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

COURT (PLENARY)

CASE OF OBERSCHLICK v. AUSTRIA

(Application no. 11662/85)

JUDGMENT

STRASBOURG

23 May 1991

In the Oberschlick case[*],

The European Court of Human Rights, taking its decision in plenary session pursuant to Rule 51 of the Rules of Court[**] and composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr J. CREMONA,
Mr Thór VILHJÁLMSSON,
Mrs D. BINDSCHEDLER-ROBERT,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Mr L.-E. PETTITI,
Mr B. WALSH,
Sir Vincent EVANS,
Mr R. MACDONALD,
Mr C. RUSSO,
Mr R. BERNHARDT,
Mr A. SPIELMANN,
Mr J. DE MEYER,
Mr S.K. MARTENS,
Mrs E. PALM,
Mr I. FOIGHEL,
Mr A.N. LOIZOU,
Mr J.M. MORENILLA,

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

Having deliberated in private on 22 November 1990, as a Chamber, and on 23 January and 25 April 1991 in plenary session,

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 16 February 1990, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art.

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[*] The case is numbered 6/1990/197/257. 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.

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

47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (no. 11662/85) against the Republic of Austria lodged with the Commission under Article 25 (art. 25) by an Austrian citizen, Mr Gerhard Oberschlick, in June 1985.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Austria recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether or not the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 para. 1 and Article 10 (art. 6-1, art. 10) of the Convention.

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 sought leave to present his case himself. On 24 April 1990 the President granted this leave, subject to the applicant's being assisted by an Austrian jurist (Rule 30 para. 1, second sentence). At the same time he authorised the applicant to use the German language (Rule 27 para. 3).

3. The Chamber to be constituted included ex officio Mr F. Matscher, the elected judge of Austrian nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 26 March 1990 the President drew by lot, in the presence of the Registrar, the names of the other seven members, namely Mr Thór Vilhjálmsson, Mrs D. Bindschedler-Robert, Mr J. Pinheiro Farinha, Sir Vincent Evans, Mr N. Valticos, Mr S.K. Martens and Mr I. Foighel (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 Austrian Government ("the Government"), the Delegate of the Commission and the applicant on the need for a written procedure (Rule 37 para. 1). In accordance with the orders made in consequence, the registry received, on 29 June and 3 July 1990 respectively, the Government's and the applicant's memorials.

In a letter of 19 July 1990 the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing. Subsequently, the Secretary produced a number of documents requested by the Registrar on the President's instructions.

5. Having consulted, through the Registrar, those who would be appearing before the Court, the President directed on 14 June 1990 that the oral proceedings should open on 19 November 1990 (Rule 38).

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

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[*] Note by the Registrar: as amended by Article 11 of Protocol No. 8 (P8-11), which came into force on 1 January 1990.

There appeared before the Court:
- for the Government
Mr W. OKRESEK, Federal Chancellery, *Agent*,
Mr F. HAUG, Federal Ministry of Foreign Affairs,
Mr S. BENNER, Federal Ministry of Justice, *Advisers*;
- for the Commission
Mr L. LOUCAIDES, *Delegate*;
- for the applicant
Mr H. TRETTER, Assistant.

7. The Court heard their addresses and their replies to its questions. During the hearing the Government and the applicant filed several documents; the latter also lodged supplementary observations on the application of Article 50 (art. 50) of the Convention. Subsequently the Government was invited to comment thereon and replied on 21 January 1991. After the closing of the procedure, the registry received on 4 February 1991 several observations by the applicant which were rejected in accordance with Rule 37 para. 1, second sub-paragraph.

8. On 22 November 1990 the Chamber had relinquished jurisdiction in favour of the plenary Court (Rule 51).

9. Having taken note of the Government's agreement and the opinions of the Commission and the applicant, the Court decided, on 23 January 1991, to proceed to judgment without holding a further hearing (Rule 26).

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

10. Mr Oberschlick, an Austrian journalist residing in Vienna, was at the relevant time the editor of the review Forum.

A. Background to the case

11. On 29 March 1983 - during the parliamentary election campaign - it was reported in a television programme that Mr Walter Grabher-Meyer, then Secretary General of one of the political parties which participated in the governing coalition, the Austrian Liberal Party (FPÖ), had suggested that the family allowances for Austrian women should be increased by 50% in order to obviate their seeking abortions for financial reasons, whilst those paid to immigrant mothers should be reduced to 50% of their current levels. He had justified his statement by saying that immigrant families were placed in a discriminatory position in other European countries as well.

12. On 20 April 1983 the applicant and several other persons laid a criminal information (Strafanzeige) against Mr Grabher-Meyer. However, the Vienna public prosecutor's office decided on 1 June 1983 not to prosecute him.

13. On the day it was laid, the full text of the criminal information was published by the applicant in Forum. The cover page of the relevant issue contained a summary of its contents, including the title : "Criminal information against the Liberal Party Secretary General (Strafanzeige gegen FPÖ-Generalsekretär)". The following text appeared at page 9:

(Translation)

"CRIMINAL INFORMATION against WALTER GRABHER-MEYER

Date of birth unknown, occupation: Secretary General, c/o FPÖ (Liberal Party), Federal Central Office, Kärntnerstrasse 28, 1010 Vienna

ON SUSPICION OF

1. the misdemeanour (Vergehen) of incitement to hatred, contrary to Article 283 of the Criminal Code,

2. the misdemeanour (Vergehen) of incitement to commit criminal offences and expressing approval of criminal offences, contrary to Article 282 of the Criminal Code, and

3. the offence (Verbrechen) of activities within the meaning of sections 3 and 3d of the Constitutional Law of 8 May 1945 (StGBl. no. 13) on the prohibition of the National Socialist Party (NSDAP) ("Prohibition Act").

THE FACTS

'The Secretary General of the Liberal Party, Mr Walter Grabher-Meyer today proposed raising family allowances for Austrian women by 50%, the aim of this measure being to deter Austrian women from having abortions for financial reasons. At the same time Walter Grabher-Meyer demanded that family allowances from the Austrian State for mothers of migrant workers' families (Gastarbeitermütter) should be reduced to half the present level. Grabher-Meyer stated that migrant worker families are placed in a less favourable position in other European countries too.'

ORF (Austrian Broadcasting Corporation), Television programmes 1 + 2 Late News 29.3.1983

Count 1:

Walter Grabher-Meyer's public statement was made in a way which offends human dignity and is directed against a group of persons defined by their membership of a people, ethnic group or State; in the present case, by the fact that they do not have Austrian citizenship.

The contrasting treatment of Austrian women, who are to be spared the need for abortions by being placed in a better financial position, and mothers of migrant

workers' families who are not only not to be treated in the same way, but who are moreover, according to Walter Grabher-Meyer's suggestion, to have their family allowances halved (allowances which in his opinion are too low to prevent abortion for financial reasons), gives the impression, which must in all likelihood have been intended by him, that mothers of migrant workers' families and their unborn children are an inferior, worthless or less valuable sector of the population as a whole, and that it is in the interests of the Austrian people for such mothers to have abortions.

Walter Grabher-Meyer has thereby presented migrant workers as being undeserving or unworthy of the respect of their fellow human beings; the authors of this information regard this as a tendentious incitement to hatred of and contempt for migrant workers in Austria, object thereto and lay this information.

Count 2:

Walter Grabher-Meyer is publicly proposing - and thereby calling in particular on the Austrian Parliament and the Federal Government to introduce - measures which constitute the substance of the offence of activities within the meaning of sections 3 and 3d of the Prohibition Act (see below).

Count 3:

Under section 3 of the Prohibition Act, activities of any sort on behalf of the NSDAP or its aims are prohibited, even if such activities are carried out outside that organisation.

Section 3d of the Prohibition Act says that "A person who in public or in the presence of several persons ... instigates, incites or seeks to induce conduct prohibited by section 1 or section 3, in particular any person who for this purpose glorifies or extols the aims, organs or actions of the NSDAP, shall, unless a more serious offence appears therein, be punished by a term of imprisonment of from 10 to 20 years and confiscation of his entire property".

The authors of this information refer in this connection to the 25 points of the NSDAP Manifesto of 24.2.1920. They note that, until the passing of the NSDAP Prohibition Act of 8 May 1945 by the Provisional Government, this manifesto remained the party's sole programme and that it therefore contains in authentic and complete form the aims of the NSDAP's programme. It says inter alia that:

'5. A person who does not have German nationality is to be able to live in Germany only as a visitor and must be subject to aliens legislation.

7. We demand that the State undertake, first and foremost, to provide opportunities for employment and the subsistence of its citizens. If it is not possible to feed the entire population of the State, citizens of foreign nations (non-citizens) must be expelled from the Reich.

8. All further immigration of non-Germans is to be prevented. We demand that all non-Germans who have immigrated to Germany since 2 August 1914 be compelled to leave the Reich immediately.'

Creating a hostile attitude to citizens of foreign nations (non-citizens), and placing them in a less favourable position, to such an extent that it became difficult for them to live in the Reich and they were forced to leave, were essential aims of the NSDAP and its policy.

Walter Grabher-Meyer's proposal to increase family allowances for Austrian women by 50% in order to stop them having abortions for financial reasons, and at the same time to reduce family allowances for mothers of migrant workers' families to half the present level, represents a cynical means of driving citizens of foreign nations out of the Republic of Austria and indeed forcing those who stay in the Republic of Austria to have abortions; being entirely consistent with and corresponding to the philosophy and aims of the NSDAP that 'the State must first and foremost provide opportunities for employment and the subsistence of its citizens', these proposals are aimed, amongst other things, at improving the living conditions of citizens (Austrian mothers) by worsening those of migrant workers and, at the same time, at preventing all further immigration of non-Austrians (see above, NSDAP points 7 and 8).

From this it is apparent that Walter Grabher-Meyer has undertaken activities which correspond to the aims of the NSDAP, or at the very least has extolled its measures against citizens of foreign nations by proposing that such measures be applied in Austria.

As to the accuracy of these allegations, the authors of this information rely on their own statements, the ORF newsreaders' scripts for the Late News on television programmes 1 and 2 on 29.3.1983 and the NSDAP manifesto of 24.2.1920.

This criminal information is therefore laid against Walter Grabher-Meyer etc.

(Signed):..., Gerhard Oberschlick"

B. Private prosecution against the applicant

1. First set of proceedings

14. On 22 April 1983 Mr Grabher-Meyer brought a private prosecution for defamation (üble Nachrede, Article 111 of the Criminal Code - see paragraph 25 below) against the applicant and the other signatories of the criminal information. He also sought the immediate seizure of the relevant issue of Forum (sections 33 and 36 of the Media Act - Mediengesetz) and compensation from its owners (section 6 of the Media Act - see paragraph 26 below).

15. The Review Chamber (Ratskammer) of the Vienna Regional Criminal Court (Landesgericht für Strafsachen - "the Regional Court") decided on the same day to order the discontinuance of the proceedings under Article 485 para. 1 (4) of the Code of Criminal Procedure (see paragraph 28 below). It found that the publication did not constitute the criminal offence defined in Article 111 of the Criminal Code, since the case did not concern the wrongful attribution of a certain (dishonest) behaviour,

but only value-judgments (Bewertung) on behaviour which, as such, had been correctly described.

16. On appeal by Mr Grabher-Meyer the Vienna Court of Appeal (Oberlandesgericht), composed of Mr Cortella, as President, and Mr Schmidt and Mr Hagen, quashed the above decision on 31 May 1983. It held that for the average reader the publication must have created the impression that a contemptible attitude (verächtliche Gesinnung) was ascribed to Mr Grabher-Meyer. The authors had disregarded the standards of fair journalism by going beyond a comparative and critical analysis of his statements and insinuating motives which he had not himself expressed, in particular by alleging that he had been guided by National Socialist attitudes. Accordingly, the case was referred back to the Regional Court.

2. Second set of proceedings

(a) Before the Regional Court

17. On 20 July 1983 the defamation proceedings against the signatories of the criminal information other than Mr Oberschlick were severed from the main proceedings by the Regional Court and referred for decision to the Vienna District Court for Criminal Matters (Strafbezirksgericht), on the ground that those persons had not been associated with the publication in Forum. On 9 April 1984 the former proceedings were discontinued.

18. On 25 July 1983 the Regional Court ordered the publication in Forum of information about the defamation proceedings against the applicant (section 37 of the Media Act - see paragraph 26 below). This decision was confirmed by the Court of Appeal on 7 September 1983.

19. The Regional Court held a hearing on 11 May 1984, during which it heard evidence from Mr Grabher-Meyer and the applicant.

The latter offered evidence that what he had written was true (Wahrheitsbeweis), claiming that in this respect it was sufficient to establish that a criminal information had actually been laid in the terms published in Forum. He argued that by reporting his suspicions he had been fulfilling a legal duty and that he was therefore exculpated under Article 114 of the Criminal Code (see paragraph 25 below). The fact that the legal qualification of Mr Grabher-Meyer's statements might have been erroneous could not be held against him because he was not a lawyer.

20. On the same day the applicant was convicted of defamation (Article 111 paras.1 and 2) and sentenced to a fine of 4,000 Austrian schillings or, in default, to 25 days' imprisonment. The Regional Court also made the following orders against the owners (Medieninhaber) of Forum - the Association of Editors and Employees of Forum (Verein der Redakteure und Angestellten des Forum): the seizure of the relevant issue of Forum, the publication of its judgment (sections 33 and 34 of the Media Act), and the award to Mr Grabher-Meyer of compensation of 5,000 schillings (section 6

of the Media Act). In addition, they were declared to be jointly and severally liable for the payment of the fine (section 35 para. 1 of the Media Act - see paragraph 26 below).

In its judgment of 11 May 1984, the Regional Court held that it was bound by the opinion expressed by the Court of Appeal in its decision of 31 May 1983 (see paragraph 16 above). Therefore the objective conditions for the offence of defamation were satisfied.

Mr Oberschlick also fulfilled the subjective requirements because he had acknowledged that he had intended to draw attention to what, in his opinion, was the National Socialist way of thinking of Mr Grabher-Meyer. Mr Oberschlick had, however, not established the truth of his allegations nor justified them. In the Regional Court's view, it was not sufficient that this politician had made the criticised statements and that a criminal information regarding it had been laid in the terms published in Forum. The statements in question did not necessarily show the intentions Mr Oberschlick had inferred therefrom. It could also be understood as a proposal to reallocate the notoriously limited resources of the Family Compensation Fund in favour of Austrians in order to stem the influx of migrant workers. This admittedly revealed a xenophobic way of thinking, but did not yet amount to a National Socialist attitude or to a criminal offence.

The fact that the publication involved only a reprint of the criminal information did not exculpate the applicant. Whilst everyone was free to report to the police facts which he considered constituted a criminal offence, it went far beyond the mere reporting of a criminal suspicion to publish the text of the information in a periodical and thus to make it accessible to the general public. There was no justification for doing so. In this respect, the applicant could not invoke a legal duty under Article 114 of the Criminal Code, namely to draw the public's attention to the (allegedly) Nazi mentality of a high-ranking official of a governing party. That allegation came under the general rule that a person who had made an attack of this kind through the media had to prove that it was true.

21. Mr Oberschlick subsequently requested on several occasions to be supplied with a copy of the record of the hearing, but without success. It seems that it was not until after the communication of the written judgment on 24 August 1984 that the record reached the applicant. On 6 September he applied for a rectification of the trial record which, according to him, failed to mention certain statements by Mr Grabher-Meyer which were of importance for assessing the evidence concerning the truth of the applicant's allegations. He had allegedly stated at the trial, inter alia, that he was opposed to excessive immigration of foreigners (Überfremdung) and that for tactical reasons he approved the "stop foreigners" campaign ("Ausländer Halt") which had been conducted by a right-wing political party and had subsequently been prohibited. He had also allegedly admitted having

considered social-policy measures directed against the children of foreign workers in Austrian schools.

On 4 October 1984 the Regional Court rejected this application, after having consulted the transcriber, on the ground that after five months the judge had no recollection of the detailed statements. It nevertheless pointed out that although the latter did not appear in the transcriber's notes, similar statements did.

(b) Before the Court of Appeal

22. On 17 December 1984 the Vienna Court of Appeal, composed of the same judges and again presided over by Mr Cortella (see paragraph 16 above), dismissed the applicant's appeal (Berufung).

In relation to a complaint concerning the Regional Court's decision of 4 October 1984 (see paragraph 21 above), the Court of Appeal observed that this decision was final. Furthermore, it did not appear that the Regional Court had failed to determine any requests made during the trial concerning the record. In any event, the statements in question were irrelevant for the judgment on the merits of the matter.

23. The Court of Appeal then dealt with the substantive issues. In its view, the Regional Court had not been legally bound by the Court of Appeal's earlier decision concerning the qualification of the offence. The Court of Appeal, however, saw no reason to depart from that decision. What was decisive was that Mr Grabher-Meyer was alleged to have had motives which he himself had not expressed. The case therefore did not concern the (possibly incorrect) legal qualification of his statements, but allegations putting a stain on his character which objectively could not be inferred from those statements.

According to the Court of Appeal, the Regional Court had rightly held that what had to be proved was the truth of the critical inferences as to Mr Grabher-Meyer's character made in the article and had rightly found that the applicant had failed to bring this proof. The fact that a short report on the criminal information against this politician would not have been punishable did not justify the conclusion that a full reprint of it was not punishable either. The publication in the form of a criminal information was intended to ensure that the accusation as to his character made therein would have a particularly telling effect on the average reader. Neither the right to report a criminal suspicion (Article 86 para. 1 of the Code of Criminal Procedure - see paragraph 27 below) nor the exception provided for in Article 114 para. 2 of the Criminal Code (see paragraph 25 below) justified the publication because it was not appropriate (mangels Anlassadäquanz): it had been insinuated, without a sufficient basis in the facts, that Mr Grabher-Meyer held National Socialist attitudes.

24. The written text of the judgment was served upon the applicant on 7 January 1985.

On 25 September 1985 he requested the Attorney-General (Generalprokurator) to file a plea of nullity for the preservation of the law (Nichtigkeitsbeschwerde zur Wahrung des Gesetzes), but he was informed on 9 January 1986 that the Attorney-General did not intend to take any action.

II. THE RELEVANT DOMESTIC LAW

A. Substantive law applicable

1. The offence of defamation

25. Article 111 of the Criminal Code provides:

> "1. Anyone who in such a way that it may be perceived by a third person accuses another of possessing a contemptible character or attitude or of behaviour contrary to honour or morality and of such a nature as to make him contemptible or otherwise lower him in public esteem shall be liable to imprisonment not exceeding six months or a fine ...
>
> 2. Anyone who commits this offence in a printed document, by broadcasting or otherwise in such a way as to make the defamation accessible to a broad section of the public shall be liable to imprisonment not exceeding one year or a fine ...
>
> 3. The person making the statement shall not be punished if it is proved to be true. As regards the offence defined in paragraph 1, he shall also not be liable if circumstances are established which gave him sufficient reason to assume that the statement was true."
>
> Under Article 112, "evidence of the truth and of good faith shall not be admissible unless the person making the statement pleads the correctness of the statement or his good faith ...".

Under Article 114 para. 1 "conduct of the kind mentioned in Article 111 ... is justified if it constitutes the fulfilment of a legal duty or the exercise of a right". Under paragraph 2 of the same provision "a person who is forced for special reasons to make an allegation within the meaning of Article 111 ... in the particular form and manner in which it was made, is not to be punished, unless that allegation is untrue and the offender could have been aware thereof if he had acted with the necessary care".

2. The relevant provisions of the Media Act

26. Section 6 of the Media Act provides for the strict liability of the publisher in cases of defamation; the victim can thus claim compensation from him. Furthermore, the publisher may be declared to be liable jointly

and severally with the person convicted of a media offence for the fines imposed and for the costs of the proceedings (section 35).

The person defamed may request the forfeiture of the publication by which a media offence has been committed (section 33). Under section 36 he may also request the immediate seizure of such a publication if section 33 is likely to be applied subsequently, unless the adverse consequences of seizure would be disproportionate to the legal interest to be protected by this measure. Seizure shall not be ordered if that interest can instead be protected by the publication of information that criminal proceedings have been instituted (section 37). Finally, the victim may request the publication of the judgment in so far as this appears necessary for the information of the public (section 34).

B. Procedural provisions applicable

1. Criminal information

27. The first sentence of Article 86 para. 1 of the Code of Criminal Procedure reads as follows:

> "Anybody who acquires knowledge of criminal conduct such as automatically attracts public prosecution shall have the right to report it."

Furthermore, section 3 (g) para. 2 of the Prohibition Act imposes a duty to denounce offences under this Act in certain circumstances. Failure to fulfil this duty may be punished by imprisonment for between five and ten years.

2. Defamation proceedings

28. Under the special simplified procedure - which was followed in this instance -, if a single judge of the Regional Court is of the opinion that the facts of the case do not constitute a criminal offence, he shall seek a decision by the Review Chamber of the Regional Court (Article 485 para. 1 (4) of the Code of Criminal Procedure), which shall order the discontinuance of the proceedings if it shares his view (Article 486 para. 3). The prosecution may appeal against such an order (Article 486 para. 4). If the Court of Appeal upholds the appeal and refers the case back to the Regional Court, the following special rules apply:

Article 486 para. 5

> "The trial court shall not be bound by decisions of the Review Chamber or of the court of second instance which confirm ... that the facts constitute a criminal offence ..."

Article 489 para. 3

"Those members of the court of second instance who participated at a previous stage in the decision of the Review Chamber to discontinue the proceedings or in the determination of an appeal against such a decision (Article 486) shall be disqualified from hearing or determining an appeal."

3. General rules concerning disqualification of or challenge to a judge

29. Disqualification of a judge (Ausschliessung) is governed by the following provisions of the Code of Criminal Procedure:

Article 70 para. 1

"A judge is obliged to bring circumstances which disqualify him to the immediate attention of the president of the court of which he is a member ..."

Article 71

"From the moment when grounds for his disqualification come to his knowledge, every judicial officer (Gerichtsperson) shall refrain from any judicial acts, on pain of nullity. The judicial officer concerned may carry out judicial acts which are urgent, but only where there is danger in delay and if another judge or registrar cannot be appointed immediately. ..."

30. Furthermore, under Article 72 the parties to the proceedings may challenge (ablehnen) a judge if they can show that there are reasons for doubting his complete impartiality. Although Article 72 refers expressly to grounds "other than disqualification", it is the practice of the courts to apply Article 72 also in cases where a party raises an issue relating to a judge's disqualification. In fact, the disqualification of a first-instance judge cannot subsequently be pleaded in nullity proceedings unless he was challenged before or at the trial or immediately after the ground for disqualification became known to the party (Article 281 para. 1 (1) of the Code of Criminal Procedure). The procedure applicable in this respect is the following:

Article 73

"Where a party seeks to challenge a judge, he may make an application in writing to the court of which the judge is a member or make an oral declaration to this effect before the registrar. He may do this at any time, except that, where the challenge concerns a member of the trial court, it must be made not later than 24 hours before the beginning of the hearing and, where it is directed against the whole court, not later than three days after service of the summons to attend the hearing. The application must specify and, as far as possible, justify the reasons for the challenge."

Article 74

"(1) As a rule it is for the president of the court of which the challenged judicial officer is a member to decide on the admissibility of the challenge.

(2) ...

(3) No appeal lies against such a decision ..."

4. Rules concerning trial records

31. Records of hearings before criminal courts in Austria are usually drawn up in summary form unless, for special reasons, the court orders the preparation of a shorthand transcript. A shorthand transcript must be prepared if this is requested by a party who advances the costs thereof (Article 271 para. 4).

In other cases the record is limited to a note of all essential formalities of the proceedings. The parties are free to request the recording of specific points in order to preserve their rights (Article 271 para. 1, applicable to single-judge proceedings by virtue of Article 488).

32. Where the establishment of a verbatim version is important, the judge shall, upon the request of a party, order that particular passages be read out at once (Article 271 para. 2).

The answers of the defendant and the depositions of the witnesses and experts shall be mentioned only if they contain deviations from, alterations of or additions to the statements recorded in the files or if the witnesses or experts are heard for the first time at the trial (Article 271 para. 3).

33. The parties are free to inspect the completed record and its appendices and to make copies thereof (Article 271 para. 5). Case-law has established that they are entitled to request additions or corrections to the record at the trial or afterwards, as long as an appeal is pending (Evidenzblatt, "EvBl", 1948, p. 32 and Sammlungstrafsachen, 32/108). The court's decision on such a request is final and is not open to appeal (Richterzeitung, 1967, p. 88, EvBl. 1948/243).

It is only total failure to prepare a trial record that is a ground of nullity (Article 281 para. 1 (3)). Other deficiencies in the record cannot be pleaded in nullity proceedings, except failure to decide on motions concerning the record which were made during the trial (Article 281 para. 1 (4)).

PROCEEDINGS BEFORE THE COMMISSION

34. In his application (no. 11662/85) of 16 June 1985 to the Commission, Mr Oberschlick alleged violations of Article 6 para. 1 (art. 6-1) (right to a fair hearing by an impartial tribunal established by law) and Article 10 (art.

10) (right to freedom of expression) of the Convention, as a result of the defamation proceedings instituted against him and his subsequent conviction.

35. The Commission declared the application admissible on 10 May 1989. In its report of 14 December 1989 (Article 31) (art. 31), the Commission expressed the opinion that there had been a violation of Article 10 (art. 10) (nineteen votes to two) and also of Article 6 para. 1 (art. 6-1) in relation to the proceedings before the Court of Appeal (twenty votes to one), but not in relation to the proceedings before the Regional Court (unanimously).

The full text of the Commission's opinion and the two dissenting opinions contained in the report is reproduced as an annex to this judgment[*].

FINAL SUBMISSIONS MADE TO THE COURT

36. In his memorial of 3 July 1990 the applicant made the following requests:

1. that the Court find:

(a) that his conviction and sentence constituted a violation of his right to freedom of expression as guaranteed by Article 10 (art. 10) of the Convention;

(b) that the proceedings at first and second instance, which led to his conviction and sentence, constituted a violation of his right to a fair trial as guaranteed by Article 6 para. 1 (art. 6-1) of the Convention;

2. that the Court instruct the Republic of Austria to annul the seizure of issue no. 352/353 of the magazine Forum;

3. that, in accordance with Article 50 (art. 50) of the Convention, the Court afford the applicant just satisfaction comprising specified costs and compensation for the non-material damage occasioned by the injustice of which he had been the victim.

The Government confirmed at the hearing held on 19 November 1990 the conclusions set out in their memorial of 29 June 1990. They asked the Court to reject the application because it had been lodged out of time (Article 26 in fine of the Convention) (art. 26), or to find that neither Article 6 para. 1 (art. 6-1) nor Article 10 (art. 10) of the Convention had been violated.

[*] Note by the Registrar. For practical reasons this annex will appear only with the printed version of the judgment (volume 204 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. PRELIMINARY OBJECTION

37. By way of preliminary objection, the Government pleaded, as they had already done before the Commission, that Mr Oberschlick had not complied with the rule, in Article 26 (art. 26) of the Convention, that applications to the Commission must be lodged "within a period of six months from the date on which the final decision was taken" ("dans le délai de six mois, à partir de la date de la décision interne définitive"). This plea was made with regard, firstly, to his main complaints under Articles 6 para. 1 and 10 (art. 6-1, art. 10) and, secondly, to the specific complaint concerning the rectification of the trial record.

A. The main complaints under Articles 6 para. 1 and 10 (art. 6-1, art. 10)

38. The Government observed that the application did not reach the Commission until 25 June 1985, whereas the final decision by the Vienna Court of Appeal had been pronounced orally more than six months previously, on 17 December 1984. In their opinion the date of the communication of the written text of the judgment (7 January 1985) was irrelevant for this purpose (see paragraphs 22 and 24 above).

Mr Oberschlick contended in reply that his application must be deemed to have been introduced on the date which it bore, namely 16 June 1985. In any event, the six-month period should run from service of the written text of the judgment, since no substantial application could be made to the Commission on the basis of the summary of the court’s reasoning given when the judgment was pronounced.

39. Following its usual practice, the Commission accepted that the application was filed on 16 June 1985, that is the last day of the six-month time-limit "if [it] should have to be counted as from the date when the final judgment was pronounced orally".

40. Having regard to the circumstances of the case, the Court accepts that, as regards his main complaints, Mr Oberschlick’s application was posted on 16 June 1985 and, accordingly, was introduced within the time-limit prescribed by Article 26 (art. 26).

B. Complaint concerning the rectification of the trial record (Article 6 para. 1) (art. 6-1)

41. The Government further submitted that, as regards the refusal of Mr Oberschlick's request for rectification of the trial record, his application was clearly out of time, because the six-month period began to run on 30 October 1984, when the Regional Court's decision of 4 October 1984 in the matter - which was final - was served on the applicant.

42. The Court does not share this view. National proceedings would be unduly delayed and complicated if applications concerning procedural decisions, such as the present one, had to be filed before the final decision on the merits. Consequently, with regard to such procedural decisions, even if they have become final before the termination of the proceedings, the six-month period mentioned in Article 26 (art. 26) runs only as from the same date as that which is relevant with regard to the final decision on the merits.

The application thus cannot be deemed to be out of time in this respect either.

C. Conclusion

43. In conclusion, the Government's preliminary objection has to be rejected.

II. ALLEGED VIOLATION OF ARTICLE 6 para. 1 (art. 6-1)

44. Mr Oberschlick alleged that he had not received a "fair hearing" by an "impartial tribunal established by law", within the meaning of Article 6 para. 1 (art. 6-1) of the Convention which, as far as relevant, provides:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law..."

A. Proceedings before the Vienna Regional Court

1. Rectification of the trial record

45. Before the Commission, the applicant complained of the Regional Court's refusal to rectify the trial record which, he said, did not accurately reproduce certain statements made by Mr Grabher-Meyer, the private prosecutor, that were of particular importance for proving the truth of the applicant's allegations (see paragraph 21 above).

In its report (paragraph 85) the Commission concluded that there had been no violation of Article 6 para. 1 (art. 6-1) on this account. The applicant declared before the Court that, with one exception relating to

another point, he fully shared the conclusions of the Commission and he did not go further into the question of the rectification of the trial record. In these circumstances the Court sees no reason to examine it.

2. Fairness of the proceedings

46. Mr Oberschlick claimed that he had been deprived of a fair trial in the second set of proceedings, in that on 11 May 1984 the Regional Court had erroneously considered itself bound by the Court of Appeal's decision in the first set of proceedings (see paragraphs 20 and 23 above).

47. Although the Regional Court's finding was held to be contrary to domestic law (Article 486 para. 5 of the Code of Criminal Procedure, see paragraph 28 above), it does not, in the Court's view, constitute of itself a violation of the Convention.

The Regional Court in fact considered the evidence before it and reached the fully-reasoned conclusion that the applicant was guilty (see paragraph 20 above). This decision was subsequently upheld on appeal.

B. Proceedings before the Court of Appeal

48. Before the Commission Mr Oberschlick contended mainly that the Vienna Court of Appeal, when hearing his case in the second set of proceedings, was not an "independent and impartial tribunal" and was not "established by law" because, contrary to Article 489 para. 3 of the Code of Criminal Procedure (see paragraph 28 above), it was presided over by the same judge as in the first set.

Before the Court Mr Oberschlick supplemented this complaint by submitting that in the meantime he had been led to believe that not only the presiding judge but also the other two appeal judges had participated on both occasions. From the Government's reply to a question put by the Court it then appeared that this was correct.

49. The Commission concluded that, as a result of the participation of a judge who should have withdrawn from the case in accordance with Article 489 para. 3 of the Code of Criminal Procedure, the Court of Appeal was on the second occasion not "established by law" and, as a separate issue, not "impartial" (see paragraphs 99 and 103 of its report).

50. The Court notes that the applicant's two complaints coincide in substance.

Article 489 para. 3 of the Code of Criminal Procedure, which lays down that the Court of Appeal shall not comprise, in a case like this, any judge who has previously dealt with it in the first set of proceedings (see paragraph 28 above), manifests the national legislature's concern to remove all reasonable doubts as to the impartiality of that court. Accordingly the failure to abide by this rule means that the applicant's appeal was heard by a

tribunal whose impartiality was recognised by national law to be open to doubt.

51. The Government argued that by failing, at the hearing of 17 December 1984, to challenge or raise any objection to the participation of the presiding judge (Articles 73, 281 para. 1, sub 1, and 345 para. 2 of the Code of Criminal Procedure), the applicant had waived his right to have him replaced.

According to the Court's case-law, waiver of a right guaranteed by the Convention - in so far as it is permissible - must be established in an unequivocal manner (see, inter alia, the Barberà, Messegué and Jabardo judgment of 6 December 1988, Series A no. 176, p. 35, para. 82).

Here, not only the President but also the other two members of the Court of Appeal should have withdrawn ex officio in accordance with Article 489 para. 3 of the Code of Criminal Procedure. Whatever the position might have been with respect to the presiding judge, neither the applicant nor his counsel were aware until well after the hearing of 17 December 1984 that the other two judges had also participated in the decision of 31 May 1983.

It is thus not established that the applicant had waived his right to have his case determined by an "impartial" tribunal.

52. There has accordingly been a violation of Article 6 para. 1 (art. 6-1) of the Convention in this respect.

III. ALLEGED VIOLATION OF ARTICLE 10 (art. 10)

A. The issues to be decided

53. According to Article 10 (art. 10) of the Convention,

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

Mr Oberschlick alleged that his conviction for defamation and the other related court decisions (see paragraph 20 above) had breached his right to freedom of expression as guaranteed in this Article.

54. It was not disputed that the applicant's conviction by the Vienna Regional Court on 11 May 1984 (see paragraph 20 above), as upheld by the Vienna Court of Appeal on 17 December 1984 (see paragraphs 22-23 above), constituted an "interference" with his right to freedom of expression.

Nor was it contested that this interference was "prescribed by law", namely Article 111 of the Criminal Code (see paragraph 25 above), and was aimed at protecting the "reputation or rights of others" within the meaning of Article 10 para. 2 (art. 10-2) of the Convention.

Argument before the Court concentrated on the question whether the interference was "necessary in a democratic society" to achieve that aim.

55. The applicant stressed that in a democratic society the role of periodicals like Forum included critical comment on social or legal policy proposals made by politicians. In this regard the press should be free to choose the form of comment it thought most appropriate to its aim. In the present case he had limited himself to reporting and giving his own interpretation of Mr Grabher-Meyer's proposal with regard to family allowances for foreigners. The Austrian courts had denied him the right not only of giving his opinion as to whether the proposal constituted a revival of National Socialism, but also of making historical comparisons on the basis of present facts.

The applicant's complaint was accepted by the Commission.

56. According to the Government, Mr Oberschlick had overstepped the limits of justifiable and reasonable criticism. The impugned publication amounted, according to the Austrian courts, to an accusation that Mr Grabher-Meyer held National Socialist ideas, the impact of this accusation being strengthened by the form chosen. They held that the applicant had not been able to prove that his accusation was well-founded and that he was therefore guilty of defamation.

In the opinion of the Government, it was not for the European Court to decide whether this reasoning of the Austrian courts was correct; this followed from the margin of appreciation to be left to the national authorities: they were better placed than the international judge to determine what matters should be regarded as defamatory, since this depended to a certain extent on national conceptions and legal culture.

B. General principles

57. The Court recalls that freedom of expression, as secured in paragraph 1 of Article 10 (art. 10-1), constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 (art. 5-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those

that offend, shock or disturb; such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society" (see, inter alia, the Handyside judgment of 7 December 1976, Series A no. 24, p. 23, para. 49, and the Lingens judgment of 8 July 1986, Series A no. 103, p. 26, para. 41).
Article 10 (art. 10) protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed.

58. These principles are of particular importance with regard to the press. Whilst it must not overstep the bounds set, inter alia, for "the protection of the reputation of others", its task is nevertheless to impart information and ideas on political issues and on other matters of general interest (see, mutatis mutandis, the Sunday Times judgment of 26 April 1979, Series A no. 30, p. 40, para. 65, and the above-mentioned Lingens judgment, loc. cit.).

Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. This is underlined by the wording of Article 10 (art. 10) where the public's right to receive information and ideas is expressly mentioned. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention (see the above-mentioned Lingens judgment, Series A no. 103, p. 26, para. 42).

59. The limits of acceptable criticism are accordingly wider with regard to a politician acting in his public capacity than in relation to a private individual. The former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance, especially when he himself makes public statements that are susceptible of criticism.

A politician is certainly entitled to have his reputation protected, even when he is not acting in his private capacity, but the requirements of that protection have to be weighed against the interests of open discussion of political issues (see the above-mentioned Lingens judgment, Series A no. 103, ibid.).

60. The Court's task in this case has to be seen in the light of these principles. What are at stake are the limits of acceptable criticism in the context of public debate on a political question of general interest. In such cases the Court has to satisfy itself that the national authorities did apply standards which were in conformity with these principles and, moreover, that in doing so they based themselves on an acceptable assessment of the relevant facts.

For this purpose the Court will consider the impugned judicial decisions in the light of the case as a whole, including the applicant's publication and the context in which it was written (see, inter alia, the above-mentioned Lingens judgment, Series A no. 103, p. 25, para. 40).

C. Application of these principles

61. The applicant was convicted for having reproduced in Forum the text of a criminal information which he and other persons had laid against Mr Grabher-Meyer. During an election campaign, this politician had made certain public statements, reported in a television programme, concerning foreigners' family allowances, and proposed that such persons should receive less favourable treatment than Austrians (see paragraphs 11-13 above). The applicant had expressed the opinion that this proposal corresponded to the philosophy and the aims of National Socialism as stated in the NSDAP Manifesto of 1920 (see paragraph 13 above).

The Court agrees with the Commission that the insertion of the text of the said information in Forum contributed to a public debate on a political question of general importance. In particular, the issue of different treatment of nationals and foreigners in the social field has given rise to considerable discussion not only in Austria but also in other member States of the Council of Europe.

Mr Oberschlick's criticisms, as the Commission pointed out, sought to draw the public's attention in a provocative manner to a proposal made by a politician which was likely to shock many people. A politician who expresses himself in such terms exposes himself to a strong reaction on the part of journalists and the public.

62. In its judgment of 11 May 1984 the Regional Court found that the article in question, "despite its designation as a criminal information, gives the impression of being intended to condemn" the character of the politician. It therefore held that Mr Oberschlick's allegations against him came under the general rule (Article 111 para. 3 of the Criminal Code - see paragraph 25 above) that a person making a defamatory statement through the media incurs criminal liability unless he proves that it is true. Since, in the Regional Court's opinion, Mr Grabher-Meyer's proposal were "inconclusive" evidence of his alleged National Socialist attitude and criminal behaviour and since no further evidence had been submitted, it found that the applicant had failed to prove his allegations and was therefore guilty (see paragraph 20 above).

In its decision of 17 December 1984 the Vienna Court of Appeal basically confirmed these assessments (see paragraph 23 above).

63. The Court, however, cannot subscribe to them. The information, as published by Mr Oberschlick, began by reciting the facts under the heading "Sachverhalt", that is reporting Mr Grabher-Meyer's statements. It is undisputed that this part of the information was factually correct. What followed was an analysis of these statements, on the basis of which the authors of the information concluded that this politician had knowingly expressed ideas that corresponded to those professed by the Nazis.

The Court can regard the latter part of the information only as a value-judgment, expressing the opinion of the authors as to the proposal made by this politician, which opinion was clearly presented as derived solely from a comparison of this proposal with texts from the National Socialist Party Manifesto.

It follows that Mr Oberschlick had published a true statement of facts followed by a value-judgment as to those facts. The Austrian courts held, however, that he had to prove the truth of his allegations. As regards value-judgments this requirement is impossible of fulfilment and is itself an infringement of freedom of opinion (see the above-mentioned Lingens judgment, Series A no. 103, p. 28, para. 46).

As to the form of the publication, the Court accepts the assessment made by the Austrian courts. It notes that they did not establish that "the presentation of the article in the form of a criminal information" was misleading in the sense that, as a consequence thereof, a significant number of the readers were led to believe that a public prosecution had been instituted against Mr Grabher-Meyer or even that he had already been convicted. The Austrian courts said no more than that this particular form of presentation was intended to ensure that what in their eyes was an accusation as to his character would have "a particularly telling effect on the average reader". In the opinion of the Court, however, in view of the importance of the issue at stake (see paragraph 61 above), Mr Oberschlick cannot be said to have exceeded the limits of freedom of expression by choosing this particular form.

64. It follows from the foregoing that the interference with Mr Oberschlick’s exercise of his freedom of expression was not "necessary in a democratic society ... for the protection of the reputation ... of others".

There has, accordingly, been a violation of Article 10 (art. 10) of the Convention.

IV. APPLICATION OF ARTICLE 50 (art. 50)

65. Under Article 50 (art. 50) of the Convention,

> "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."

The applicant requested the Court to direct the Government of Austria: (a) to rehabilitate him and formally set aside the judgment of 17 December 1984; and (b) to annul the seizure of issue no. 352/353 of Forum.

The Court, however, is not empowered to make directions of this kind (see, mutatis mutandis, the Hauschildt judgment of 24 May 1989, Series A no. 154, p. 23, para. 54).

Mr Oberschlick also sought compensation for pecuniary and non-pecuniary damage, as well as the reimbursement of costs and expenses. He claimed that certain of these amounts should be increased by interest at the rate of 11% per annum.

A. Pecuniary damage

66. The applicant sought firstly sums corresponding to the fine imposed (4,000 schillings) and the costs awarded to the private prosecutor (14,123.84 schillings) by the Austrian courts. Having regard to the direct link between these items and the violation of Article 10 (art. 10) found by the Court, he is, as the Government agreed, entitled to recover the full amount of 18,123.84 schillings.

67. The applicant also claimed one symbolic Austrian schilling for the seizure of issue no. 352/353 of Forum (see paragraphs 13 and 20 above) and 38,280 schillings for the cost of publishing in that magazine, in pursuance of section 37 of the Media Act (see paragraphs 18 and 26 above), information concerning the defamation proceedings.

The Court notes that the damage referred to was in fact sustained by the owners of Forum and that Mr Oberschlick did not furnish any explanation as to why he should be entitled to compensation under these heads. No award can therefore be made to him for them.

B. Non-pecuniary damage

68. The applicant sought 70,000 schillings for non-pecuniary damage, on account of the perplexity, anxiety and uncertainty occasioned by the prosecution for defamation.

The Government contested both the existence of any such damage and the amount claimed.

69. The Court does not exclude that the applicant may have sustained some prejudice of the kind alleged as a result of the breaches of Articles 6 para. 1 and 10 (art. 6-1, art. 10). It considers, however, that in the circumstances of the case the findings of violation in this judgment constitute of themselves sufficient just satisfaction.

C. Costs and expenses

70. The applicant claimed 9,753 schillings for his costs and expenses in Austria. These items fall to be taken into account, since they were incurred to prevent or redress the breaches found by the Court. The amount, which

was accepted by the Government, appears reasonable to the Court and is therefore awarded in full.

71. For his costs and expenses before the Convention institutions, Mr Oberschlick sought reimbursement of the fees due to Mr Fiebinger, who had prepared the initial application to the Commission (4,000 schillings), and to Mr Tretter, who had assisted the applicant throughout the proceedings (60,000 schillings), as well as his own and Mr Tretter's travel expenses to Strasbourg for the purpose of attending the Court's hearing on 19 November 1990 (11,532 schillings). The Government contested only the amount of Mr Tretter's fees which, in their view, should be reduced to 30,000 schillings.

The Court, however, finds the sums claimed to be reasonable and therefore allows them in their entirety.

72. The applicant is thus entitled to 85,285 schillings for his costs and expenses.

D. Interest

73. Mr Oberschlick claimed that interest of 11% per annum should be added to certain of the above sums; he based this claim on the argument that he had been obliged to borrow in order to meet the costs involved. Although the Government have asked for proof of the latter allegation, no evidence has been submitted in due time. The Court therefore dismisses this claim.

FOR THESE REASONS, THE COURT

1. Rejects unanimously the Government's preliminary objection;

2. Holds unanimously that, in the second set of proceedings, there has been a violation of Article 6 para. 1 (art. 6-1) of the Convention as regards the impartiality of the Vienna Court of Appeal, but not as regards the fairness of the trial before the Vienna Regional Court;

3. Holds by sixteen votes to three that there has been a violation of Article 10 (art. 10) of the Convention;

4. Holds unanimously that Austria is to pay to the applicant 18,123.84 Austrian schillings (eighteen thousand one hundred and twenty-three schillings and eighty-four groschen) for pecuniary damage, and 85,285 Austrian schillings (eighty-five thousand two hundred and eighty-five schillings) for costs and expenses;

5. Dismisses unanimously 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 23 May 1991.

Rolv RYSSDAL
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 following separate opinions are annexed to this judgment:

(a) partly dissenting opinion of Mr Thór Vilhjálmsson;

(b) partly dissenting opinion of Mr Matscher, approved by Mrs Bindschedler-Robert;

(c) concurring opinion of Mr Martens;

(d) concurring opinion of Mr Morenilla;

R.R.
M.-A.E.

PARTLY DISSENTING OPINION OF JUDGE THOR VILHJALMSSON

To my regret I have found it unavoidable to part company with the majority of the Court on the question of Article 10 (art. 10). I have voted for non-violation of that Article (art. 10) and would like to explain briefly my point of view.

The idea or ideal underlying the European Convention on Human Rights is that the invididual should be protected vis-à-vis the State. The protection afforded to freedom of expression by Article 10 (art. 10) of our Convention clearly has this aim. The Lingens judgment shows that very harsh words expressed in the context of political debate enjoy this protection. However, as is stated at the beginning of paragraph 2 of this Article (art. 10-2), the exercise of this freedom "carries with it duties and responsibilities". In this context one often has to keep in mind Article 8 (art. 8) of the Convention, concerning the right to respect for private life, as well as what is said in paragraph 2 of Article 10 (art. 10-2) on the protection of the reputation or rights of others. The two principles enshrined in Articles 8 and 10 (art. 8, art. 10) must both be respected in every democratic society worthy of that name. In our time and our part of the world, the application of rules intended to protect these principles is marked by the power of the media and the inability of the individual to protect his reputation. Legal rules have frequently proved not to be an effective tool in this respect, but this fact - as I consider it to be - should not influence our Court when it applies the Convention. The Austrian legislation described in paragraphs 25-33 of the judgment is an example of a set of rules enacted by a member State in order to meet the obligations flowing from Article 8 (art. 8) of our Convention.

The present case should be decided by an interpretation of Article 10 (art. 10) which takes into account the principle enshrined in Article 8 (art. 8). I am not of the opinion that the decisive question is whether or not a value-judgment is involved. Neither do I agree with the majority when it says that it regards "the latter part of the information only as a value-judgment".

The applicant had, of course, a right to voice strong disagreement with the statements of Mr Grabher-Meyer, as reported in a television programme on 29 March 1983. This he could do without breaching Austrian law. He chose, however, to print in full a "criminal information" - a kind of private criminal summons - laid by himself and others, in which Mr Grabher-Meyer was said to be suspected of contravening three provisions of Austrian penal law. The criminal-law setting thus given to his criticism took it out of the sphere of mere political debate and carried it into the arena of personal attack, thereby impinging on private life. The contents of the document printed were also, in my opinion, characterised by exaggerations. Here I have especially in mind the strong words to the effect that the statement corresponded to the aims of the Nazis or extolled measures applied by them.

These very same words found in the text published by the applicant also, it seems to me, fall outside the ambit of value-judgments. The programme and the acts of the Nazis constitute a set of facts and the statement is another fact. Whether or not that statement reflected that programme and those acts is a question of factual assessment and my own conclusion is that it did not. The applicant, in my opinion, transgressed the limits of freedom of expression and violated the rules on respect for the reputation of the person concerned that are necessary in a democratic society.

As in other cases, I have voted on Article 50 (art. 50) on the basis of the findings of the majority.

PARTLY DISSENTING OPINION OF JUDGE MATSCHER, APPROVED BY JUDGE BINDSCHEDLER-ROBERT

(Translation)

1. I do not oppose the somewhat lenient decision to treat the present application as having been introduced within the six-month time-limit for the purposes of Article 26 (art. 26).

In my view, Rule 38 para. 3 of the Commission's Rules of Procedure should be construed as meaning that the date which the application bears can be decisive only where the person concerned is in a position to prove that he did in fact despatch the application on that date.

It is inconceivable that a lawyer who submits an application on the last day before the expiry of a time-limit should not do so by registered letter, in order to be able to prove, should it be necessary, that the time-limit in question has been complied with.

It is equally incomprehensible that the Commission should not have kept in its file the envelope, which would also have made it possible to verify by the postmark the date on which the application in question was in fact despatched.

2. I fully endorse the reasoning in the Lingens judgment (Series A no. 103, p. 26, para. 42), reiterated in the present judgment, to the effect that the limits of acceptable criticism are wider as regards a politician as such than as regards a private individual.

Criticism of political conduct may be expressed in press articles, in other publications or through other media, or again in a political debate. If the applicant, as a journalist, had had recourse to one of these means, criticism, even if it were harsh and bitter - but not going beyond the limits of decency -, would have been acceptable and his conviction for such criticism would indeed have constituted an interference with his freedom of expression which would not be covered by paragraph 2 of Article 10 (art. 10-2).

However, in the present case, the applicant did not engage in criticism of this type. He chose to proceed by another means, namely to lodge with the competent authority, and the very day on which his review appeared, a criminal information against X. - in which he accused the person in question of very serious crimes - and to reproduce this information in that review, thereby giving the impression, at least to the average reader, that criminal proceedings had actually been instituted against X. This is a very important aspect of the case to which, regrettably, the majority of the Court has not thought right to accord the weight which in my view it merited.

In so acting, the applicant did not confine himself to permissible criticism, but perpetrated a treacherous attack on the reputation of a politician. Thus he did not respect the "duties and responsibilities" which freedom of expression carries with it; his conviction cannot therefore be

regarded as a measure which was unnecessary and disproportionate for the purposes of this provision.

The majority of the Court also found a violation in the fact that the Austrian court had supposedly required Mr Oberschlick to prove his accusations, proof which the majority regarded as impossible to establish since the criminal information constituted a value-judgment. I am, on the other hand, of the opinion that this information was merely an affirmation of certain facts - moreover an unfounded affirmation -, facts which in themselves were susceptible to proof. The Austrian court’s judgment did not therefore infringe freedom of expression by regarding them as such.

CONCURRING OPINION OF JUDGE MARTENS

1. I have voted in favour of rejecting the Austrian Government's preliminary objection because it was examined and rejected by the Commission: for the reasons given in my separate opinion in the Brozicek case (Series A no. 167, pp. 23 et seq.) I think that the Court should leave it to the Commission to determine whether such pleas are founded or not.

2. In the present case the Court has for the first time[*] extended the doctrine that I question to a preliminary objection based on an alleged failure to observe the time-limit specified in Article 26 (art. 26). It seems to me that the reasons given in my afore-mentioned opinion are all the more cogent when it comes to extending that doctrine, and especially extending it to the present type of preliminary objection, and should have led the Court to refrain from doing so. In this connection I would make the following three points.

Firstly, assuming jurisdiction to examine the present preliminary objection should lead to consideration of the question whether Rule 44 para. 4 (present numbering) of the Commission's Rules of Procedure - as applied in the Commission's case-law over more than three decades - is the best way of supplementing the last words of Article 26 (art. 26) of the Convention. There is, however, no reason for the Court to do this as there are no complaints that either the Rule or its application by the Commission are unsatisfactory. This is well illustrated by the fact that this is the first time after all these years that a Government reiterates before the Court an objection of this kind[**]!

Secondly, reviewing whether the Commission has correctly applied its rules to the case at hand necessarily draws the Court into pure questions of fact which, under the Convention system, should be left to the Commission.

Lastly, differences of opinion between the Commission and the Court as to questions of that kind could lead to a result that I would find completely unacceptable: imagine, for example, an applicant who, after fighting his case strenuously before the Commission and then before the Court for five or six years, is told that all his efforts have been in vain because in the Court's opinion his application was made a day too late!

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[*] See, however, note 2.

[**] In the "Vagrancy cases" an objection based on non-observance of the time-limit had been raised by the Government for the first time at the oral hearings before the Court; the Court therefore held that the Government was estopped (see the De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 11, pp. 32-33, para. 58).

CONCURRING OPINION OF JUDGE MORENILLA

In this case the Court has decided to reject the Government's preliminary objection as to the admissibility of Mr Oberschlick's application. This conclusion does not, however, reflect a certain disparity in the reasoning. Like Judge Martens, I have voted in favour of rejecting the objection starting from the premise that the decision of the Commission should be respected for the reasons expressed in my dissenting opinion in the Cardot case (judgment of 19 March 1991, Series A no. 200) in which I subscribed entirely to the analysis and conclusions of Judge Martens [in his separate opinion] in the Brozicek case (Series A no. 167, p. 23 et seq.).

As I said on that occasion, the role of this Court is not to act as a Court of Appeal from the Commission, examining the case-files to check if an application was correctly admitted. In the allocation of roles under the Convention, the two organs set up to ensure the observance of the engagements undertaken by States' Parties (Article 19) (art. 19) have each different functions with clear-cut boundaries to avoid any overlapping. The main province of the Commission is to decide on the admissibility of petitions, according to Article 27 (art. 27) of the Convention, while the jurisdiction of the Court "shall extend to all cases concerning the interpretation and application of the present Convention" as provided for in Articles 45 and 46 (art. 45, art. 46) of the Convention.

The preliminary objection raised by the Government in this case is a paradigm of the undesired consequences of the appeal jurisdiction assumed by this Court in questions of admissibility following the De Wilde, Ooms and Versyp judgment of 18 June 1971 (Series A no. 12, pp. 29-31, paras. 49-55): the Government's preliminary objection is based on a mere question of fact - the date of the introduction of the application before the Commission - and, as such, it should be decided by this organ on the basis of its undisputed practice and in accordance with Articles 27 para. 3, 28 and 31 (art. 27-3, art. 28, art. 31) of the Convention, and in the light of Rule 44 para. 3 of its own Rules of Procedure which confers on the Commission a margin of appreciation in deciding on the date of introduction of the first communication from the applicant setting out the object of the application.

Moreover the re-examination of this question by the Court involves not only a fresh assessment of the basis for the Commission's decision in this matter but it also amounts to questioning the practice of the Commission based on its own experience, as well as the compatibility with the Convention of Rule 44 para. 3 of the Commission's Rules of Procedure.

The fact that in the present case the Court and the Commission have shared the same views with regard to the time-limit objection does not exclude:

(1) the applicant's uncertainty as to the outcome, since after winning his case before the Commission he may, with good reason, fear that at the end

of a long procedure the Court may not decide on the merits of his complaint;

(2) the possibility of two contradictory decisions that may endanger public confidence in the Convention system's ability to protect the rights of the individual; and

(3) a time-consuming activity of the Court with no real effect on the protection of individual rights because either - as in this case - the Court confirms the Commission's finding and proceeds to examine the merits of the case or it quashes the decision and declares itself unable to take cognisance of the applicant's complaints.

In my view, having regard to the uniqueness of the preliminary objection in the present case, the Court has missed an opportunity to reconsider its established case-law on the examination of admissibility objections and to leave all matters of admissibility entirely to the Commission thereby respecting its "final" decision on such questions.