



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

FIRST SECTION

CASE OF ÖLLINGER v. AUSTRIA

(Application no. 76900/01)

JUDGMENT

STRASBOURG

29 June 2006

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Öllinger v. Austria,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Mr C.L. ROZAKIS, *President*,

Mr L. LOUCAIDES,

Mrs F. TULKENS,

Mrs E. STEINER,

Mr K. HAJIYEV,

Mr D. SPIELMANN,

Mr S.E. JEBENS, *judges*,

and Mr S. NIELSEN, *Section Registrar*,

Having deliberated in private on 8 June 2006,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 76900/01) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Austrian national, Mr Karl Öllinger (“the applicant”), on 31 July 2001.

2. The applicant was represented by Mr M. Hager, a lawyer practising in Linz. The Austrian Government (“the Government”) were represented by their Agent, Ambassador F. Trauttmansdorff, Head of the International Law Department at the Federal Ministry of Foreign Affairs.

3. The applicant alleged, in particular, a violation of his right to freedom of assembly.

4. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 24 March 2005 the Court declared the application admissible.

6. The parties did not submit further observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1951 and lives in Vienna.

8. On 30 October 1998 the applicant, who is a member of parliament for the Green Party, notified the Salzburg Federal Police Authority (*Bundespolizeidirektion*) under section 2 of the Assembly Act (*Versammlungsgesetz*) that on All Saints' Day, 1 November 1998, from 9 a.m. until 1 p.m., he would be holding a meeting at the Salzburg municipal cemetery in front of the war memorial. He noted that the meeting would coincide with the gathering of Comradeship IV (*Kameradschaft IV*), which he considered to be unlawful.

9. The purpose of the meeting would be to commemorate the Salzburg Jews killed by the SS during the Second World War. The applicant expected about six participants, who would carry commemorative messages in their hands and attached to their clothes. The applicant stated that no other means of expression (such as chanting or banners) which might offend piety or undermine public order would be used.

10. On 31 October 1998 the Salzburg Federal Police Authority, relying on section 6 of the Assembly Act and on Article 11 of the Convention, prohibited the meeting on the ground that it would endanger public order and security.

11. The authority noted that F.E., also a member of parliament for the Green party, had informed the Salzburg Federal Police Authority of the allegedly illegal assembly of Comradeship IV in memory of the SS soldiers killed in the Second World War which was to be held at the same time and place, but had refused to give an undertaking that the proposed meeting in memory of the murdered Salzburg Jews would not disturb that gathering.

12. The Salzburg Federal Police Authority noted that Comradeship IV was a registered association. Like a number of other organisations it traditionally held a commemoration ceremony at the Salzburg municipal cemetery on All Saints' Day. Such commemorations qualified as popular ceremonies within the meaning of section 5 of the Assembly Act and thus did not require authorisation. The disturbance of this and other commemoration ceremonies was likely to offend the religious feelings of members of the public visiting the cemetery and would indisputably be regarded as disrespectful towards the dead soldiers of both world wars and thus as an unbearable provocation. Accordingly, there was a risk of protests by visitors to the cemetery which could degenerate into open conflict between them and those participating in the assembly.

13. The Salzburg Federal Police Authority ordered that any remedies used against its decision should not have suspensive effect. Accordingly, the demonstration could not take place.

14. On 17 August 1999 the Salzburg Public Security Authority (*Sicherheitsdirektion*) dismissed an appeal by the applicant.

15. It noted that Comradeship IV was a registered association whose members were mainly former members of the SS. For more than forty years they had commemorated SS soldiers killed in the Second World War by gathering on All Saints' Day and laying a wreath in front of the war memorial at the Salzburg municipal cemetery. In the past few years, a number of organisations had organised protest campaigns with the aim of disturbing the Comradeship IV commemoration ceremony. These protests had led to vehement discussions with members of Comradeship IV and other visitors to the cemetery and had required intervention by the police.

16. The Public Security Authority, referring to the submissions of F.E., found that the assembly planned by the applicant was also aimed at a confrontation with Comradeship IV and concluded that its prohibition was necessary for the maintenance of public order and for the protection of the Comradeship IV commemoration ceremony.

17. On 13 December 2000 the Constitutional Court (*Verfassungsgerichtshof*) dismissed a complaint by the applicant alleging violations of his rights to freedom of assembly, freedom of expression, freedom of religion and non-discrimination.

18. The Constitutional Court observed that the authorities deciding on the prohibition of an assembly had to weigh the applicant's interest in holding the meeting against the public interests enumerated in Article 11 § 2 of the Convention. It went on to say that the prohibition of the proposed meeting would not be justified if its sole purpose were to protect the Comradeship IV commemoration ceremony and expressed doubts as to the authorities' assessment that the latter meeting was a popular ceremony within the meaning of section 5 of the Assembly Act and therefore did not require authorisation. Nevertheless, the prohibition of the meeting proposed by the applicant was justified for other reasons.

19. The authorities had also had regard to the fact that the gathering of Comradeship IV had in previous years been the target of activities aimed at disturbing it which had caused considerable nuisance to other visitors of the cemetery and had each time required police intervention. The authorities had therefore correctly assumed that the prohibition of the assembly planned by the applicant was necessary to protect the general public against potential disturbances.

20. The Constitutional Court added further considerations in support of that conclusion. It observed that All Saints' Day was an important religious holiday on which the population traditionally visited cemeteries in order to commemorate the dead. As a religious tradition, the commemoration of the

dead was protected by Article 9 of the Convention, which contained a positive obligation for the State to protect persons manifesting their religion against deliberate disturbance by others. Thus, the prohibition of the assembly at issue was necessary under Article 11 § 2 of the Convention for the protection of the rights and freedoms of others. It followed that it did not violate any other Convention right relied on by the applicant.

21. That decision was served on the applicant's counsel on 5 February 2001.

II. RELEVANT DOMESTIC LAW

22. The Assembly Act 1953 (*Versammlungsgesetz*) regulates the exercise of the right to freedom of assembly. Section 2(1) provides that any person intending to organise a public assembly or any assembly which is generally open to persons other than invited guests must give the authorities notice in writing at least 24 hours in advance, indicating the purpose, place and time of the meeting.

23. Pursuant to section 5, certain gatherings such as public entertainment, popular ceremonies or religious processions do not fall within the scope of the Assembly Act.

24. Pursuant to section 6, the competent authority must prohibit any assembly which would contravene criminal law or endanger public order and security.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 11 OF THE CONVENTION

25. The applicant complained about the prohibition of an assembly he had intended to hold on All Saints' Day in commemoration of the Salzburg Jews murdered by the SS during the Second World War. He relied in the first place on Article 11 of the Convention, which provides:

“1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the

exercise of these rights by members of the armed forces, of the police or of the administration of the State.”

A. The parties' submissions

26. The applicant agreed with the position taken by the Constitutional Court, namely that the prohibition of the assembly in question could not be justified solely by the aim of protecting the meeting of Comradeship IV against disturbances.

27. In his submission, the prohibition had not been justified for any other reasons either. He asserted that the position taken by the authorities in the domestic proceedings and by the Government before the Court disregarded the fact that the purpose of the meeting was to express an opinion, namely to remind the public of the crimes committed by the SS and to commemorate the Jews killed by its members. That the meeting coincided with the ceremony organised by Comradeship IV, whose members were mainly former members of the SS, was an essential part of the message he wished to convey. The authorities had failed to give sufficient reasons for the prohibition. Furthermore, they had not correctly weighed up the interests of the applicant and of Comradeship IV in holding their respective meetings and had not made any efforts to ensure that both assemblies could take place. The contested decisions were tantamount to protecting the commemoration ceremony for SS soldiers against legitimate criticism.

28. The Government submitted that the interference with the applicant's right to freedom of assembly was prescribed by law, namely by section 6 of the Assembly Act. It served a legitimate aim, as its purpose was to maintain public order and to protect the rights and freedoms of others, namely the undisturbed worship of all those visiting the cemetery on All Saints' Day, an activity which was itself protected by Article 9 of the Convention.

29. As to the question whether the prohibition of the assembly planned by the applicant had been necessary, the Government pointed out that the Constitutional Court's case-law required the authorities to weigh the applicant's interest in holding the assembly against the public interests enumerated in the second paragraph of Article 11. Furthermore, in assessing whether the assembly would run counter to these interests they were required to rely on circumstances which could be objectively verified. A number of factors justified the authorities' assumption that the applicant's assembly had been mainly aimed at disturbing the commemoration ceremony organised by Comradeship IV: the time and venue chosen for the assembly so as to make it coincide with the gathering of Comradeship IV; the view expressed by the applicant and by F.E., another member of the Green Party, that the latter gathering was unlawful; and their failure to give the required assurances not to disturb the Comradeship IV wreath-laying ceremony. Furthermore, the authorities had rightly assumed that a

confrontation between the two groups would endanger public order at the municipal cemetery and offend the religious feelings of uninvolved visitors. In arriving at that conclusion the authorities had also been able to rely on experiences from previous years in which assemblies like the one planned by the applicant had annoyed visitors, had led to heated discussions and had required police intervention.

30. The Government conceded that an assembly could not be prohibited solely on the ground of a certain likelihood of tensions and confrontations between opposing groups. However, in the particular circumstances of the case, the prohibition had been justified in order to protect the rights of others as guaranteed by Article 9 of Convention. All Saints' Day was traditionally devoted to commemorating the dead and the prohibition of the assembly, a measure aimed at avoiding loud disputes unbecoming of the peace and quiet of a cemetery, had been necessary to ensure that visitors could manifest their religious beliefs without disturbance.

31. Given that disturbances could not be ruled out, the authorities had not been under a positive obligation to allow both meetings, all the more so as measures designed to prevent confrontations (such as a police cordon) would themselves have disturbed the peace required at a cemetery on All Saints' Day.

B. The Court's assessment

32. It is common ground that the prohibition at issue constitutes an interference with the applicant's right to freedom of peaceful assembly which was prescribed by law, namely by section 6 of the Assembly Act, and served legitimate aims recognised in Article 11 § 2, namely the "prevention of disorder" and "the protection of the rights and freedoms of others".

33. The parties' submissions concentrate on the question whether the interference was also "necessary in a democratic society" within the meaning of Article 11 § 2. The Court reiterates that the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it is for the Court to give the final ruling on whether a restriction is reconcilable with the rights protected by the Convention. In carrying out its scrutiny, the Court must look at the interference complained of in the light of the case as a whole and determine, after having established that it pursued a legitimate aim, whether it was proportionate to that aim and whether the reasons adduced by the national authorities to justify it were "relevant and sufficient" (see *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, nos. 29221/95 and 29225/95, § 87, ECHR 2001-IX)

34. The Court notes at the outset that the present case is one concerned with competing fundamental rights. The applicant's right to freedom of peaceful assembly and his right to freedom of expression have to be balanced against the other association's right to protection against disturbance of its assembly and the cemetery-goers' right to protection of their freedom to manifest their religion.

35. As regards the right to freedom of peaceful assembly as guaranteed by Article 11, the Court reiterates that it comprises negative and positive obligations on the part of the Contracting State.

36. On the one hand, the State is compelled to abstain from interfering with that right, which also extends to a demonstration that may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote (see *Stankov and the United Macedonian Organisation Ilinden*, cited above, § 86, and *Plattform "Ärzte für das Leben" v. Austria*, judgment of 21 June 1988, Series A no. 139, p. 12, § 32). If every probability of tension and heated exchange between opposing groups during a demonstration was to warrant its prohibition, society would be faced with being deprived of the opportunity of hearing differing views (see *Stankov and the United Macedonian Organisation Ilinden*, cited above, § 107).

37. On the other hand, States may be required under Article 11 to take positive measures in order to protect a lawful demonstration against counter-demonstrations (see *Plattform "Ärzte für das Leben"*, cited above, p. 12, § 34).

38. Notwithstanding its autonomous role and particular sphere of application, Article 11 of the Convention must also be considered in the light of Article 10. The protection of opinions and the freedom to express them is one of the objectives of freedom of assembly and association enshrined in Article 11 (see *Stankov and the United Macedonian Organisation Ilinden*, cited above, § 85). In this connection it must be borne in mind that there is little scope under Article 10 § 2 for restrictions on political speech or on debate on questions of public interest (*ibid.*, § 88; see also *Scharsach and News Verlagsgesellschaft v. Austria*, no. 39394/98, § 30, ECHR 2003-XI).

39. Turning finally to Article 9 of the Convention, the Court has held that, while those who choose to exercise the freedom to manifest their religion cannot reasonably expect to be exempt from all criticism, the responsibility of the State may be engaged where religious beliefs are opposed or denied in a manner which inhibits those who hold such beliefs from exercising their freedom to hold or express them. In such cases the State may be called upon to ensure the peaceful enjoyment of the right guaranteed under Article 9 to the holders of those beliefs (see *Otto-Preminger-Institut v. Austria*, judgment of 20 September 1994, Series A no. 295-A, p. 18, § 49).

40. In the present case, the Salzburg Federal Police Authority and the Salzburg Public Security Authority considered the prohibition of the applicant's assembly necessary in order to prevent disturbances of the Comradeship IV commemoration meeting, which was considered a popular ceremony not requiring authorisation under the Assembly Act. They had particular regard to the experience of previous protest campaigns by other organisers against the gathering of Comradeship IV, which had provoked vehement discussions, had disturbed other visitors to the cemetery and had made police intervention necessary.

41. The Constitutional Court dismissed this approach as being too narrow. It observed that the prohibition of the intended meeting would not be justified if its sole purpose were the protection of the Comradeship IV commemoration ceremony. It went on to say that the prohibition was nevertheless justified or even required by the State's positive obligation under Article 9 to protect persons manifesting their religion against deliberate disturbance by others. In arriving at that conclusion, the Constitutional Court had particular regard to the fact that All Saints' Day was an important religious holiday on which the population traditionally went to cemeteries to commemorate the dead and that disturbances caused by disputes between members of the assembly organised by the applicant and members of Comradeship IV were likely to occur in the light of the experience of previous years.

42. The Court notes that the domestic authorities had regard to the various competing Convention rights. Its task is to examine whether they achieved a fair balance between them.

43. The applicant's assembly was clearly intended as a counter-demonstration to protest against the gathering of Comradeship IV, an association which undisputedly consists mainly of former members of the SS. The applicant emphasises that the main purpose of his assembly was to remind the public of the crimes committed by the SS and to commemorate the Salzburg Jews murdered by them. The coincidence in time and venue with the commemoration ceremony of Comradeship IV was an essential part of the message he wanted to convey.

44. In the Court's view, the unconditional prohibition of a counter-demonstration is a very far-reaching measure which would require particular justification, all the more so as the applicant, being a member of parliament, essentially wished to protest against the gathering of Comradeship IV and, thus, to express an opinion on a issue of public interest (see, *mutatis mutandis*, *Jerusalem v. Austria*, no. 26958/95, § 36, ECHR 2001-II). The Court finds it striking that the domestic authorities attached no weight to this aspect of the case.

45. It is undisputed that the aim of protecting the gathering of Comradeship IV does not provide sufficient justification for the contested

prohibition. This has been clearly pointed out by the Constitutional Court. The Court fully agrees with that position.

46. Therefore, it remains to be examined whether the prohibition was justified to protect the cemetery-goers' right to manifest their religion. The Constitutional Court relied on the solemn nature of All Saints' Day, traditionally dedicated to the commemoration of the dead, and on the disturbances experienced in previous years as a result of disputes between members of Comradeship IV and members of counter-demonstrations.

47. However, the Court notes a number of factors which indicate that the prohibition at issue was disproportionate to the aim pursued. First and foremost, the assembly was in no way directed against the cemetery-goers' beliefs or the manifestation of them. Moreover, the applicant expected only a small number of participants. They envisaged peaceful and silent means of expressing their opinion, namely the carrying of commemorative messages, and had explicitly ruled out the use of chanting or banners. Thus, the intended assembly in itself could not have hurt the feelings of cemetery-goers. Moreover, while the authorities feared that, as in previous years, heated debates might arise, it was not alleged that any incidents of violence had occurred on previous occasions.

48. In these circumstances, the Court is not convinced by the Government's argument that allowing both meetings while taking preventive measures, such as ensuring police presence in order to keep the two assemblies apart, was not a viable alternative which would have preserved the applicant's right to freedom of assembly while at the same time offering a sufficient degree of protection as regards the rights of the cemetery's visitors.

49. Instead, the domestic authorities imposed an unconditional prohibition on the applicant's assembly. The Court therefore finds that they gave too little weight to the applicant's interest in holding the intended assembly and expressing his protest against the meeting of Comradeship IV, while giving too much weight to the interest of cemetery-goers in being protected against some rather limited disturbances.

50. Having regard to these factors, and notwithstanding the margin of appreciation afforded to the State in this area, the Court considers that the Austrian authorities failed to strike a fair balance between the competing interests.

51. Consequently, there has been a violation of Article 11 of the Convention.

II. ALLEGED VIOLATION OF ARTICLES 9, 10 AND 14 OF THE CONVENTION

52. The applicant also relied on Articles 9, 10 and 14 of the Convention.

53. Having regard to the above considerations, the Court finds that no separate examination is warranted under these Articles.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

54. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Costs and expenses

55. The applicant, stating that he did not wish to claim any damages, claimed a total amount of 7,577.86 euros (EUR) inclusive of VAT for costs and expenses, comprising EUR 2,378.88 incurred in the domestic proceedings, namely the proceedings before the Constitutional Court, and EUR 5,198.98 incurred in the Convention proceedings.

56. The Government did not comment on the claim relating to the domestic proceedings, but contended that the claim in respect of costs incurred in the Convention proceedings was excessive.

57. The Court reiterates that in order for costs and expenses to be included in an award under Article 41 of the Convention, it must be established that they were actually and necessarily incurred and are reasonable as to quantum (see, for instance, *Feldek v. Slovakia*, no. 29032/95, § 104, ECHR 2001-VIII).

58. As regards the costs of the domestic proceedings, the Court finds that they were necessarily incurred and reasonable as to quantum. It therefore awards them in full, namely EUR 2,378.88.

59. The costs of the Convention proceedings were also necessarily incurred. Having regard to the sums awarded in comparable cases (see, for instance, *Wirtschafts-Trend Zeitschriften-Verlags GmbH v. Austria*, no. 58547/00, § 59, 27 October 2005) and making an assessment on an equitable basis, the Court awards EUR 3,500.

60. In sum, the Court awards the applicant EUR 5,878.88, inclusive of VAT, under the head of costs and expenses.

B. Default interest

61. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Holds* by six votes to one that there has been a violation of Article 11 of the Convention;
2. *Holds* unanimously that it is not necessary to examine separately the applicant's complaints under Articles 9, 10 and 14 of the Convention;
3. *Holds* by six votes to one
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 5,878.88 (five thousand eight hundred and seventy-eight euros and eighty-eight cents) in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 29 June 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Registrar

Christos ROZAKIS
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Mr Loucaides is annexed to this judgment.

C.L.R.
S.N.

DISSENTING OPINION OF JUDGE LOUCAIDES

I disagree with the finding that there has been a violation of Article 11 in this case. I find the judgment of the Austrian Constitutional Court in all respects reasonable and in line with the provisions of Article 11 of the Convention. In particular I find that the Constitutional Court was right in finding that the prohibition of the assembly at issue was necessary for the protection of the rights and freedoms of others, namely all those persons visiting the cemetery in order to commemorate the dead on All Saints' Day. As was rightly observed by the same court, that day was an important religious holiday and the commemoration of the dead was protected by Article 9 of the Convention, which contained a positive obligation for the State to protect persons manifesting their religion against deliberate disturbance by others.

The applicant sought authorisation for a meeting to be organised by him in Salzburg cemetery in front of the "world war memorial". The meeting would coincide in place and time with the gathering of Comradeship IV in memory of the SS soldiers killed in the Second World War, and its purpose would be to commemorate the Salzburg Jews killed by the SS during the same war.

The applicant expected about six participants, who would carry commemorative messages in their hands and attached to their clothes. He stated that no other means of expression (such as chanting or banners) which might offend piety or public order would be used. However, there was undisputed evidence that another member of the same party that would organise the meeting had refused to give an undertaking that the proposed meeting in memory of the murdered Salzburg Jews would not disturb the gathering of Comradeship IV. Furthermore, in the past few years a number of organisations had organised protest campaigns with the aim of disturbing Comradeship IV's commemoration ceremony. These protests had led to vehement discussions with members of Comradeship IV and other visitors to the cemetery and had required intervention by the police. In the circumstances the Constitutional Court was right in finding that the authorities had correctly assumed that the prohibition of the assembly being organised by the applicant was necessary to protect the general public against potential disturbances.

I would like also to add the following: the gathering of Comradeship IV in memory of the SS soldiers killed in the Second World War was regarded by the authorities as not requiring any authorisation because it qualified as a "popular ceremony" with the meaning of section 5 of the Assembly Act. The Constitutional Court expressed doubts regarding the correctness of this finding. I share these doubts and I would even go so far as to say that personally I do not see how such a finding can legally be justified. Be that as it may, the fact remains that Comradeship IV was a registered association

and for more than forty years had commemorated SS soldiers killed in the Second World War by gathering on All Saints' Day and laying a wreath in front of the war memorial at Salzburg municipal cemetery. If the applicant's aim was to dispute the legality of this provocative gathering, the proper way to do so was indisputably through legal means or peaceful demonstrations against the authorities who allowed the gatherings, and certainly not through a confrontation in a cemetery on All Saints' Day. In substance, the assembly planned by the applicants was a political meeting whose objectives may have been understandable (see paragraph 43 of the judgment), but I fail to see how the time and place of such meeting showed any respect for the rights of others in the cemetery (not belonging to Comradeship IV). The time and place of the proposed demonstration or gathering were not appropriate. A cemetery is a sacred place and is not, I believe, the proper place, especially on All Saints' Day, for political demonstrations, however respectable they may be, when other people are present in the cemetery and have a right to peaceful commemoration of the dead. This, I believe, becomes even more evident when there is undisputed evidence, as in this case, of a real danger of such disturbances in the cemetery as to require intervention by the police.

All civilised people agree that the Nazis and their SS were a horrible part of the history of mankind. The Holocaust and other abhorrent crimes against the Jews and other peoples received the condemnation of the whole world and millions of people died in order save humanity from this scourge. However, I repeat that there is a time and place for any political demonstration or gathering entailing disturbances at the expense of the rights of others.

Finally, I feel the need to deal with the major points of the reasoning of the majority, which are as follows:

(a) The assembly was in no way directed against the cemetery-goers' beliefs or the manifestation of them. (paragraph 47 of the judgment)

The assembly would have had the inevitable result of interfering with the rights of the cemetery-goers and that should have been known by those participating in it. Even though it was not their principal aim the result would have been the same.

(b) Moreover, the applicant expected only a small number of participants. They envisaged peaceful and silent means of expressing their opinion, namely the carrying of commemorative messages, and had explicitly ruled out the use of chanting or banners. Thus, the intended assembly in itself could not have hurt the feelings of cemetery-goers. (paragraph 47)

The participants would have formed an organised group of persons sharing the same objective of confrontation with Comradeship IV. Therefore, the small number of members of this group would not have changed the fact that a certain disturbance would inevitably be caused at the expense of the rights of the others in the cemetery. Here, the majority ignore the fact that one of the members of the party organising this assembly “refused to give an undertaking that the proposed meeting in memory of the murdered Salzburg Jews would not disturb that gathering” (see paragraph 11 of the judgment). Furthermore, commemorative messages are not silent means of expressing an opinion, for they speak for themselves, and even though the message they conveyed would have been just and fair, it would still have been a kind of provocation.

(c) While the authorities feared that, as in previous years, heated debates might arise, it was not alleged that any incidents of violence had occurred on previous occasions. (paragraph 47)

The majority accept the possibility of heated debates – and in any event there was undisputed evidence that these had occurred in previous years. However, it seems that they consider that such debates would not amount to a disturbance as long as there were no “incidents of violence”. I find no difficulty in disagreeing with that. In any event, one cannot reasonably exclude the possibility that heated debates might develop into violent incidents. It is also useful to note that according to the facts, the past incidents “had disturbed other visitors to the cemetery and had made police intervention necessary” (paragraph 40 of the judgment).

(d) The Court is not convinced by the Government’s argument that allowing both meetings while taking preventive measures, such as ensuring police presence in order to keep the two assemblies apart, was not a viable alternative which would have preserved the applicant’s right to freedom of assembly while at the same time offering a sufficient degree of protection as regards the rights of the cemetery’s visitors. (paragraph 48)

The majority find that an arrangement consisting in allowing both meetings while taking preventive measures such as ensuring police presence in order to keep the two assemblies separated would have been a solution. However, I do not see how (i) the police presence for the purpose in question would not in itself have upset the peace required for the protection of the rights of the cemetery visitors, and (ii) the police presence could have prevented heated debates. It could possibly have prevented incidents of violence but even the effort to do so would have entailed sufficient disturbance in the cemetery.

(e) The Court therefore finds that they gave too little weight to the applicant's interest in holding the intended assembly and expressing his protest against the meeting of Comradeship IV, while giving too much weight to the interest of cemetery-goers in being protected against some rather limited disturbances. (paragraph 49)

The facts before the Court do not, in my view, support such a conclusion, especially the finding to the effect that the disturbances would have been “rather limited”. In any event, limited or not, disturbances in the cemetery on All Saints’ Day would have been sufficient to justify the application of the limitation regarding the “protection of the rights and freedoms of others” in the circumstances of the present case.

(f) Notwithstanding the margin of appreciation afforded to the State in this area, the Court considers that the Austrian authorities failed to strike a fair balance between the competing interests. (paragraph 50)

Although I personally am reluctant to invoke the “margin of appreciation” save in exceptional cases, the reference to this concept by the majority in the context of the present case does not appear to have been pertinent as I believe that they have substituted their own assessment of the circumstances of the case for that of the Constitutional Court and left nothing to the latter’s margin of appreciation.

For all the above reasons, I find that there has been no violation of Article 11 of the Convention in this case.