In the case of Chorherr v. Austria*,

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

Mr R. Ryssdal, President,
Mr Thór Vilhjálmsson,
Mr F. Gölcüklü,
Mr F. Matscher,
Mr N. Valticos,
Mr I. Foighel,
Mr A.N. Loizou,
Mr M.A. Lopes Rocha,
Mr G. Mifsud Bonnici,

and also of Mr M.-A. Eissen, Registrar, and Mr H. Petzold, Deputy Registrar,

Having deliberated in private on 26 February and 22 June 1993,

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

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Notes by the Registrar

* The case is numbered 22/1992/367/441. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

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

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PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 10 July 1992, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 13308/87) against the Republic of Austria lodged with the Commission under Article 25 (art. 25) by an Austrian national, Mr Otmar Chorherr, on 14 July 1987.

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 the facts of the case disclosed a breach by the respondent State of its obligations under Articles 5 and 10 (art. 5, art. 10).

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

3. The Chamber to be constituted included ex officio 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 September 1992, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr F. Gölcüklü, Mr N. Valticos, Mr I. Foighel, Mr A.N. Loizou, Mr M.A. Lopes Rocha and Mr G. Mifsud Bonnici (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's lawyer on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicant's memorial on 15 December 1992. On 4 January 1993 the Government informed him that they would not be submitting a memorial.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 24 February 1993. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr F. Cede, Ambassador, Legal Adviser,
Ministry of Foreign Affairs, Agent,
Mr S. Rosenmayr, Federal Chancellery,
Mr A. Dearing, Federal Ministry of the Interior, Advisers;

(b) for the Commission

Mrs G.H. Thune, Delegate;

(c) for the applicant

Mr T. Höhne, Rechtsanwalt, Counsel.

The Court heard addresses by the above-mentioned representatives, as well as their replies to its questions.

AS TO THE FACTS

I. The particular circumstances of the case

6. Mr Otmar Chorherr is an Austrian citizen and currently resides in Vienna.

7. On 26 October 1985 a military ceremony was held in the Rathausplatz in Vienna to mark the thirtieth anniversary of Austrian neutrality and the fortieth anniversary of the end of the Second World War. It started at 11 a.m. with the taking of the oath by some 1,200 conscripts and continued with a march past which ended at around 1 p.m. It was attended by about 50,000 people, in addition to numerous dignitaries on the official platform.

During the ceremony the applicant and a friend distributed leaflets calling for a referendum on the purchase of fighter aircraft by the Austrian armed forces ("Volksbegehren für eine Volksabstimmung gegen Abfangjäger"). They wore rucksacks to the backs of which were attached enlargements of the leaflet; these measured about 50cm by 70cm, projected approximately 50cm above the heads of the persons carrying them and bore the slogan "Austria does not need any interceptor fighter planes" ("Österreich braucht keine Abfangjäger").

8. According to the judgment delivered by the Constitutional Court (Verfassungsgerichtshof) on 28 November 1986 on the basis of the police file and the statements of the parties (see paragraph 10 below), what happened subsequently can be summarised as follows.

The actions of the two men had caused a commotion among the spectators, whose view had been blocked. Two policemen informed the applicant and his friend that they were disturbing public order and instructed them to cease what could only be regarded as a demonstration. However, they refused to comply, asserting their right to freedom of expression. When they persisted despite further warnings from police officers and increasingly loud protests from the crowd, they were arrested (festgenommen) at 11.15 a.m. and were taken to Central Vienna police station (Bezirkspolizeikommissariat Innere Stadt), where administrative criminal proceedings (Verwaltungsstrafverfahren) were instituted against them.

9. At the police station the applicant was placed in police custody (in den Arrest abgegeben) at 11.35. After ascertaining whether he had a criminal record, a police officer questioned him from 2.15 p.m. Mr Chorherr denied that he had been warned that he was committing administrative offences (Verwaltungsübertretungen); he would otherwise, so he said, have immediately ceased his action. He was released at 2.40 p.m.

10. On 4 April 1986 he filed an appeal (Beschwerde) in the Constitutional Court against his arrest and the prohibition on distributing leaflets. He relied inter alia on Articles 5 and 10 (art. 5, art. 10) of the Convention and asserted his right to personal freedom (Recht auf persönliche Freiheit) and freedom of expression (Freiheit der Meinungsäußerung).

Mr Chorherr claimed that he had not disturbed the crowd in any way and had never been ordered by the police to cease demonstrating. The Constitutional Court did not, however, give credence to his statements, as in its opinion the majority of the spectators had come to watch the parade and some of them had had their enjoyment of it marred by the applicant's conduct.

The appeal was dismissed on 28 November 1986. The Constitutional Court found, in relation to the applicant's arrest, that Mr Chorherr's conduct could properly have been considered an administrative offence and that the applicant, caught in the act of committing the offence, had continued despite the instructions of the police officers. It took the view that the requirements of Article 4 of the Law on the Protection of Personal Freedom (Gesetz zum Schutz der persönlichen Freiheit), section 35, sub-paragraph 3, of the Law on Administrative Offences (Verwaltungsstrafgesetz) of 1950 and section IX(1), sub-paragraph 1, of the Introductory Law of the Administrative Procedure Laws (Einführungsgesetz zu den Verwaltungsverfahrensgesetzen - "the Introductory Law") had therefore all been complied with in this respect (see paragraph 12 below).

As to the custody (Anhaltung), the Constitutional Court held that this had been in conformity with section 36 (1), first sentence, of the Law on Administrative Offences, since there had been no particular circumstance to make the police think that the applicant, if released, would not recommence his culpable actions.

Finally, the court considered that the order to remove the placards and cease distributing leaflets had not in any way infringed the constitutional right to freedom of opinion, as its aim was not to prevent the applicant exercising such freedom, but rather to put an end to a breach of the peace.

11. At the conclusion of the administrative criminal proceedings the Federal Police Authority (Bundespolizeidirektion) in Vienna made a sentence order (Straferkenntnis) on 29 April 1987, fining Mr Chorherr 1,000 schillings for causing excessive noise and a breach of the peace (section VIII, second limb, and section IX(1), sub-paragraph 1, of the Introductory Law - see paragraph 12 below). On appeal by the applicant, the Public Security Authority (Sicherheitsdirektion) on 3 March 1988, while amending the wording of the decision, upheld the conviction on the latter charge and reduced the fine to 700 schillings; on 25 April 1988 it withdrew the charge of causing excessive noise.

The applicant did not appeal to the Administrative Court or the Constitutional Court.

II. Relevant domestic law

12. The administrative procedure legislation, reissued on 23 May 1950 by a decision of the Federal Government (Kundmachung der Bundesregierung vom 23. Mai 1950 über die Wiederverlautbarung von Rechtsvorschriften auf dem Gebiet des Verwaltungsstrafverfahrens), includes the following provisions.

Introductory Law of the Administrative Procedure Laws

Section VIII, second limb*

"A person who ... offends public decency or causes excessive noise commits an administrative offence ..."

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* Note by the Registrar: at the time Austria made the reservation referred to in the next paragraph, this section was numbered VII.

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Section IX(1), sub-paragraph 1

"A person who ... causes a breach of the peace by conduct likely to cause annoyance ... commits ... an administrative offence ..."

Law on Administrative Offences

Arrest (Festnahme)

Section 35

"The agents of the security forces may, except in the cases specially regulated by law, arrest persons caught in the act of committing an offence, for the purpose of bringing them before the authorities, if

...

(3) despite being warned, the person in question persists in the culpable conduct or attempts to repeat it."

Section 36(1)

"Every arrested person must immediately be brought before the nearest competent authority, or released if the reason for the arrest has already ceased to exist ..."

III. The Austrian reservation to Article 5 (art. 5) of the Convention

13. The instrument of ratification of the Convention deposited by the Austrian Government on 3 September 1958 contains, inter alia, the following reservation:

> "The provisions of Article 5 (art. 5) of the Convention shall be so applied that there shall be no interference with measures for the deprivation of liberty prescribed in the laws on administrative procedure, BGBl [Federal Official Gazette] No. 172/1950, subject to review by the Administrative Court or the Constitutional Court as provided for in the Austrian Federal Constitution."

PROCEEDINGS BEFORE THE COMMISSION

14. Mr Chorherr applied to the Commission on 14 July 1987. He complained of a violation of Articles 5 and 10 (art. 5, art. 10) of the Convention.

On 1 March 1991 the Commission declared the complaint relating to the sentence order (see paragraph 11 above) inadmissible on the ground of failure to exhaust domestic remedies (Article 26 of the Convention) (art. 26), and declared the remainder of the application (no. 13308/87) admissible. In its report of 21 May 1992 (made under Article 31) (art. 31), it expressed the opinion that there had been no breach of Article 5 (art. 5) (twelve votes to two), but that there had been a violation of Article 10 (art. 10) (seven votes to seven, with the acting President's casting vote). The full text of the Commission's opinion and of the separate opinions contained in the report is reproduced as an annex to this judgment*.

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* Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 266-B of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

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AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 (art. 5)

15. The applicant alleged that his arrest and his detention by the police had infringed Article 5 para. 1 (art. 5-1) of the Convention, which reads as follows:

> "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

..."

According to the Government, the contested measures were founded on laws covered by the Austrian reservation in respect of Article 5 (art. 5) (see paragraph 13 above).

In Mr Chorherr's submission, on the other hand, his conduct was in no way "likely to cause annoyance" and consequently was not caught either by section IX(1), sub-paragraph 1, of the Introductory Law (see paragraph 12 above) or by any other of the provisions covered by the reservation, which was therefore not applicable.

However, the Constitutional Court found that the deprivation of liberty was based on section IX(1), sub-paragraph 1, and that all the relevant requirements had been complied with (see paragraph 10 above).

16. It is therefore necessary to determine whether the above-mentioned reservation satisfies the conditions laid down in Article 64 (art. 64) of the Convention. Only two of them need be examined here: the prohibition of reservations "of a general character" and the requirement that the reservation should contain "a brief statement of the law concerned". The other conditions are manifestly fulfilled and compliance therewith was not moreover in dispute before the Court.

A. The "general character" of the Austrian reservation in respect of Article 5 (art. 5)

17. In the applicant's view the field of application of section IX(1), sub-paragraph 1, of the Introductory Law is so vast that it cannot be regarded as a "law" within the meaning of Article 64 para. 1 (art. 64-1) of the Convention. As the Austrian reservation embraced the aforementioned section of the Introductory Law, it was of "a general character" and thus prohibited under the Convention provision.

In the Government's contention, the section in question is aimed at a very specific offence, the limits of which have been even more precisely defined by a substantial body of case-law from the Administrative Court.

18. The Court reiterates that "by 'reservation of a general character' in Article 64 (art. 64) is meant in particular a reservation couched in terms that are too vague or broad for it to be possible to determine their exact meaning and scope" (see the Belilos v. Switzerland judgment of 29 April 1988, Series A no. 132, p. 26, para. 55). It shares the Commission's view that the Austrian reservation encompasses a limited number of laws which, taken together, constitute a well-defined and coherent body of substantive and procedural administrative provisions. Among other things, they lay down rules for the punishment of offences, setting out the punishable acts, the penalties incurred and the procedure to be followed.

It should be added that the provisions to which the reservation applied in this case were all in force on 3 September 1958, when Austria ratified the Convention (see paragraph 13 above), namely sections VIII and IX(1) of the Introductory Law and sections 35 and 36 (1) of the Law on Administrative Offences (see paragraph 12 above and also, mutatis mutandis, the Campbell and Cosans v. the United Kingdom judgment of 25 February 1982, Series A no. 48, p. 17, para. 37).

It follows that the wording of the reservation in question does not attain, in relation to the provisions in issue here, the degree of generality prohibited by Article 64 para. 1 (art. 64-1) of the Convention.

B. The need for a "brief statement of the law concerned"

19. Mr Chorherr and a minority of the Commission stressed that, by way of "brief statement", the reservation confined itself to a mere reference to the Federal Official Gazette (Bundesgesetzblatt). They considered that it was not possible by reading the text in question to obtain a precise idea of the content of the laws concerned, especially in view of the fact that there were four of them and they were long. Paragraph 2 of Article 64 (art. 64-2) had therefore not been complied with.

20. According to the Court's case-law, the "brief statement" as required by that provision "both constitutes an evidential factor and contributes to legal certainty"; its purpose "is to provide a guarantee - in particular for the other Contracting Parties and the Convention institutions - that a reservation does not go beyond the provisions expressly excluded by the State concerned" (see the Belilos judgment, cited above, Series A no. 132, pp. 27-28, para. 59, and the Weber v. Switzerland judgment of 22 May 1990, Series A no. 177, p. 19, para. 38). This does not, however, mean that it is necessary under Article 64 para. 2 (art. 64-2) to provide a description, even a concise one, of the substance of the texts in question.

In this instance, the reference to the Federal Official

Gazette - preceded moreover by an indication of the subject-matter of the relevant provisions - makes it possible for everyone to identify the precise laws concerned and to obtain any information regarding them. It also provides a safeguard against any interpretation which would unduly extend the field of application of the reservation. Accordingly, that reservation complies with Article 64 para. 2 (art. 64-2).

Conclusion

21. As the reservation is therefore compatible with Article 64 (art. 64), the Court finds that there has been no violation of Article 5 (art. 5).

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

22. In complaining of the deprivation of liberty inflicted on him, the applicant also relied on Article 10 (art. 10), which reads as follows:

> "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 ...
>
> 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."

23. None of the participants in the proceedings disputed that the measure in question constituted an interference with the exercise of Mr Chorherr's right to freedom of expression. Such intervention is in breach of Article 10 (art. 10) unless it was "prescribed by law", pursued one or more of the legitimate aims set out in paragraph 2 (art. 10-2) and was "necessary in a democratic society" to attain them.

A. Whether the interference was "prescribed by law"

24. In Mr Chorherr's submission, section IX(1), sub-paragraph 1, of the Introductory Law could not be regarded as a "law" within the meaning of paragraph 2 of Article 10 (art. 10-2) of the Convention. Its wording was, he argued, too general and made it impossible "to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail" (see the Sunday Times v.

the United Kingdom (no. 1) judgment of 26 April 1979, Series A no. 30, p. 31, para. 49).

25. The Court reiterates that the level of precision required of the domestic legislation - which cannot in any case provide for every eventuality - depends to a considerable degree on the content of the instrument considered, the field it is designed to cover and the number and status of those to whom it is addressed (see, inter alia, the following judgments: Silver and Others v. the United Kingdom, 25 March 1983, Series A no. 61, p. 33, para. 88; Groppera Radio AG and Others v. Switzerland, 28 March 1990, Series A no. 173, p. 26, para. 68; and Herczegfalvy v. Austria, 24 September 1992, Series A no. 244, p. 27, para. 89). Furthermore it is primarily for the national authorities to interpret and apply domestic law (see, among other authorities, the Hadjianastassiou v. Greece judgment of 16 December 1992, Series A no. 252, p. 18, para. 42). In the present case there is nothing in the Constitutional Court's judgment to lend weight to the proposition that the wording of the contested provision creates a situation incompatible with legal certainty (see paragraphs 10 and 12 above). Mr Chorherr was therefore in a position to foresee to a reasonable extent the risks inherent in his conduct. Accordingly, the Court considers, like the Government and the Commission, that the interference was "prescribed by law".

B. Whether the aim pursued was legitimate

26. The applicant maintained that the sole purpose of the impugned measures was to prevent him from expressing in public an opinion hostile to the army; these measures could not therefore find support in paragraph 2 of Article 10 (art. 10-2).

27. The Government replied that the police intervention was intended to prevent disorder and to protect the rights of citizens to attend a military parade without being molested. They invoked, inter alia, the positive duties that Article 11 (art. 11) of the Convention entailed for the State (see the Plattform "Ärzte für das Leben" v. Austria judgment of 21 June 1988, Series A no. 139, p. 12, para. 32).

28. Having regard to all the circumstances surrounding the actions of the applicant and the police, the Court, like the Commission, sees no grounds for doubting that the arrest in issue pursued at least one of the legitimate aims referred to in Article 10 para. 2 (art. 10-2), namely the prevention of disorder.

C. Whether the interference was "necessary in a democratic society"

29. Mr Chorherr denied that the interference in question had been necessary. If the poster projecting above his rucksack had genuinely blocked the view of a number of spectators, it would have been sufficient for the police to ask him to remove it. In reality,

however, it could not have caused a substantial nuisance because at the same time he had been moving among the crowd handing out leaflets, which again was not in itself conduct liable to create such a serious disturbance as to justify his arrest. In any event, if the police officers had clearly ordered him to cease his demonstration - which they did not - he would have complied with that instruction.

The majority of the Commission drew attention to the fact that the applicant had not been released until one and a half hours after the end of the ceremony and expressed the opinion that the interference complained of was disproportionate.

30. In the Government's contention, the police had had to intervene because of the commotion that the applicant's behaviour was beginning to engender among the spectators who wished to attend the parade peaceably. Some of them had even threatened the applicant, who had moreover, despite his claims to the contrary, refused to obey the instructions of the police officers. It was therefore to be feared, if the police merely moved him further away, that he would continue his action elsewhere and that it would get out of hand. The length of the police custody was explained by the fact that at the same time thirteen other persons who had been arrested were being detained at the police station for questioning.

31. The Court has consistently held that the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent an interference is necessary, but this margin goes hand in hand with European supervision embracing both the legislation and the decisions applying it; when carrying out that supervision the Court must ascertain whether the impugned measures are "proportionate to the legitimate aim pursued", due regard being had to the importance of freedom of expression in a democratic society (see, among other authorities, the following judgments: Barfod v. Denmark, 22 February 1989, Series A no. 149, p. 12, para. 28; Groppera Radio AG and Others, cited above, Series A no. 173, p. 28, para. 72; and Observer and Guardian v. the United Kingdom, 26 November 1991, Series A no. 216, p. 30, para. 59).

That margin of appreciation extends in particular to the choice of the - reasonable and appropriate - means to be used by the authorities to ensure that lawful manifestations can take place peacefully (see, mutatis mutandis, the Plattform "Ärzte für das Leben" judgment, cited above, Series A no. 139, p. 12, para. 34).

32. The Court notes in the first place that the nature, importance and scale of the parade could appear to the police to justify strengthening the forces deployed to ensure that it passed off peacefully. In addition, when he chose this event for his demonstration against the Austrian armed forces, Mr Chorherr must have realised that it might lead to a disturbance requiring measures of restraint, which in this instance, moreover, were not excessive.

Finally, when the Constitutional Court approved these measures it expressly found that in the circumstances of the case they had been intended to prevent breaches of the peace and not to frustrate the expression of an opinion (see paragraph 10 above).

33. In the light of these findings, it cannot be said that the authorities overstepped the margin of appreciation which they enjoyed in order to determine whether the measures in issue were "necessary in a democratic society" and in particular whether there was a reasonable relationship of proportionality between the means employed and the legitimate aim pursued.

In conclusion, no violation of Article 10 (art. 10) has been established.

FOR THESE REASONS, THE COURT

1. Holds unanimously that there has been no violation of Article 5 (art. 5);

2. Holds by six votes to three that there has been no violation of Article 10 (art. 10).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 25 August 1993.

Signed: Rolv RYSSDAL
President

Signed: 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 Valticos;
(b) joint partly dissenting opinion of Mr Foighel and Mr Loizou.

Initialled: R. R.

Initialled: M.-A. E.

PARTLY DISSENTING OPINION OF JUDGE VALTICOS

(Translation)

In the case of Chorherr v. Austria, one of the questions which arose was that of the validity of the reservation made by the Austrian Government in respect of Article 5 (art. 5) of the European Convention

on Human Rights when they ratified that Convention in 1958.

In general, since the adoption of the Convention, sufficient attention would not seem to have been paid to the question of the reservations made in relation thereto and it gives rise to issues which are far from simple.

The Convention itself authorises reservations to the Convention, but subject to specific conditions which do not appear always to have been strictly complied with. It does so in Article 64 (art. 64), which is worded as follows:

> "1. Any State may, when signing [the] Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article (art. 64).
>
> 2. Any reservation made under this Article (art. 64) shall contain a brief statement of the law concerned."

Such reservations are therefore subject to four conditions:

1. They must be made when the Convention is signed or when the instrument of ratification is deposited, and therefore no later.

2. They are authorised only in so far as a law then in force in the territory of the country concerned is not in conformity with the particular Convention provision in question. They cannot therefore extend to laws enacted subsequently or, presumably, to instruments which are not laws.

3. Reservations of a general character are not permitted.

4. Every reservation must contain a brief statement of the law concerned. It follows that the substance of the law to which the reservation relates must be briefly set out so that the parties concerned (States, individuals and supervisory institutions) know what the precise scope of the reservation is. Accordingly, it is not sufficient merely to indicate the law in question mentioning its date, number or even title. Sufficient indication of its substance must be given.

In the light of these general principles, it can only be concluded that the reservation made by the Austrian Government in respect of Article 5 (art. 5) of the Convention does not fully satisfy that last condition. It is worded as follows:

> "The provisions of Article 5 (art. 5) of the Convention

shall be so applied that there shall be no interference with the measures for the deprivation of liberty prescribed in the laws on administrative procedure, BGBl no. 172/1950, subject to review by the Administrative Court or the Constitutional Court as provided for in the Austrian Federal Constitution."

This provision is precise only with regard to the identification of the laws in question and the subject-matter dealt with (certain deprivations of liberty which are subject only to subsequent review by the Administrative Court or the Constitutional Court), without further specification. It clearly does not contain a "brief statement" of the substance of this law which would make it possible to understand the law's content and its scope, or to determine whether the text amounts to a general reservation which is not permitted under the Convention.

Accordingly, in my view, the reservation cannot be regarded as valid and cannot therefore be taken into account.

In these circumstances, compliance with Article 5 (art. 5) of the Convention must be examined regardless of this "reservation".

Nevertheless, before such an examination is undertaken in this case, it is also necessary to consider more closely a much wider problem concerning reservations, namely when, and above all in what circumstances, their validity can be examined, which gives rise to various questions. The first aspect (the timing) is only partly clear. Practice has helped to render it more obscure. The basic text, which is Article 64 (art. 64), does not permit of any doubt: it is, as has been seen, "when signing [the] Convention or when depositing [the] instrument of ratification" that the reservation must be made, and no later. But it is also necessary that the reservation should relate to a law which was, as has been said, then in force in the country and which was not then in conformity with the provision of the Convention in question.

Thus, under the Convention, certain discrepancies may be maintained, but it is not possible to derogate from that instrument at a later date. Where the law in question is amended, the discrepancy to which the reservation relates could no doubt, if a strict view is not taken, be retained in the new text, but it could not of course be widened.

We now come to an important question: how and when can the institutions responsible for ensuring observance of the Convention satisfy themselves of the conformity of reservations deposited by the States with the conditions laid down by the Convention? This is where a problem arises and a lacuna appears to exist.

In principle, the institutions responsible for review (Court and Commission) examine the question of compliance with the Convention

only if an application is submitted by a State, an individual, etc. alleging non-compliance with the Convention. On such an occasion, the question of the validity of a reservation may arise if the application concerns compliance by a respondent State with a provision which has been the subject of a reservation. This was the situation in the Belilos v. Switzerland case (judgment of 29 April 1988, Series A no. 132) among others.

But what happens if an application is not submitted, or so long as an application is not submitted, in relation to such a provision?

It appears that when a State ratifies the Convention, there is no regular, systematic practice of verifying, or at any rate of judicially reviewing, the validity of reservations (or of interpretative declarations, which are often reservations in disguise).

If I am correctly informed, Council of Europe officials have on occasion conducted more or less unofficial exchanges of views with the national civil servants concerned and, when the reservation (or interpretative declaration) is deposited with the instrument of ratification of the Convention, the Secretariat of the Council of Europe notifies the declaration to the other member States (see, for example, notification reference JJ 2175 C, tr/5-21 of 26 January 1989). It may happen that States submit comments or objections, but this does not affect the validity of the reservation or declaration (unless, presumably, these objections are particularly numerous).

Such a practice - if I have correctly understood it - is of course common where simple multilateral conventions are involved. It corresponds more or less to the provisions (Articles 19 and 20) of the Vienna Convention on the Law of Treaties of 1969, but that Convention "reserves" its position as regards the situation in which reservations are prohibited by the treaty in question and that in which only certain reservations may be made. This is exactly the position with which we are confronted. As regards the European Convention on Human Rights and in view of its nature and its purpose, it cannot be considered that the objection made by a State to a reservation made by another precludes the State which made the reservation from becoming a party to the Convention in relation to the State which has objected. Such a view, which is already disputable as such*, cannot apply to the European Convention on Human Rights, which constitutes what Georges Scelle would have called a Law Treaty (as opposed to Contract Treaties) and which is in addition - and this is crucial here - equipped with judicial control machinery.

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* See in this connection Paul Reuter, "Introduction au droit des traités", Paris, PUF, 1972-85, nos. 132-133, pp. 74-75.

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It is therefore necessary in the present case to take account, for the purpose of considering reservations, of two important special features: first, as has been said, the fact that the Convention specifies in Article 64 (art. 64) which reservations are authorised and secondly, the fact that the Convention has set up an organised control system and that it is therefore the institutions constituted under that system which, as in the Belilos case, are called upon to determine the compatibility of a reservation with the terms of the Convention.

It is therefore this control machinery and it alone, in other words essentially the Court, which can rule on the validity of a reservation. That is moreover what has on occasion happened, but in less than satisfactory conditions because a question of a practical nature arises in addition to the legal issue.

Reference may be made in this regard to the Belilos judgment, in which the Court, examining an application concerning Switzerland, had to consider an "interpretative declaration" deposited when that country ratified the Convention, in 1974, and took the view, in its judgment delivered in 1988, that the declaration in question could not be accepted. It therefore ruled on the substance of the case without taking account of the reservation. But that meant that for fourteen years Switzerland had been under the impression that its declaration was valid. Following the Court's judgment, it made another "interpretative declaration", which was therefore submitted some considerable time after ratification (which gives rise to another problem, which will be examined below).

We must therefore ask ourselves how many reservations already deposited by various States really comply with the conditions laid down in Article 64 (art. 64). It suffices to read the text of such reservations to appreciate that there is some cause for concern. Behind the impressive façade of ratification of the Convention by all the member States of the Council of Europe, reservations sometimes constitute regrettable cracks.

So what should be done? And here a distinction should be drawn between reservations which have already been deposited and those which may be in the future by new member States.

Clearly we have to be realistic. It would be impossible now to call into question what has been done over a period of several decades. That would be a daunting task and would cast doubt upon the legal certainty created by so many years of tacit acceptance. It is only in connection with specific applications relating to compliance with a provision which has been the subject of a reservation that the question should be examined. In such cases, the Commission should systematically transmit the question to the Court so that it may review the position.

On the other hand, for any new ratification of the Convention which contains a reservation or interpretative declaration equivalent to a reservation it would be appropriate for the Council of Europe, before registering the ratification, to submit to the Court the issue of the reservation's conformity with Article 64 (art. 64). This is a question of the observance of the Convention, which the Court was set up to ensure.

There remains one last question, which was referred to above: if, several years after it has been made (when the Convention was ratified), a reservation is found to be contrary to the rules laid down in Article 64 (art. 64) and is therefore held to be null and void, can it be replaced by another reservation which is more consistent with that Article (art. 64)? In principle that should not be possible, because a reservation may be made only at the moment of ratification. That would, however, be unreasonable, because the government concerned have been informed of the non-validity of their reservation only several years after the ratification. The government in question should therefore have the opportunity to rectify the situation and to submit a valid reservation within a reasonable time and on the basis of their former reservation. That is what appears to have happened in regard to the Swiss declaration which the Belilos judgment found to be invalid, but the government concerned ought also - and this does not appear to have been done - to inform the Court of the new wording, so that it can rule on the validity of the declaration, since otherwise the problem may recur.

The matter having been discussed from a general point of view, what happens in the present case (Chorherr) if the Austrian Government's reservation concerning Article 5 (art. 5) of the Convention is not valid? Article 5 (art. 5) should then be fully applicable to the case before the Court. In my view, it may nevertheless be held that there has been no violation of this provision, in view of the fact that the individuals in question were arrested because, as is stated in Article 5 (art. 5), it was reasonably considered necessary to prevent them committing a public-order offence.

The case must therefore be studied in the different context of Article 10 (art. 10), which concerns freedom of expression. In this respect I consider that there has been a violation as the means used by the police were disproportionate to the legitimate aim pursued, regard being had to the importance of freedom of expression in a democratic society.

JOINT PARTLY DISSENTING OPINION OF JUDGES FOIGHEL AND LOIZOU

Our only point of disagreement with the view of the majority is that we are of the opinion that the interference with the applicant's right of expression safeguarded by Article 10 (art. 10) was disproportionate to the legitimate aim pursued. Accordingly such interference was not necessary in a democratic society.

It seems to us that the impairment of the spectators' view which was one of the actions of the applicant that made the crowd agitated could have been remedied by several other measures, in the circumstances, than resorting to the extreme measures of arrest and detention. Nor was it necessary to keep him in custody for about an hour and a half after the end of the ceremony, that is after the reason for his arrest had ceased to exist.