, pp. 13-15, paras. 25-26, and, as the most recent authorities, the two above-mentioned judgments of 8 December 1983, Series A no. 71, p. 12, para. 23, and Series A no. 72, p. 12, para. 27).

The manner of application of this text depends, however, on the particular circumstances of the case (ibid.). The Court, concurring with the Government and the Commission, considers that account must be taken of the entirety of the proceedings conducted in the domestic legal order; what has to be determined is whether in the present instance the proceedings before the Military Court of Cassation had, like those before the Divisional Court, to be accompanied by each of the guarantees laid down in Article 6 para. 1 (art. 6-1).

II. ABSENCE OF PUBLIC HEARINGS

29. In the applicant’s submission, the holding of public hearings is required even before a court of cassation because, amongst other things, it allows an exchange of argument by the parties and enables the public to be aware of the pleadings being put forward.

30. Whilst Mr. Sutter’s case had been heard in public by the Divisional Court, the proceedings before the Military Court of Cassation were conducted in writing, as was then and is still provided by the Swiss federal legislation. The latter Court received only a memorial filed by the applicant, since the grand juge, the Military Prosecutor and the Chief Military Prosecutor had confined themselves, without giving reasons, to submitting that the appeal should be dismissed. The Court of Cassation did not rule on the merits of the case, as regards either the question of guilt or the sanction imposed by the Divisional Court. It dismissed Mr. Sutter’s appeal in a judgment that was devoted solely to the interpretation of the legal

provisions concerned. There is therefore nothing to suggest that his trial before the Military Court of Cassation was less fair than his trial before the Divisional Court, and it is not in dispute that the latter trial fulfilled the requirements of Article 6 (art. 6). In the particular circumstances of the case, oral argument during a public hearing before the Court of Cassation would not have provided any further guarantee of the fundamental principles underlying Article 6 (art. 6).

The Court accordingly finds that the absence of public hearings at the cassation stage did not infringe Article 6 para. 1 (art. 6-1).

III. ABSENCE OF PUBLIC PRONOUNCEMENT

31. In accordance with section 197 of the 1889 Act, the judgment delivered on 21 October 1977 by the Military Court of Cassation was served on the parties but not pronounced in open court (see paragraph 17 above). For the applicant and the minority of the Commission, this state of affairs violated the Convention.

32. The terms used in the second sentence of Article 6 para. 1 (art. 6-1) - "judgment shall be pronounced publicly", "le jugement sera rendu publiquement" - might suggest that a reading out aloud of the judgment is required. Admittedly the French text employs the participle "rendu" (given), whereas the corresponding word in the English version is "pronounced" (prononcé), but this slight difference is not sufficient to dispel the impression left by the language of the provision in question: in French, "rendu publiquement" - as opposed to "rendu public" (made public) - can very well be regarded as the equivalent of "prononcé publiquement".

At first sight, Article 6 para. 1 (art. 6-1) of the European Convention would thus appear to be stricter in this respect than Article 14 para. 1 of the 1966 International Covenant on Civil and Political Rights, which provides that the judgment "shall be made public", "sera public".

33. However, many member States of the Council of Europe have a long-standing tradition of recourse to other means, besides reading out aloud, for making public the decisions of all or some of their courts, and especially of their courts of cassation, for example deposit in a registry accessible to the public. The authors of the Convention cannot have overlooked that fact, even if concern to take it into account is not so easily identifiable in their working documents as in the travaux préparatoires of the 1966 Covenant (see, for instance, document A/4299 of 3 December 1959, pp. 12, 15 and 19, paras. 38 (b), 53 and 63 (c) in fine).

The Court therefore does not feel bound to adopt a literal interpretation. It considers that in each case the form of publicity given to the "judgment" under the domestic law of the respondent State must be assessed in the light of the special features of the proceedings in question and by reference to the object and purpose of Article 6 para. 1 (art. 6-1) (see the two above-

mentioned judgments of 8 December 1983, Series A no. 71, p. 12, paras. 25-26, and Series A no. 72, pp. 13-14, paras. 30-31).

34. As indicated in paragraph 20 above, anyone who can establish an interest may consult or obtain a copy of the full text of judgments of the Military Court of Cassation; besides, its most important judgments, like that in the Sutter case, are subsequently published in an official collection. Its jurisprudence is therefore to a certain extent open to public scrutiny.

Having regard to the issues dealt with by the Military Court of Cassation in the instant case and to its decision - which made the judgment of the Divisional Court final and changed nothing in respect of its consequences for Mr. Sutter -, a literal interpretation of the terms of Article 6 para. 1 (art. 6-1), concerning pronouncement of the judgment, seems to be too rigid and not necessary for achieving the aims of Article 6 (art. 6).

The Court thus concurs with the Government and the majority of the Commission in concluding that the Convention did not require the reading out aloud of the judgment delivered at the final stage of the proceedings.

FOR THESE REASONS, THE COURT

1. Holds unanimously that the absence of public hearings before the Military Court of Cassation did not contravene Article 6 para. 1 (art. 6-1);

2. Holds by eleven votes to four that the absence of public pronouncement of that Court's judgment did not contravene the said Article (art. 6-1).

Done in English and in French, the French text being authentic, at the Human Rights Building, Strasbourg, this twenty-second day of February, one thousand nine hundred and eighty-four.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 50 para. 2 of the Rules of Court, the following separate opinions and observations are annexed to the present judgment:

- dissenting opinion of Mr. Cremona, Mr. Ganshof van der Meersch, Mr. Walsh and Mr. Macdonald;

- supplementary observations of Mr. Ganshof van der Meersch in support of his dissenting opinion;

- concurring opinion of Mr. Bernhardt, joined by Mrs. Bindschedler-Robert and Mr. Matscher.

R. R.
M.-A. E.

DISSENTING OPINION OF JUDGES CREMONA, GANSHOF VAN DER MEERSCH, WALSH AND MACDONALD

We regret that we do not find ourselves in agreement with the majority of the Court on the question of whether the judgment of the Military Court of Cassation was pronounced publicly in accordance with Article 6 para. 1 (art. 6-1) of the Convention. We are of opinion that the failure to do so in the present case constituted a violation of Article 6 para. 1 (art. 6-1). We are also of opinion that our conclusion on the question of public access to the judgment of the Military Court of Cassation is borne out by the decisions of this Court recently given in the Axen and Pretto cases.

Having regard to the object and purpose of the publicity requirement enshrined in that provision, elaborated by the Court in its judgment in this case, we feel it is necessary to emphasise the particular importance of the accessibility of the judgment to the general public. If the basic underlying concept of public scrutability is to be a reality, a restricted access to judgments such as existed in the present case, i.e. restricted only to persons who could establish an interest to the satisfaction of a court official, falls short of what is required by that provision of the Convention. Public knowledge of court decisions cannot be secured by confining that knowledge to a limited class of persons.

Neither the annual roneotyping of the judgments of the Military Court of Cassation after appreciable delay nor the subsequent publication of some of those judgments in printed form in volumes covering a number of years (in the present case the judgment was published only after an interval of some six years) is sufficient to comply with the requirements of the said provision. Furthermore, it is to be noted that even such publication is not required by law but depends solely on voluntary initiative.

While it must be acknowledged that the Federal Army (Constitution of Courts and Criminal Procedure) Act of 28 June 1889 has now been replaced by the Federal Military Criminal Procedure Act of 23 March 1979, which now requires the Military Court of Cassation to deliver judgment in open court, the present case was and remains governed by the 1889 Act.

SUPPLEMENTARY OBSERVATIONS OF JUDGE GANSHOF VAN DER MEERSCH IN SUPPORT OF HIS DISSENTING OPINION

(Translation)

To interpret restrictively a right guaranteed by the Convention is not consonant with the latter's object and purpose as they are indicated in the preamble both to the Convention itself and to the Statute of the Council of Europe, the organisation within which the Convention was conceived and concluded.

This is why I cannot agree with the limiting conditions which the judgment finds to be sufficient to meet the requirements of Article 6 (art. 6) of the Convention.

As in the case of the Axen and Pretto judgments, which have just been cited, I regret that I cannot accept that, as regards the conditions for assuring the public character of proceedings, a distinction should be drawn between "courts of cassation" (see paragraph 33 of the judgment) and other courts. The determination of the issue of law is liable to put in question, as regards its very basis, the justification for the lower court's decision.

Furthermore, I would add that my inability to agree with the conditions in which the judgment accepts that the publicity requirements of Article 6 (art. 6) of the Convention are satisfied is reinforced by the fact that this was a criminal matter ("bill of indictment" and sentence of "ten days' imprisonment") and that in this area the guarantees of publicity must be strictly implemented.

CONCURRING OPINION OF JUDGE BERNHARDT, JOINED BY JUDGE BINDSCHEDLER-ROBERT AND JUDGE MATSCHER

I share the opinion of the majority of the Court that in this case Article 6 (art. 6) has not been violated. But my reasoning is somewhat different.

In the present judgment (paras. 28, 30 and 33), as in the judgments of 8 December 1983 in the Axen case (Series A no. 72, paras. 28, 31 and 32) and (partly) in the case of Pretto and others (Series A no. 71, para. 26), the "particular circumstances of the case" and "the special features of the proceedings in question" are emphasised; this reasoning gives the impression that in general Article 6 para. 1 (art. 6-1) of the Convention requires public hearings and the public pronouncement of a decision in cassation proceedings also, and that only the special circumstances of a case dispense from compliance with this requirement. I think that the publicity requirement contained in Article 6 para. 1 (art. 6-1) should be understood in a different way.

Public hearings and the public pronouncement of judgments are absolutely necessary (except in the cases enumerated in the second sentence of Article 6 para. 1 (art. 6-1)) whenever a person is faced with a criminal charge and the competent court has to deal with questions of fact and law. The object and purpose of Article 6 para. 1 (art. 6-1) are to guarantee a fair hearing, inter alia, through the public character of the hearing and the public pronouncement of the judgment at least in the first instance, and probably also in appeal proceedings if the facts and the law can be reviewed at that stage. However, the situation is different in cassation proceedings if the only issue is whether the lower court has correctly interpreted the law. It seems to me to be possible and necessary to give the publicity requirement in Article 6 para. 1 (art. 6-1) a restrictive interpretation in this respect, taking into account the fact that publicity is, as far as Article 6 (art. 6) is concerned, not an end in itself but a means of protecting the right of the individual.

The present judgment rightly points out (para. 33) that - as far as "public pronouncement" is concerned - many member States of the Council of Europe have recourse to means other than public pronouncement for making judgments known to the public. Nevertheless, it is also true that in many countries public hearings are obligatory and held in cassation proceedings only if exceptional circumstances are involved, but not in normal cases in which solely questions of law are discussed. Article 6 para. 1 (art. 6-1) can and should be interpreted restrictively, in conformity with this long-standing practice.

It goes without saying that the hearing must be fair at all stages of the procedure. In cassation proceedings also, the person faced with a criminal charge must have the opportunity of submitting his arguments and, if there

is a public hearing, of taking an active part therein (see the Court's Pakelli judgment of 25 April 1983, Series A no. 64).