[TRANSLATION-EXTRACT]

...

THE FACTS

The applicant, Mr Roger Garaudy, is a French national who was born in 1913 and lives in Chennevières-sur-Marne. He is a philosopher, writer and former politician. He was represented before the Court by Ms I. Coutant Peyre, of the Paris Bar.

A. The circumstances of the case

The applicant explained that he had written many books and essays on, among other things, history, philosophy and Marxist issues, but also on religion and the dialogue of civilisations. Having been a politician, a Marxist humanist and then a Christian humanist, he subsequently converted to Islam.

The facts of the case, as submitted by the parties, may be summarised as follows.

In December 1995 the applicant published a book entitled *The Founding Myths of Israeli Politics*, which was distributed through non-commercial outlets by *La vieille taupe* publishers and subsequently republished at the applicant's own expense in April and May 1996 as *Samiszdat Roger Garaudy*. Between February and July 1996 four criminal complaints, together with applications to join the proceedings as civil parties, were lodged against the applicant for denying crimes against humanity, publishing racially defamatory statements and inciting to racial or religious hatred or violence. The complaints concerned various passages from both editions of the book and were lodged by associations of former resistance members, deportees and human-rights organisations. The investigating judge's office started four judicial investigations in respect of the four complaints. Other associations subsequently sought leave to join the proceedings as civil parties. On 6 June 1996 the Paris public prosecutor also opened a judicial investigation in respect of the applicant on a charge of denying crimes against humanity.

In five orders made by the investigating judge of the Paris *tribunal de grande instance* on 7 March 1997, the applicant was committed to stand trial before that court for five offences. Five separate sets of proceedings were thus referred to the trial courts. The proceedings concerned two different editions of and different passages from the applicant's book. At each stage of the different proceedings the courts gave judgment on the same day during the same hearing and each party addressed them once in respect of all five cases. The courts were composed of the same judges, who examined the five cases at each stage but gave five different decisions.

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1. *The first set of proceedings concerning chapters 2 and 3, entitled The Myth of the Nuremberg Trials and The Myth of the **Holocaust** respectively, of the December 1995 edition (offence charged: aiding and abetting the denial of crimes against humanity)*

On 22 February 1996 a criminal complaint and application to join the proceedings as a civil party was lodged by the National Union of Associations of Deported and Interned Members of the Resistance and the National Federation of Deported and Interned Members of the Resistance for denial of crimes against humanity. The complaint was lodged not only against the applicant, but also against Mr Pierre Guillaume, the editorial director of *La vieille taupe*, for publishing the

applicant's book in December 1995, chapters 2 and 3 (pages 72 and 136) of which were the subject of the complaint.

Basing his decision on sections 23, 24(6), 24 *bis*, 42 and 43 et seq. of the Press Freedom Act of 29 July 1881, one of the investigating judges at the Paris *tribunal de grande instance* made an order on 7 March 1997 committing the applicant and Mr Pierre Guillaume for trial before that court on the charges of denying and aiding and abetting the denial of a crime against humanity respectively.

On 27 February 1998 the court acquitted the defendants of the charges and dismissed the civil parties' claims. Noting that "section 24 *bis* [of the Act of 29 July 1881] refers ... expressly to the means of publication set out in section 23" and that "publication is therefore one of the constituent elements of the offence", the court held that "publication must have been proved and be imputable to the defendant". The court found that the prosecution had failed to adduce sufficient proof that the 1995 edition had been published within the meaning of section 23 of the Act of 29 July 1881. As publication had not been established, the offence had not been made out and the court did not examine the merits of the prosecution.

The applicant had asked the court to refer a preliminary question to the European Court of Human Rights on the compatibility of section 24 *bis* of the Act of 1881 with the European Convention on Human Rights, particularly Article 10. Pointing out that the Convention was directly applicable in France, the court declared the applicant's proposed preliminary question inadmissible.

The public prosecutor and seven civil-party associations appealed against the judgment of the Paris *tribunal de grande instance*.

In a judgment of 16 December 1998 the Paris Court of Appeal set aside the lower court's judgment and sentenced the applicant to a suspended term of six months' imprisonment and a fine of 50,000 French francs (FRF). It awarded the civil parties damages of one franc. Mr Pierre Guillaume was given a suspended term of six months' imprisonment and fined FRF 30,000. The court also ordered publication in the Official Gazette of the announcement of Mr Pierre Guillaume's conviction for publishing the applicant's book.

Basing its decision on section 24 *bis* of the Act of 29 July 1881 and the reference text to which it refers, namely Article 6 of the Statute of the International Military Tribunal, which defines crimes against humanity, the court held that the constituent elements of the offence of denying crimes against humanity had been made out.

It found, firstly, that the publication element had been made out because the book had been made available to the public on payment of a subscription.

It then examined the question raised by the applicant of the compatibility of section 24 *bis* of the Act of 29 July 1881 with Article 10 of the Convention. It confirmed that it was compatible with that provision, as follows:

> "Article 10 of the aforementioned Convention has to be interpreted in the light of the provisions of Article 17 of that Convention, according to which none of its provisions may be interpreted as implying any right to engage in any activity or perform any act aimed at the destruction of the rights and freedoms set forth in the Convention.
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> Firstly, section 24 *bis* falls within "the measures necessary in a democratic State" for the protection of the rights of others, provided for in Article 10, as it concerns the protection of the rights of the Nazis' victims in terms of ensuring and safeguarding the respect due to their memory. Moreover, a witness, Mr Finkelkraut, referred to "the offensiveness of denying the survivors the true reasons for their suffering and the dead the true reasons for their death".
>
> Secondly, section 24 *bis* of the Act of 29 July 1881 is aimed at preventing or punishing the public denial of facts that have been the subject of a final ruling by the Nuremberg International

Military Tribunal and relate to events that are totally incompatible with the values of the Convention for the purposes of Article 17.

With regard to the submission based on the *Isorni/Lehideux* judgment, the court notes that the European Court has twice ruled on the question of the application of Article 10 to crimes against humanity:

§ 47: "... [the case] does not belong to the category of clearly established historical facts – such as the **Holocaust** – whose negation or revision would be removed from the protection of Article 10 by Article 17."

§ 53: "There is no doubt that, like any other remark directed against the Convention's underlying values, the justification of a pro-Nazi policy could not be allowed to enjoy the protection afforded by Article 10".

This submission cannot therefore succeed."

Having regard to the evidence produced in the case and to the submissions before the court, it appears that Mr Garaudy's intention, in his book, is to deny that a "final solution", in the sense of people's extermination, of the Jewish question was organised. He also denies the method used, which was to send those unable or no longer able to work to their death in the gas chambers and incinerate their bodies.

Mr Garaudy's demonstration is structured around two themes: questioning the conditions in which the facts have been studied and questioning the facts themselves".

With regard to his questioning of the conditions in which the facts have been studied, the court noted the following points:

"(i) trivialisation of the facts: in respect of an event that has been regarded as exceptional – that of the destruction of human beings by reason of their membership of a race – Mr Garaudy makes a number of comparisons with the aim of trivialising the crime, firstly by comparing it to acts for which he blames the allies and, secondly, by drawing parallels with other historical events.

After reiterating a number of Hitler's comments on the fate that should have been reserved to Jews in the First World War ... and in the event of a Second World War "the result ... would be ... the annihilation of the Jewish race in Europe ..." (page 76), Mr Garaudy states on page 81 "Neither Churchill, nor Stalin, nor Truman was among the war criminals in the dock. Nor were any of the perpetrators of the very worst incitements to commit crime ... the incitement to commit a "genocide", in the true sense of the word this time, made in 1942 in the book by the American Jew, Theodor Kaufman ..." then in a footnote and on page 82 "... neither the Anglo-American leaders responsible for the Dresden bombing ... nor Truman, the perpetrator of the atomic apocalypse of Hiroshima and Nagasaki ... was among the accused at the Nuremberg trials ...".

Regarding the numbers involved (on page 138): "Hitlerian domination is thus incorrectly described in certain propaganda as a "pogrom" of which the Jews were allegedly the principal, if not the only, victims. It was a human catastrophe which, unfortunately, is not without precedent since Hitler dealt with whites in the same way as European colonialists had dealt with "coloureds" for five centuries.

(ii) pejoration of the facts: in his book Mr Garaudy indicates the need for a debate: page 135 "As long as there is no academic and public debate between specialists of equal calibre on the report by the engineer Fred Leuchter, and the Cracow report ... doubt and even scepticism will remain". This process, which he presents as one of historical exactitude, is in fact coupled with another process, which, by the terms used, consists in portraying the question of the systematic and massive extermination of Jews as a sham. Thus the words "gas chambers", "genocides" and "holocausts" are put in quotation marks and presented as an "unexpected alibi" ..., "a myth dressed up as history and the political mileage gained from it", "the myth of six million exterminated Jews that has become a dogma justifying and lending sanctity (as indicated by the very word ***Holocaust***) to every act of violence" (page 85).

Although the word myth can mean a symbolical representation, it appears from the context here that is used to mean an untruth.

The author uses the same reasoning on the subject of the gas chambers, referring to the "spectre of the gas chambers" (page 144), and the crematoriums "there are crematoriums in all the big

cities, in Paris (at Père-Lachaise), in London, and in all the major capitals and these incinerations evidently do not signify an intention to exterminate people" (page 145). That comparison removes any association with their use in the Nazi camps.

His approach is backed up by derisory comments regarding a number of terms used to refer to the events in question. Films on the subject are described as "Shoah business" or "fictional picture strips". The court has heard the parties' submissions regarding the origin of that term but, whatever it may be, the term has indeed been used in the instant case to describe the events in question as a fiction";

(iii) discrediting the relevant institutions and witness evidence: Mr Garaudy refers to the Nuremberg Tribunal in terms which systematically call into question its legitimacy and undermine its actions. Hence the heading on page 72: "The Myth of the Nuremberg Trials", on page 73: "It is not an international tribunal since it is composed only of victors and, consequently, the only crimes to be judged are those committed by the vanquished", and on page 112:"the victors disguised in judges' gowns. With regard to the Auschwitz trial, which concerned the same subjects, a parallel is drawn on page 110 with "witch hunts" ... .

As regards the photos from the Auschwitz Album, which Mr Garaudy produced before the court again, "they also rule out the possibility that such extermination could have occurred at the same time in any "secret" part of the "camp" (page 133).

In these conditions, the report by the engineer Leuchter, which denies the existence of the gas chambers, is presented as one of the only reports which "would, if seriously and publicly debated, put an end to the controversy".

(iv) disputing the meaning of words such as overall solution, final solution ... The defendant interprets these words every time as a solution to which recourse will be had only after the war (pages 96 and 107). Besides that, he considers that the only correct interpretation of these words is a geographical one: a deportation to Madagascar or to the east of the European continent."

On the denial of crimes against humanity the court made the following findings:

"Mr Garaudy denies the nature of the final solution and disputes the number of Jewish victims and the cause of their deaths.

- Regarding the nature of the final solution: in Mr Garaudy's view ... no one has ever been able to produce proof that, for the Nazis, the "final solution" of the Jewish problem meant extermination" (page 141).

He infers, however, from a number of quotations from various texts that this solution was in fact their exile:

- ~~€€€€€~~ regarding a letter from Goering to Heydrich : "The only final solution" thus consisted in ridding Europe of its Jews by deporting them in ever larger numbers until the war (presuming we win it) allows them all to be put in a ghetto outside Europe (as first suggested in the Madagascar plan)" (page 94).
- ~~€€€€€~~ regarding a document referred to as the Wannsee Protocol which gives an account of a meeting of Nazi dignitaries "There is no question of gas chambers or of extermination in this document, but only of transferring Jews to Eastern Europe" (page 100).
- ~~€€€€€~~ regarding a document written by Hitler "... he defined, as early as 1919, ... what he had already described as his "ultimate goal", "deportation of the Jews". That was his "ultimate goal" until his death, as was the fight against "Bolshevism" which ultimately got the better of him (page 227).

The defendant suggests that the very idea of the Jews' destruction is implausible because it would have been inefficient: "He [Hitler] is driven to mobilising extra troops by withdrawing the factory workforce, and was allegedly so fatally obsessed with his war effort that he took to exterminating prisoners and Jews, rather than employing them, albeit in inhuman conditions, on his work sites." After Hannah Arendt referred to the "crazy and fanciful" nature of that comment, Mr Garaudy writes "What is even stranger is that people as shrewd as Poliakov or Hannah Arendt had such fixed ideas that they failed to reconsider their surrealist theories" (pages 107 et 108) ... .

(v) Regarding the number of victims and the cause of their death: in numerous passages Mr Garaudy disputes at the same time the number of Jewish deaths, the cause of their deaths and the use of gas chambers to kill them.

Regarding the number of deaths on page 85 ".... we will endeavour to examine one of the untruths which still, after almost half a century, gains the most ground across the world today and not only in the Middle East: the myth of the 6 million Jews that has become a dogma."

The title of a chapter on page 136 "The myth of the **Holocaust**".

In Mr Garaudy's view, the deaths were caused by the deportations: "That was when they suffered the most, not only in the way that all civilians suffer in times of war ... but also forced labour ... to serve the German war effort ... Lastly, epidemics, such as typhus, seriously ravaged the concentration camp population, who were malnourished and reduced to a state of exhaustion". "Is it therefore necessary to resort to other methods to explain the terrible incidence of death among the victims of this treatment ..." (page 143).

The manner in which the author denies the existence of the gas chambers has already been indicated. The following are examples of more specific denials:

On page 145: "Gas chambers" therefore had to be added to the crematoriums to establish the dogma of extermination by fire".

On page 236 (passage not included as such in the charge, but referred to here on account of the context): "When it was proved, despite a considerable number of "eyewitnesses" to the existence of "gas chambers", that they had never existed in **Germany**, it became necessary, in similarly arbitrary manner, to continue to affirm as undeniable identical evidence of their existence in the eastern camps."

Lastly, the court held:

During the hearings Mr Garaudy was invited to address the court on all the issues which have just been examined. This was done in the light of his previous statements both before the investigating judge and the trial courts, which were read out to the court in full.

He maintained the content and import of those statements, which themselves confirmed the passages in respect of which he had been prosecuted. He indicated, among other things, that his purpose was to combat the risks posed by Zionism.

Before the court the defendant reiterated, among other things, that there was no proof that the final solution meant the extermination of the Jews, ... denied the existence of gas chambers in Auschwitz, confirmed that he disputed the figure of 6 million dead. ...

It can be established from all the foregoing evidence that Mr Roger Garaudy has committed the offence of denying crimes against humanity."

The applicant appealed on points of law against that judgment. In his submission, prosecuting him on the charge of denying crimes against humanity within the meaning of section 24 *bis* of the Act of 29 July 1881 did not fall within the exceptions authorised by Article 10 § 2 of the European Convention of Human Rights since his book was a politically polemical work that was devoid of any racist purpose and did not set out to deny the existence of Nazi crimes.

On 12 September 2000 the Court of Cassation dismissed the appeal on the following grounds:

"In declaring the defendant guilty, on the grounds reproduced in the appeal, of the offence of denying crimes against humanity on account of several passages from his book *The Founding Myths of Israeli Politics*, the Court of Appeal, which did not exceed the limits of the case as referred to it, justified its decision.

Having regard to the terms employed in the passages complained of and also to extrinsic elements contained in other parts of the book, the judges properly evaluated the significance and impact of the comments in question;

Article 10 of the European Convention of Human Rights, which guarantees the principle of the freedom of expression, provides in its second paragraph for certain restrictions or penalties, as are

prescribed by law, which constitute necessary measures in a democratic society for the prevention of disorder and the protection of the rights of others. That is the purpose of section 24 *bis* of the Act of 29 July 1881;

Lastly, denial of the existence of crimes against humanity falls within the provisions of section 24 *bis* of the Act of 29 July 1881, even where presented indirectly or in terms expressing doubts or by insinuation. The offence is also made out where, on the pretext of attempting to ascertain an alleged historical truth, the aim is to deny the crimes against humanity committed by the Nazis against the Jewish community; that was the case here.

The submission must therefore fail."

2. The second set of proceedings concerning twelve passages from the April-May 1996 edition (offence charged: denial of crimes against humanity)

On 6 May 1996 the Association of the Sons and Daughters of Jews deported from France lodged a criminal complaint, together with an application for leave to join the proceedings as a civil party, against *Samiszdat Roger Garaudy* publishers and the applicant for the offence of denying crimes against humanity. The complaint concerned the entire second edition of the applicant's book.

After being committed for trial before the Paris *tribunal de grande instance* in an order of 7 March 1997, the applicant was then convicted.

On 27 February 1998 the court found the applicant guilty of denying crimes against humanity and sentenced him to a fine of FRF 30,000. It awarded the civil parties one franc in damages and compensation of FRF 10,000. After examining the relevant passages, the court noted:

"It thus appears that, far from confining himself to political or ideological criticism of Zionism and the actions of the State of Israel – criticism that is perfectly legal under the legislation governing freedom of expression – or even giving an objective account of revisionist arguments and merely calling, as he claims, for a "public and academic debate" on the historical event constituted by the gas chambers, Roger Garaudy has subscribed to those theories and engaged in a virulent and systematic denial of the existence of the crimes against humanity committed against the Jewish community, as adjudged by the Nuremberg International Military Tribunal.

The offence under section 24 *bis* has therefore been made out."

The applicant, the public prosecutor and four civil-party associations appealed against the judgment of the Paris *tribunal de grande instance*.

In a judgment of 16 December 1998 the Paris Court of Appeal upheld the lower court's judgment and added a suspended term of six months' imprisonment. The court based its decision on reasoning analogous to that in the judgment delivered on the same date in the first set of proceedings.

As in the first set of proceedings, the applicant appealed to the Court of Cassation against that judgment.

On 12 September 2000 the Court of Cassation dismissed the appeal for reasons identical to those of the judgment delivered on the same date in the first set of proceedings.

3. The third set of proceedings concerning twenty passages from the April-May 1996 edition (offence charged: denial of crimes against humanity)

Following an investigation opened at the request of the public prosecutor at the Paris *tribunal de grande instance*, the applicant was committed for trial before that court in an order of 7 March 1997.

On 27 February 1998, after examining the passages in respect of which the applicant was being prosecuted, the court found him guilty of the offence of denying

crimes against humanity and sentenced him to a fine of FRF 50,000. It awarded the civil parties one franc in damages and FRF 10,000 in compensation. The court also ordered publication of the operative provisions of its judgment in the Official Gazette of the French Republic.

The applicant, the public prosecutor and five civil-party associations appealed against that judgment.

In a judgment of 16 December 1998 the Paris Court of Appeal upheld the aforementioned judgment and added a suspended term of six months' imprisonment. It also ordered the publication of an announcement of the applicant's conviction in the Official Gazette of the French Republic. The court based its judgment on reasoning analogous to that in the judgments delivered on the same date in the first and second set of proceedings.

As in the previous two sets of proceedings, the applicant appealed to the Court of Cassation.

On 12 September 2000 the Court of Cassation dismissed the appeal for the same grounds as those set out in the judgments delivered on the same date in the first and second proceedings.

4. The fourth set of proceedings concerning several passages from the April-May 1996 edition (offence charged: publishing racially defamatory statements)

On 23 May 1996 the International League against Racism and Anti-Semitism (LICRA) lodged a criminal complaint, together with an application to join the proceedings as a civil party, against the applicant for the offence of defaming a group of persons on grounds of their membership or non-membership of an ethnic group, race or religion. In an order of 7 March 1997 the applicant was committed for trial before the Paris *tribunal de grande instance*.

On 27 February 1998 the court, basing its decision on sections 23, 29(1) and 32(2) of the Act of 29 July 1881 after examining the passages in question, found the applicant guilty of the offence of publicly defaming a group of persons (the Jewish community) and sentenced him to a fine of FRF 20,000. It awarded the civil parties one franc in damages and compensation of FRF 10,000, FRF 5,000 and FRF 1.

The applicant, the public prosecutor and five civil-party associations appealed against the judgment of the Paris *tribunal de grande instance*.

I In a judgment of 16 December 1998, the Paris Court of Appeal upheld the aforementioned judgment adding a suspended term of three years' imprisonment and ordering the payment of FRF 20,000 to LICRA for the legal costs it had incurred.

In its judgment the court found as follows:

> "Contrary to the [the applicant's] allegations, the charge of defaming the Jewish community is not based on the criticism of the policies pursued by the State of Israel – only rarely mentioned as such, moreover, in the book in question – but the substance of the book as constituted by the passages that form the basis of the prosecution's case. The explicit and avowed aim of the book is the description of what the author calls the "founding myths" of that policy, those myths being presented as deliberate distortions of history ("myth of the six million") or mystifications for political ends ... by the Zionists ("the Israeli-Zionist lobbies in France and the United States") who were "the major beneficiaries", in order to legalise all their external and internal acts of violence by placing themselves above the law and endangering world unity and peace."

The court found that the passages referred to, whether taken alone or as part of the whole book, "seriously harmed the Jewish community as a whole, as the lower courts had properly decided". In the court's opinion, the undifferentiated use of the terms "Zionist", "Jewish vote", "Jewish lobby", "Israeli" or "State of Israel" in the

applicant's book, and in particular in the passages complained of, served to confuse the reader. In the court's opinion, "such confusion, having regard to the intellectual level and to the influence which the defendant claimed, particularly in the Middle East, referring as he did to 25 translations of the book in question, had a purpose that had indeed been the one reflected in the charge: damaging the honour and reputation of that community".

The applicant appealed on points of law against that judgment. In his submission, the statement about "lobbying", which was a legal activity, fell outside the charge of defamation.

On 12 September 2000 the Court of Cassation gave judgment dismissing the appeal on the following grounds:

> "In finding the defendant guilty of the offence, the judges ruled in accordance with the grounds reproduced in the appeal.
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> In the light of those statements, the judges did not exceed the limits of the case as referred to them and properly judged the significance and impact of the comments complained of.
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> Suggesting that a community referred to in section 32(2) of the Act of 29 July 1881 engaged in the practice of "lobbying" in order to justify acts of violence "endangering world unity and peace" infringes the honour and reputation of that community and amounts to the offence referred to in and punishable under the above-mentioned provision.
>
> The interests protected by that provision and those protected by the provision making it an offence to deny crimes against humanity are different in nature. They do not necessarily concern the same persons or the same groups of persons and consequently the two offences, where both are charged, do not constitute a plurality of offences in respect of the same criminal act."

5. The fifth proceedings concerning four passages from the April-May 1996 edition (offences charged: publication of racially defamatory statements and incitement to racial hatred)

On 1 July 1996 the Movement against Racism and for Friendship among Peoples (MRAP) lodged a criminal complaint, together with an application to join the proceedings as a civil party, against the applicant for publicly defaming a group of persons on grounds of their membership or non-membership of a particular ethnic group or race and inciting to discrimination, hatred or violence against a group of persons on grounds of their origin or their membership or non-membership of a particular ethnic group or race. In an order of 7 March 1997 the applicant was committed for trial before the Paris *tribunal de grande instance*.

On 27 February 1998, basing its decision on sections 23, 24(6) and 24(7), 29(1), 32(2), 42 et seq., the court acquitted the applicant of incitement to racial discrimination, hatred or violence, but convicted him of publicly defaming a group of persons, namely the Jewish community. The applicant was sentenced to a fine of FRF 20,000 and the court awarded the civil parties one franc in damages.

The court acquitted the applicant of the first offence on the grounds that although "in both passages referred to in the charge sheet the author singled out ... the Jewish community on account of its allegedly excessive influence on the media and its power to "manipulate" public opinion", "in order for the offence of incitement under ... in section 24(6) of the Press Act to be made out, it was necessary for the impugned text, both in terms of its significance and its impact, to incite the public to discrimination, hatred and violence". The court concluded that there was nothing in the passages that "incited or even encouraged readers to adopt the behaviour or sentiments punishable under the Act".

However, the court convicted the applicant of public defamation for using the term "Shoah business" in his book on the grounds that

> "In associating the term "business" with the word "Shoah" (which means "catastrophe") by which Jews refer to the genocide inflicted on them during the Second World War, and in expressing doubts as to whether it actually occurred, the defendant suggests, in these passages, that the Jews deceitfully fabricated evidence of the reality and extent of the genocide for financial gain.
>
> That allegation undeniably infringes the honour and reputation of the entire Jewish community."

The applicant, the public prosecutor and four civil-party associations appealed against the judgment of the Paris *tribunal de grande instance*.

In a judgment of 16 December 1998 the Paris Court of Appeal set aside the applicant's acquittal on the charge of incitement to racial discrimination and hatred and upheld his conviction for public defamation. The applicant was sentenced to a suspended term of three months' imprisonment and a fine of FRF 20,000.

Regarding the offence of incitement to racial discrimination and hatred, the court held:

> "... It is indeed the Jewish community that is targeted by the impugned passages and not simply the supporters of the State of Israel's policies. That community is clearly accused of constituting a minority concentrated in the areas of politics, the press, radio, television and publishing capable of collusion, exerting influence disproportionate to its numbers and manipulating public opinion in favour of the interests it defends.
>
> By giving readers the impression that they are being manipulated by a category representing 2 % of the French population that acts like a secret bandmaster, the author cannot but encourage sentiments of rejection and hatred of that fraction of society, in this case the Jewish community.
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> The impugned comments do not have to contain an incitement to hatred, violence or discrimination. It is sufficient, for the offence to be made out, for the passages to be such as to arouse those sentiments."

The applicant appealed on points of law against that judgment.

On 12 September 2000 the Court of Cassation dismissed the appeal on the following grounds:

> "In declaring the defendant guilty, on the grounds reproduced in the appeal, of the offences of publicly defaming a group of persons on grounds of their origin, their membership or non-membership of a particular ethnic group, nation, race or religion and of incitement to hatred or violence against that group of people, on account of several passages of his book *The Founding Myths of Israeli Politics*, the Court of Appeal, which did not exceed the limits of the case as referred to it, properly assessed the significance and impact of the impugned comments and found that all the elements of the offences – in terms of both the *actus reus* and the *mens rea* – had been made out."

6. Circumstances common to the five sets of proceedings

(a) The applications to join the proceedings

The applicant applied to the Paris Court of Appeal five times for the proceedings to be joined, relying on the fact that the five cases concerned the same book and were dealt with at the same hearing. In his submission, the reason for examining each case separately had been to interfere with the exercise of the rights of the defence and provide the prosecution with additional pretexts.

The court dismissed the application five times. It considered that the proceedings against the applicant, "although they concern the same author, involve two different editions of the same work; the reasons for keeping them separate is that several different sets of proceedings were brought by the public prosecutor and by the

[different] civil parties, which each referred to ... different passages or passages of different impact". However, the court did take the following measure: "on the other hand, the parties have been informed that all the court records will be appended to each case file, as has been done, moreover, for all the previous investigative measures".

The five suspended prison sentences were ordered to run concurrently. The fines (totalling FRF 170,000) were cumulative, however, as were the amounts payable to the civil-party associations (totalling FRF 220,021).

(b) Increase of sentence on appeal

In its five judgments the Paris Court of Appeal decided to impose a heavier sentence on the applicant than the one imposed by the *tribunal de grande instance* on the ground that the sentence should be determined "on the basis of the seriousness of the offence and the status of the offender". The court found that the offences with which the applicant had been charged were particularly serious in that they amounted "in reality to deconstructing the values on which the fight against racism and particularly anti-Semitism are based", and that "the author twisted his comments in such a way as to discredit the Jewish community as a whole, arouse hostility towards it by associating himself with revisionist theories ... and undermine not only the values of the community in question but the universal values of our civilisation."

As regards the status of the author, the court took account, in determining sentence, of the applicant's position as a recognised academic in France and abroad, of his responsibility as a former lecturer and politician and of his avowed intention to wield international influence, particularly in the Middle East.

...

B. Relevant domestic law

1. Press Freedom Act of 29 July 1881

(a) Sections 23, 24, 24 *bis*, 29 and 32

Section 23

"Where a crime or major offence is committed, anyone who, by uttering speeches, shouts or threats in a public place or meeting, or by means of a written or printed matter, drawing, engraving, painting, emblem, image, or any other written, spoken or pictorial item sold or distributed, offered for sale or exhibited in a public place or meeting, or by means of a placard or poster on public display, has directly and successfully incited another or others to commit the said crime or major offence shall be punished as an accomplice thereto." This provision shall also apply where the incitement is followed only by an attempt to commit a crime, as defined in Article 2 of the Criminal Code."

Section 24

Anyone who, by one of the means set forth in the preceding section, has directly but unsuccessfully incited another to commit one of the following offences shall be liable to a prison sentence of five years and a fine of FRF 300,000:

1° intentional homicide, intentional bodily harm or sexual assault as defined in Book II of the Criminal Code;

2° theft, extortion or wilful destruction, damage or vandalism constituting a danger to persons as defined in Chapter III of the Criminal Code.

T Those who, by the same means, have directly incited another to commit a crime or major offence against the fundamental interests of the nation as defined by Title I of Book IV of the Criminal Code shall be liable to the same penalties.

Anyone who, by one of the means set out in section 23, has made a public defence of the crimes referred to in section 23(1), a war crime, a crime against humanity or a crime or major offence of collaboration with the enemy shall be liable to the same penalty.

Anyone who, by the same means, has directly incited another to commit a terrorist act as defined in Title II of Chapter IV of the Criminal Code or has made a public defence of such an act shall be liable to the penalty set forth in section 24(1).

Anyone who engages in seditious shouting or chanting in a public place or assembly shall be liable to the fine prescribed for class 4 offences.

Anyone who, by one of the means set forth in section 23, incites another to discrimination, hatred or violence against a person or group of people on grounds of their origin or their membership or non-membership of a specific ethnic group, nation, race or religion shall incur a term of imprisonment of one year and a fine of FRF 300,000 or one of those penalties only.

W Where a conviction is secured for one of the offences set forth in the preceding sub-section, the court may also order

1° the offender to be stripped of the rights listed in paragraphs 2 and 3 of Article 131-26 of the Criminal Code for a maximum of five years, save where the offender's responsibility is engaged under section 42 and section 43(1) of this Act or under sub-sections 1-3 of section 93(3) of the Audiovisual Communication Act of 29 July 1982 (no. 82-652);

2° the decision to be posted up or displayed pursuant to Article 131-35 of the Criminal Code."

Section 24 *bis* (created by Law no. 90-615 of 13 July 1990)

" "Anyone who denies the existence of one or more crimes against humanity as defined in Article 6 of the Statute of the International Military Tribunal annexed to the London agreement of 8 August 1945 which have been committed either by the members of an organisation declared criminal under Article 9 of the Statute or by a person found guilty of such crimes by a French or international court shall be liable to the penalties set forth in section 24(6)".

The court may also order

1° the decision to be posted up or displayed pursuant to Article 131-35 of the Criminal Code."

Section 29

""It shall be defamatory to make any statement or allegation of a fact that damages the honour or reputation of the person or body of whom the fact is alleged. The direct publication or reproduction of such a statement or allegation shall be an offence, even if expressed in tentative terms or if made about a person or body not expressly named but identifiable by the terms of the impugned speeches, shouts, threats, written or printed matter, placards or posters. It shall be an insult to use any abusive or contemptuous language or invective not containing an allegation of fact."

Section 32

"Defamation of an individual by one of the means set forth in section 23 shall be punishable by a fine of FRF 80,000. Defamation by the same means of a person or group of people on grounds of their origin or their membership or non-membership of a specific ethnic group, nation, race or religion shall be punishable by a term of imprisonment of one year and a fine of FRF 300,000 or one of those penalties only.

Where a conviction is secured for one of the offences listed in the preceding sub-section the court may also order

1° the decision to be posted up or displayed pursuant to Article 131-35 of the Criminal Code."

(b) The Court of Cassation's case-law

In a judgment of 24 October 1989 the Court of Cassation held:

"Since publication is the element by which an offence against the press legislation is made out, any reproduction in a published periodical of a text that has already been published shall, regardless of the language in which it is written, constitute a further offence; accordingly, without infringing the *non bis in idem* rule, republication shall expose the offender to criminal proceedings, irrespective of those brought following initial publication. (Bull. crim. no. 428)"

2. The Code of Criminal Procedure

(a) Joinder of proceedings

Article 387

"Where a court is required to deal with several sets of proceedings relating to connected facts it can order them to be joined of its own motion or at the request of the public prosecutor or one of the parties."

In a judgment of 24 October 1989 the Court of Cassation held:

"The *non bis in idem* rule does not apply where the acts giving rise to the first set of proceedings are not legally or factually identical to the facts relating to the second set of proceedings. (Bull. crim. no. 211*)"*

...

3. The Criminal Code

Article 5

"In the event of conviction for several serious offences or less serious offences, only the heaviest penalty available for one of the individual offences shall be imposed".

That provision was repealed on 1 March 1994 and replaced by the following provisions:

Article 132-2

"There is aggregation of offences where a further offence is committed before the offender is finally convicted of a previous offence."

Article 132-4

"Where, in separate proceedings, the defendant has been convicted of several offences the penalties shall be served consecutively up to the statutory limit for the most serious offence. However, sentences of the same type may be ordered to be served concurrently, in full or in part, either by the last court to deal with the case or in the conditions set out in the Code of Criminal Procedure."

...

COMPLAINTS

1. Relying on Article 6 § 1, the applicant submitted that his right to a fair hearing by an impartial tribunal had been breached. He contended that the courts had systematically dismissed his defence submissions because the conditions in which the proceedings had been conducted had unfairly

placed him at a disadvantage when defending his case. The applicant sought to stress that the proceedings had been reported by the media in a tense and hostile environment. He submitted that he had been the subject of a smear campaign and trial by the press that had set out to falsify, distort and discredit the contents of his book and present him as a revisionist. ...

2. The applicant complained, under Article 6 § 1 and Article 4 of Protocol No. 7, of a breach of the *non bis in idem* rule on account of the French authorities' refusal to join the five sets of proceedings. In his submission, the decision to deal with the cases separately despite the fact that they concerned one individual alone and one book was an artificial exercise that had been undertaken in order to secure multiple convictions. According to the applicant, the simultaneity of the proceedings and convictions, three of which had been secured on the basis of the same criminal classification, aggravated the breach in question. By misusing their power of exclusive jurisdiction, the French courts had thus, he argued, infringed his right to a fair and equitable trial.

...

5. Relying on the Declaration of the Rights of Man, the French Constitution and the European Convention on Human Rights, the applicant complained of section 24 *bis* of the Act of 29 July 1881 (inserted by the Act of 13 July 1990 (known as the *loi Gayssot*)), on which the first three sets of proceedings had been based. ...

6.a. The applicant complained that the French courts had misunderstood the thrust of his book. He submitted that he had never denied the Nazi crimes against the Jews in his book or claimed that they had not amounted to crimes against humanity. In his submission, the book was part of a study he had intended to make of the three major monotheist religions: after examining Roman Catholic and Islamic fundamentalism, he had intended to extend his study to political Zionism, which he considered to be a form of fundamentalism. Without claiming to be a **historian**, he submitted that he had intended to write a political work challenging Zionism and criticising the State of Israel's colonialist policy, but not the Jewish faith or Judaism. Since, in his submission, his book had centred on a political critique of Zionism devoid of any racist or anti-Semitic thinking, he could not be regarded as a revisionist and should have fully benefited from the freedoms of opinion and expression. He relied on Articles 9 and 10 of the Convention. That line of argument underscored the applicant's entire reasoning.

b. The applicant complained of the Court of Appeal's assessment of the historical references contained in section 24 *bis* of the Act of 29 July 1881, namely Article 6 of the Statute of the International Military Tribunal annexed to the London agreement of 8 August 1945 defining crimes against humanity. In his submission, the Court of Appeal should have confined its examination to the contents of Article 6 rather than extend it to assessing the impugned passages in the light of other provisions, namely the Criminal Code and an extract from the judgment of the Nuremberg Tribunal on the persecution of the Jews and giving details of the means used to attain the “final solution”. The applicant disputed that interpretation of history, which, he alleged, the Court of Appeal had sought to impose by making it an offence to express any alternative opinion, including his. Relying on Articles 9 and 10 of the Convention, he submitted that he had thus been prevented from expressing his opinions freely.

7. The applicant submitted further, under Articles 9 and 10 of the Convention, that the constituent elements of the offence of denying crimes against humanity had not been made out:

a. regarding the trivialisation of the facts, the applicant submitted that he was not the only writer to have drawn comparisons between the persecution of the Jews and that of other peoples; he claimed that, far from trivialising racist or anti-Semitic acts, he had intended to assert the right of all peoples, including non-Jews, not to be persecuted and to be treated equally, and to demystify Zionism, a concept that – he alleged – was used by Israel to justify the persecution of the Palestinians; in his submission, he had never denied Hitler's crimes against the Jews and he referred to a number of passages of his book as examples;

b. regarding the use of certain expressions, he submitted that the Court of Appeal had arbitrarily dismissed the submissions relating to the origin of the term "Shoah business", while convicting him for having used it. He had not, he alleged, been the one who had "invented" the expression or been the only one to use it; he also submitted that the Court of Appeal had interpreted the expression "fictional picture strips" – used to refer to the films about the Shoah – out of context, whereas the only films he had meant to refer to had been Zionist propaganda films, which was a specific category;

c. as regards discrediting institutions, the applicant claimed that he had merely undertaken a critical analysis of the London agreement, the Statute of the International Military Tribunal and the trial of Auschwitz; with the benefit of historical hindsight, which had enabled him to grasp the facts with greater objectivity, he had, he alleged, without any revisionist intentions, intended to counter the use of propaganda to limit historical memory to one category of victims, which he called the "apartheid of the dead"; he considered that the Court of Appeal had in fact propounded and sought to impose its own opinions, which conflicted with the book and failed to take account of its real purpose;

d. regarding the questioning of the nature of the final solution, the applicant argued that, notwithstanding the judgment of the Nuremberg Tribunal, the exact meaning of the term "final solution" and the existence of a decision to implement it would always be a subject of debate among historians; he therefore considered that he, in turn, had the right to express his opinion freely on the subject and argued that the Court of Appeal, by taking as its sole reference criterion in convicting him "what was an opinion of the Nuremberg judges" had infringed "the principle of justice and not been impartial in their examination of the problem raised"; he also submitted that the Court of Appeal had unfairly distorted the passages of the book to which it had referred in its judgment;

e. regarding the questioning of the number of victims and the cause of their death, the applicant maintained that the figure of six million Jewish deaths during the Second World War had been inflated in order to portray the Nazis' crimes as the worst genocide in the history of mankind to the detriment of other victims such as Slavs, homosexuals and gypsies; he submitted that the official number of deaths at Auschwitz had been reduced by two thirds and that he had mentioned that aspect in his book with the sole aim of showing that the horror of the Nazi genocide did not lie in the figures, but in the "unjust suffering", that much "being indisputable";

f. regarding the existence of the gas chambers, the applicant submitted that he had merely referred to documents which he had considered reliable (the report by the engineer Leuchter, the Cracow report, a letter from Mr Pinter). In his submission, he could not be regarded as revisionist for quoting from those documents.

8. Relying on Articles 9 and 10 of the Convention, the applicant maintained that the constituent elements of the offence of publishing racially defamatory statements had not been made out. Referring to the passages examined in the fifth set of

proceedings, the applicant maintained that the term “Shoah business”, which he had not been the first to use, had not been used in his book for the purposes of denying the genocide. The Court of Appeal had, he alleged, distorted his work and interpreted it subjectively, partially and unfairly.

9. Relying on Article 10 of the Convention, the applicant maintained that the constituent elements of the offence of incitement to racial discrimination, hatred and violence had not been made out. He submitted that the term “lobby” had been used in the passages examined in the fifth set of proceedings in order to criticise the methods used by the Zionist lobby and not to attack Judaism as such. In his opinion, the Court of Appeal had taken the passages in question out of their original context and given them a contrary interpretation to the one he had intended; it had convicted him on the basis of that interpretation and had thus breached his right to freedom of expression.

...

THE LAW

1. The applicant complained of an infringement of his right to freedom of expression as guaranteed by Article 10 of the Convention, which provides:

> “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 ...
>
> 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 the ... rights of others ...”

He submitted that the French courts had misunderstood the thrust of his work. According to him, his book did not deny that the Nazis had committed crimes against the Jews or that these were crimes against humanity, but was a political work whose main purpose had been to criticise the State of Israel's policies. He therefore considered that he could not be regarded as a revisionist and that the offences of which he had been convicted had not been made out. In his view, it followed that his criminal convictions amounted to unjustified interference with the exercise of his right to freedom of expression.

He also complained of section 24 *bis* of the Act of 29 July 1881, which had served as a basis for the first three sets of proceedings. In his submission, that provision created a censorship mechanism that wrongfully restricted freedom of expression. He relied on Article 17 of the Convention, which provides:

> “Nothing in [the] Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.”

The Court considers that the last complaint is closely linked to the preceding one about the alleged breach of the applicant's right to freedom of expression, and must therefore be assessed as part of its examination of that complaint.

The Government contested the applicant's argument. Their principal submission was that the application should be declared inadmissible under Article 17 of the Convention. At the very least, in their submission, paragraph 2 of Article 10 should be applied in the light of the obligations under Article 17.

As regards the application of Article 17, the Government relied on the Commission's case-law (in particular *Glimmerveen and another v. the Netherlands*, Commission decision of 11 October 1979, Decisions and Reports (DR) 18, p. 198, and *Pierre Marais v. France*, Commission decision of 24 June 1996, DR 86, p. 184) and on *Lehideux and Isorni* v. France, judgment of 23 September 1998, *Reports of Judgments and Decisions* 1998-VII, §§ 47 and 53). The Government pointed out that where the right to freedom of expression was relied on by applicants to justify the publication of texts that infringed the very spirit of the Convention and the essential values of democracy, the Commission had always had recourse to Article 17 of the Convention, either directly or indirectly, in rejecting their arguments and declaring their applications inadmissible. The Court had subsequently confirmed that approach.

In the instant case the Government submitted that the Court could follow the Commission's reasoning in the aforementioned *Glimmerveen* case and upheld by the Court in its above-mentioned *Lehideux and Isorni* judgment. The Court's task was thus to analyse the aim pursued, the method used and the content of the applicant's book in order to assess whether or not it denied historical facts.

According to the Government, that analysis showed, in the light of the decisions of all the French courts that had examined the case, that the proven aim of the applicant's book was indeed to deny the reality of the **Holocaust**, since the applicant had subscribed to revisionist theories. The Government accordingly requested the Court to dismiss the application as incompatible with the provisions of the Convention.

...

In the further alternative, the Government submitted that, should the Court reject the foregoing arguments, the provisions of Article 10 of the Convention had not been violated in the instant case. Even supposing that the applicant's criminal convictions did constitute “interference” with his freedom of expression, that interference had been justified under paragraph 2 of Article 10. The Government maintained that the conditions of application of that paragraph had been satisfied, while continuing to rely on the observations submitted under Article 17 of the Convention.

The interference had indeed been in accordance with the Act of 29 July 1881, as amended by the Act of 13 July 1990. It had pursued a legitimate aim, whether it be the general aim of fighting anti-Semitism or that of punishing behaviour that seriously threatened public order or damaged the reputation and honour of individuals. In Convention terms, it was “the prevention of disorder and crime” and “the protection of the reputation or rights of others” that were in issue. Lastly, having regard to the margin of appreciation afforded to the national authorities in the present case, the Government submitted that the applicant's convictions satisfied the criteria of necessity and proportionality identified by the Court's case-law. In their submission, the complaint was manifestly ill-founded

The applicant submitted that Article 17 of the Convention had been wrongfully applied to him. He maintained his claim that his book merely amounted to political criticism of Zionism and the policies implemented by Israel and that his work had been misunderstood, or even distorted by the domestic judges, who, in convicting him, had expressed their personal opinion. He asserted that the domestic courts had not read his book, let alone scrupulously examined it. He maintained that he did not in any circumstances deny the Nazis' crimes or the racist persecution of the Jews, whereas the Government had in fact – particularly in their observations – ardently defended the State of Israel. He reiterated that the Press Act of 29 July 1881, which had instituted a restriction on the freedom of expression, did not amount to a

“necessary measure” and did not satisfy a “pressing social need” under the Convention. He re-affirmed his right to the full enjoyment of freedom of expression.

...

On the merits, the Court notes at the outset that it is not for it to rule on the constituent elements of the offences under French law of denying crimes against humanity, publishing racially defamatory statements or inciting to racial hatred. It is in the first place for the national authorities, notably the courts, to interpret and apply domestic law (see, among many other authorities, the *Lehideux and Isorni* v. France judgment, cited above, § 50). The Court's task is merely to review under Article 10 the decisions they delivered pursuant to their power of appreciation. In so doing, it must satisfy itself that the national authorities based their decisions on an acceptable assessment of the relevant facts (see *Incal v. Turkey*, judgment of 9 June 1998, Reports 1998-IV, § 48).

Regarding freedom of expression, the Court reiterates that although its case-law has enshrined the overriding and essential nature of this freedom in a democratic society (see, among other authorities, *Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A no. 24, § 49, and *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103, § 41), it has also laid down the limits. The Court has held, among other things, that there is no doubt that, like any other remark directed against the Convention's underlying values, the justification of a pro-Nazi policy could not be allowed to enjoy the protection afforded under Article 10” and that there is “a category [of] clearly established historical facts – such as the **Holocaust** - whose negation or revision would be removed from the protection of Article 10 by Article 17” (see *Lehideux and Isorni*, cited above, §§ 47 and 53).

In the instant case the Court notes that, according to the Government, the application was inadmissible under Article 17 of the Convention.

(i) As regards firstly the applicant's convictions for denying crimes against humanity, the Court refers to Article 17 of the Convention, which “in so far as it concerns ... individuals is aimed at making it impossible for them to derive from the Convention a right to engage in any activity or perform any act aimed at destroying any of the rights and freedoms set forth in the Convention; ... no one may be able to take advantage of the provisions of the Convention to perform acts aimed at destroying the aforesaid rights and freedoms; ...” (see *Lawless v. Ireland,* judgment of 1 July 1961, Series A no. 3, p. 45, § 7).

The book which gave rise to the applicant's criminal convictions analyses in detail a number of historical events relating to the Second World War, such as the persecution of the Jews by the Nazi regime, the **Holocaust** and the Nuremberg Trials. Relying on numerous quotations and references, the applicant questions the reality, extent and seriousness of these historical events that are not the subject of debate between historians, but – on the contrary – are clearly established. It would appear, as the domestic courts have shown on the basis of a methodical analysis and detailed findings that, far from confining himself to political or ideological criticism of Zionism and the State of Israel's actions, or even undertaking an objective study of revisionist theories and merely calling for “a public and academic debate” on the historical event of the gas chambers, as he alleges, that the applicant does actually subscribe to those theories and in fact systematically denies the crimes against humanity perpetrated by the Nazis against the Jewish community.

There can be no doubt that denying the reality of clearly established historical facts, such as the **Holocaust**, as the applicant does in his book, does not constitute historical research akin to a quest for the truth. The aim and the result of that approach are

completely different, the real purpose being to rehabilitate the National-Socialist regime and, as a consequence, accuse the victims themselves of falsifying history. Denying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order. Such acts are incompatible with democracy and human rights because they infringe the rights of others. Its proponents indisputably have designs that fall into the category of aims prohibited by Article 17 of the Convention.

The Court considers that the main content and general tenor of the applicant's book, and thus its aim, are markedly revisionist and therefore run counter to the fundamental values of the Convention, as expressed in its Preamble, namely justice and peace. It considers that the applicant attempts to deflect Article 10 of the Convention from its real purpose by using his right to freedom of expression for ends which are contrary to the text and spirit of the Convention. Such ends, if admitted, would contribute to the destruction of the rights and freedoms guaranteed by the Convention.

Accordingly, the Court considers that, in accordance with Article 17 of the Convention, the applicant cannot rely on the provisions of Article 10 of the Convention regarding his conviction for denying crimes against humanity.

It follows that this part of the complaint is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected pursuant to Article 35 § 4.

(ii) The Court must next examine the aspects of the applicant's book which criticise the actions of the State of Israel and of the Jewish community and have, in particular, given rise to the applicant's convictions for publishing racially defamatory statements and inciting to racial hatred. The Court notes – and the Government do not deny this – that these criminal convictions may be regarded as interference by the public authorities with the exercise of freedom of expression guaranteed by Article 10 § 1 of the Convention. The parties agreed that the interference was “in accordance with the law”, namely sections 24(6) and 32(2) of the Act of 29 July 1881, as amended by the Act of 13 July 1990.

The Court considers that the interference pursued at least two of the legitimate aims provided for in the Convention: “the prevention of disorder and crime” and “the protection of the reputation and rights of others”. Contrary to the applicant's allegations that the relevant provisions of the Act of 1881 had been enacted for reasons of unlawful censorship and did not constitute necessary measures in a democratic society, the Court affirms that the provisions aim to secure the peaceful coexistence of the French population (see *Pierre Marais,* cited above).

For the same reasons as stated earlier (see paragraph i. above), and having regard to the generally revisionist tenor of the book, the Court has had serious doubts as to whether the expression of such opinions could attract the protection of the provisions of Article 10 of the Convention. Indeed, although political criticism of the State of Israel, or any other State, does indisputably fall under that provision, the Court finds that the applicant does not limit himself to such criticism, but in fact pursues a proven racist aim.

However, the Court does not consider it necessary to decide that issue in the present case, as it considers that this part of the complaint is in any event manifestly ill-founded.

Indeed, it considers that, having regard to the content of the applicant's work, the grounds on which the domestic courts convicted him of publishing racially

defamatory statements and inciting to racial hatred were relevant and sufficient, and the interference "necessary in a democratic society" within the meaning of Article 10 § 2 of the Convention.

It follows that this part of the application must be rejected as manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

2. The applicant raises several complaints of a breach of Article 6 § 1 of the Convention, taken alone and in conjunction with Article 4 of Protocol No. 7 to the Convention, the relevant provisions of which are worded as follows:

Article 6 (1)

"1. 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. ..."

Article 4 of Protocol No. 7

"1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

3. Relying on Article 6 § 1 of the Convention, the applicant complained generally that the domestic courts had been unfair. He explained that the courts had systematically rejected his defence submissions, the trial having taken place in conditions that had unfairly placed him at a disadvantage in defending his case. He challenged in particular the domestic courts' refusal to join the five sets of proceedings that had been brought against him, alleging a breach of the *non bis in idem* rule and relying on Article 6 § 1 of the Convention and Article 4 of Protocol No. 7 to the Convention.

The Government disputed that submission, arguing that the proceedings taken as a whole had not infringed the applicant's right to a fair trial within the meaning of Article 6 § 1 of the Convention. Regarding, more specifically, the refusal to join the proceedings, they submitted that as there had been five separate sets of proceedings in respect of different texts (and therefore facts) and offences, a decision to join the proceedings was an optional administrative measure that was a matter for the court's discretion alone. They noted that, in the instant case, the proceedings had been brought on different dates by different civil parties, that the complaints had been expressed differently, that both editions of the book had been concerned, that the applicant had been prosecuted for different passages of both editions, that different offences had been involved, and that joining the proceedings had not therefore been justified in the interests of the proper administration of justice. In the same vein, the Government stressed the special nature of offences against the press legislation. These were governed by the Act of 1881, which laid down specific procedural requirements. Failure to comply with those requirements rendered the proceedings irrevocably null and void. Accordingly, where cases were joined and a procedural flaw was found to have occurred, all the different sets of proceedings could potentially be set aside, which made the courts disinclined to order joinder.

The Government submitted that the refusal to join the cases had not infringed the applicant's right to a fair trial since, despite that refusal, the cases had been examined simultaneously by the same judges. They pointed out that the applicant had had an opportunity to submit his defence to both the Court of Appeal and the Court of Cassation. The applicant had not shown how the refusal by the Court of Appeal judges to order the joinder of the cases had prevented him from securing a fair trial of his case. The Government added that the prison sentences had been ordered to run

concurrently. Regarding the fact that the refusal to join the cases had resulted in five convictions being imposed on the applicant instead of one, the Government submitted that this complaint did not concern the right to a fair trial but rather the execution of sentences, which was not an area covered by the Convention.

The Government further pointed out that the effect of the Appeal Court's order for the sentences to run concurrently had been that the concurrent sentences had not exceeded the statutory maximum custodial sentence imposable for the most serious offence had the five cases been joined. As regards the fines, the Government noted that the aggregate amount of the fines imposed in the five cases was far less than the statutory maximum fine imposable for the most serious offence. Moreover, the applicant could always apply for the fines to be subsumed within the largest individual amount.

The applicant replied that it had not been shown that if one set of proceedings had been brought, which would have been logical since only one book by the same author had been at issue, the sentence would have been the same as five cumulative sentences. He added that the large number of proceedings had obliged him to incur increased costs when lodging his appeals with the Court of Cassation. In his submission, the reason for the decision to bring several sets of proceedings had been to exaggerate the risk of a threat to public order and justify stronger repressive measures in the eyes of the public.

The Court considers that the complaint about the refusal to join the proceedings is just one aspect of the general unfairness of which the applicant complains and will therefore examine the complaints of unfairness of the proceedings, which the applicants submits under Article 6 § 1 of the Convention, together with the complaint under Article 4 of Protocol No. 7 to the Convention.

The first issue to be considered therefore is the applicability of Article 4 of Protocol No. 7. The Court reiterates that, according to its case-law, "the aim of Article 4 of Protocol No. 7 is to prohibit the repetition of criminal proceedings that have been concluded by a final decision. That provision does not therefore apply before new proceedings have been opened (see *Gradinger v. Austria*, judgment of 23 October 1995, Series A no. 328-C, p. 65, § 53). In the instant case the proceedings were conducted concurrently, so it cannot be alleged that the applicant was prosecuted several times "for an offence for which he has already been finally acquitted or convicted", as required by that very provision. Furthermore, Article 4 of Protocol No. 7 does not come into play unless the same offence is punished two or more times. Such is not the case here: as has been stated above, on the subject of the decision not to join the proceedings, there were separate offences (see, *mutatis mutandis*, *Oliveira v. Switzerland*, judgment of 30 July 1998, *Reports* 1998-V). Accordingly, Article 4 of Protocol No. 7 is not applicable in the present case.

The Court will therefore examine the complaint only under Article 6 § 1 of the Convention.

Having regard to the refusal to join the five sets of proceedings, the Court reiterates that its case-law lays down the general principle of the "proper administration of justice" and that the measures taken by domestic courts, such as the refusal to join proceedings, have to be assessed according to whether they were appropriate and reasonable (see *Boddaert v. Belgium,* judgment of 12 October 1992, Series A no. 235-D, §§ 38 and 39).

The Court points out that the present case presented a number of difficulties. These arose, firstly, from the large number of civil parties, who, like the prosecution, brought separate actions on different dates in respect of different passages from both editions

of the applicant's book. Furthermore, the applicant was prosecuted for a number of distinct offences (denial of crimes against humanity, defamation, incitement to discrimination). Lastly, with regard to offences committed via the press, it was evident, as the Government pointed out, that the subject matter was of a special nature and governed by specific procedural rules.

The Court notes that the courts established a close link between the proceedings. Availing themselves of their discretionary power, and having regard to the difficulties referred to above, they decided not to join the cases, but hearings were held in the five cases on the same days in the Criminal Court, the Court of Appeal and the Court of Cassation, which contributed to minimising the effects of keeping them separate. Furthermore, all the court records and all the previous investigative measures were added to each case file.

Merely deciding not to join the proceedings did not therefore have the effect of restricting the applicant's opportunity of submitting his defence during the five sets of proceedings.

Lastly, regarding the penalties, the Court notes that the Court of Appeal decided of its own motion to order the prison sentences to run concurrently and that the total length did not exceed the statutory maximum custodial sentence imposable for the most serious offence had the five cases been joined. As regards the fines, although they were not subsumed within the largest individual amount, it should be pointed out that the aggregate amount of the fines imposed in the five cases was FRF 170,000, which was far less than the statutory maximum fine imposable for the most serious offence (FRF 300,000).

Having regard to the foregoing, the Court considers that the complexity and special nature of the offences concerned could reasonably appear to require them to be “dealt with in parallel proceedings”. It considers that the refusal to join the proceedings was motivated by considerations relating to the smooth operation of the justice system and that, in the circumstances of the case, the conduct of the authorities was consistent with the fair balance which has to be struck between the various aspects of this fundamental requirement.

Furthermore, the Court does not see any other factor by which it can be established that the applicant's right to a fair trial within the meaning of Article 6 § 1 of the Convention was infringed. Indeed, the domestic courts gave their ruling at the end of adversarial proceedings during which submissions were heard in respect of the various evidence adduced. The applicant was able to challenge the arguments submitted by the prosecution and submit all the observations and arguments that he deemed necessary. The courts also appear to have assessed the credibility of the various evidence adduced having regard to all the circumstances of the cases and to have duly given reasons for their decisions. The mere fact that the applicant disagreed with the courts' decisions does not suffice to conclude that the proceedings were unfair.

It follows that this part of the application must be rejected as manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

...

The applicant also sought to stress that the media reporting of the domestic proceedings had taken place in a tense and hostile environment. He submitted that he had been the victim of a smear campaign and trial by the press, which had set out to present him as a revisionist.

Assuming that the applicant did exhaust domestic remedies in that respect, the Court points out that there is general recognition of the fact that the courts cannot

operate in a vacuum. Whilst the courts are the only forum for the determination of a person's guilt or innocence on a criminal charge, this does not mean that there can be no prior or contemporaneous discussion of the subject matter of trials, be it in specialised journals, in the general press or amongst the public at large (see, *mutatis mutandis*, The Sunday Times *v. the United Kingdom (no. 1)*, judgment of 26 April 1979, Series A no. 30, p. 40, § 65).

Provided that it does not overstep the bounds imposed in the interests of the proper administration of justice, reporting, including comment, on court proceedings contributes to their publicity and is thus perfectly consonant with the requirement under Article 6 § 1 of the Convention that hearings be public. Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them (ibid.). This is all the more so where a public figure is involved, such as, in the present case, a politician and writer. Such persons inevitably and knowingly lay themselves open to close scrutiny by both journalists and the public at large (see, among other authorities, *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103, p. 26, § 42). Accordingly, the limits of acceptable comment are wider as regards a politician as such than as regards a private individual (ibid.).

However, public figures are entitled to the enjoyment of the guarantees of a fair trial set out in Article 6 § 1 of the Convention, which include the right to an impartial tribunal, on the same basis as every other person. This must be borne in mind by journalists when commenting on pending criminal proceedings since the limits of permissible comment may not extend to statements which are likely to prejudice, whether intentionally or not, the chances of a person receiving a fair trial or to undermine the confidence of the public in the role of the courts in the administration of criminal justice (see *Worm v. Austria*, judgment of 29 August 1997, *Reports* 1997-V, p. 1552, § 50; *Pullicino v. Malta* (dec.), no. 45441/99, 15 June 2000; and, especially, *Papon v. France (no. 1)* (dec.), no. 64666/01, ECHR 2001-VI (extracts)).

The Court notes that the applicant was prosecuted for a book which had been controversial from the time of its publication, and that it could be expected that a fierce debate would surround the trial itself. In the Court's opinion, however, the applicant has not shown that a media campaign was waged against him of such virulence as to sway or be likely to sway the judges' opinion and the outcome of the deliberations. On the contrary, the very length of the trial, which had necessitated four days of hearings on appeal, showed that the judges had allowed each party to make their submissions and had ruled objectively after analysing the parties' arguments and the relevant passages of the book in question.

Having regard to the above considerations, it follows that this part of the complaint must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

...

For these reasons, the Court unanimously

Declares the application inadmissible.

GARAUDY v. FRANCE DECISION