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

CASE OF LEHIDEUX AND ISORNI v. FRANCE

(55/1997/839/1045)

JUDGMENT

STRASBOURG

23 September 1998

In the case of Lehideux and Isorni v. France[1],

The European Court of Human Rights, sitting, in accordance with Rule 51 of Rules of Court A[2], as a Grand Chamber composed of the following judges:

Mr R. BERNHARDT, *President*,
Mr F. GÖLCÜKLÜ,
Mr L.-E. PETTITI,
Mr C. RUSSO,
Mr A. SPIELMANN,
Mr J. DE MEYER,
Mrs E. PALM,
Mr I. FOIGHEL,
Mr R. PEKKANEN,
Mr A.N. LOIZOU,
Mr J.M. MORENILLA,
Sir John FREELAND,
Mr A.B. BAKA,
Mr G. MIFSUD BONNICI,
Mr B. REPIK,
Mr P. JAMBREK,
Mr P. KŪRIS,
Mr J. CASADEVALL,
Mr P. VAN DIJK,
Mr T. PANTIRU,
Mr V. BUTKEVYCH,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 24 April and 24 August 1998,

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

Notes by the Registrar

1. The case is numbered 55/1997/839/1045. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. Rules of Court A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol. They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 28 May 1997 and by the French Government ("the Government") on 8 August 1997, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (no. 24662/94) against the French Republic lodged with the Commission under Article 25 by two French nationals, Mr Marie-François Lehideux and Mr Jacques Isorni, on 13 May 1994.

The Commission's request referred to Articles 44 and 48 and to the declaration whereby France recognised the compulsory jurisdiction of the Court (Article 46); the Government's application referred to Article 48. The object of the request and of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 10 of the Convention.

2. The second applicant died on 8 May 1995. On 24 June 1996 the Commission decided that his widow, Mrs Yvonne Isorni, had standing to continue the proceedings on her late husband's behalf.

3. In response to the enquiry made in accordance with Rule 33 § 3 (d) of Rules of Court A, the applicants stated that they wished to take part in the proceedings and designated the lawyer who would represent them (Rule 30).

4. The Chamber to be constituted included *ex officio* Mr L.-E. Pettiti, the elected judge of French nationality (Article 43 of the Convention), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 § 4 (b)). On 3 July 1997, in the presence of the Registrar, the President of the Court, Mr R. Ryssdal, drew by lot the names of the other seven members, namely Mr R. Macdonald, Mr A. Spielmann, Mr I. Foighel, Mr A.N. Loizou, Mr J.M. Morenilla, Mr T. Pantiru and Mr V. Butkevych (Article 43 *in fine* of the Convention and Rule 21 § 5).

5. On 22 October 1997 the Chamber decided to relinquish jurisdiction forthwith in favour of a Grand Chamber (Rule 51). The Grand Chamber to be constituted included *ex officio* Mr Ryssdal, President of the Court, and Mr Bernhardt, the Vice-President, together with the other members and the four substitutes of the original Chamber, the latter being Mr B. Walsh, Mr P. Jambrek, Mr F. Gölcüklü and Mr R. Pekkanen (Rule 51 § 2 (a) and (b)). On 25 October 1997 the President, in the presence of the Registrar,

drew by lot the names of the seven additional judges needed to complete the Grand Chamber, namely Mr C. Russo, Mrs E. Palm, Sir John Freeland, Mr A.B. Baka, Mr B. Repik, Mr J. Casadevall and Mr P. van Dijk (Rule 51 § 2 (c)). Subsequently Mr J. De Meyer, Mr G. Mifsud Bonnici and Mr P. Kūris, substitute judges, replaced Mr Ryssdal and Mr Walsh, who had died, and Mr Macdonald, who was unable to take part in the further consideration of the case, and Mr Bernhardt took Mr Ryssdal's place as President of the Grand Chamber (Rules 21 § 6, 22 § 1, 24 § 1 and 51 § 6).

6. As President of the Grand Chamber, Mr Ryssdal, acting through the Registrar, had consulted the Agent of the Government, the applicants' lawyers and the Delegate of the Commission on the organisation of the proceedings (Rules 37 § 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicants' and the Government's memorials on 23 and 27 February 1998 respectively.

7. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 20 April 1998. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*
Mr M. PERRIN DE BRICHAMBAUT, Director of Legal Affairs,
Ministry of Foreign Affairs, *Agent*,
Mrs M. DUBROCARD, *magistrat*, on secondment to the Legal
Affairs Department, Ministry of Foreign Affairs,
Mr A. BUCHET, *magistrat*, Head of the Human Rights Office,
European and International Affairs Service,
Ministry of Justice,
Mrs C. ETIENNE, *magistrat*, on secondment to the
Criminal Justice and Individual Freedoms Office,
Criminal Cases and Pardons Department,
Ministry of Justice, *Counsel*;

(b) *for the Commission*
Mr B. CONFORTI, *Delegate*;

(c) *for the applicants*
Mr B. PREVOST, of the Paris Bar,
Mr J. EBSTEIN-LANGEVIN, former member of the Paris Bar, *Counsel*.

The Court heard addresses by Mr Conforti, Mr Ebstein-Langevin, Mr Prevost and Mr Perrin de Brichambaut.

8. On 23 June 1998 the Court was informed that Mr Lehideux had died on 21 June.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. Mr Lehideux, the first applicant, who was born in 1904 and died on 21 June 1998 (see paragraph 8 above), was formerly an administrator and later a director of several companies – including Renault France – and lived in Paris. From September 1940 to April 1942 he was Minister for Industrial Production in the Government of Marshal Pétain and, from 1959 to 1964, a member of the Economic and Social Committee. He was the President of the Association for the Defence of the Memory of Marshal Pétain.

The second applicant, Mr Isorni, who was born in 1911 and died on 8 May 1995 (see paragraph 2 above), was formerly a lawyer practising in Paris. As First Secretary of the Conference of Pupil Advocates of the Paris Bar, he was officially appointed to assist the President of the Bar Association in defending Marshal Pétain at his trial before the High Court of Justice. On 15 August 1945 the High Court of Justice sentenced Philippe Pétain to death and forfeiture of his civic rights for collusion with Germany with a view to furthering the designs of the enemy.

A. The publication in issue

10. On 13 July 1984 the daily newspaper *Le Monde* published a one-page advertisement bearing the title "People of France, you have short memories" in large print, beneath which appeared in small italics, "Philippe Pétain, 17 June 1941". The text ended with an invitation to readers to write to the Association for the Defence of the Memory of Marshal Pétain and the National Pétain-Verdun Association.

11. The text, which was divided into several sections each beginning with the words "People of France, you have short memories if you have forgotten…" in large capitals, recapitulated, in a series of assertions, the main stages of Philippe Pétain's life as a public figure from 1916 to 1945, presenting his actions, first as a soldier and later as French Head of State, in a positive light.

In respect of the 1940–45 period, the text contained the following passage:

> **"PEOPLE OF FRANCE, YOU HAVE SHORT MEMORIES**
>
> **– IF YOU HAVE FORGOTTEN...**
>
> – That in 1940 the civil and military authorities had led France to disaster. Those responsible begged him to come to its assistance. By his call to the nation of 17 June 1940 *he secured an armistice* and prevented the enemy from camping on the shores of

the Mediterranean, *thereby saving the Allies*. Power was then legally conferred on him by the Parliamentary Assemblies, in which the Popular Front had a majority. The grateful French people rightly saw him as their saviour. There were 'forty million Pétainists' (Henri Amouroux).

How many no longer remember this and how many have disavowed it?

– That in the thick of difficulties which no French Head of State had ever known, Nazi atrocities and persecutions, he protected them against German omnipotence and barbarism, thus ensuring that two million prisoners of war were saved.

– That he provided daily bread, re-established social justice, defended private schools and protected a pillaged economy.

– That, through his supremely skilful policy, he managed to send a personal representative to London on the very same day that he went to Montoire, thereby allowing France, in defeat, to maintain its position between the contradictory demands of the Germans and the Allies and, through his secret agreements with America, to prepare and contribute to its liberation, for which he had formed the army of Africa.

– That he preserved for France virtually every part of what people then still dared to call the French Empire.

– That he was threatened by Hitler and Ribbentrop for resisting their will, and that on 20 August 1944 German troops carried him off to Germany.

PEOPLE OF FRANCE, YOU HAVE SHORT MEMORIES

– IF YOU HAVE FORGOTTEN...

– That, while he was a prisoner of the enemy, Philippe Pétain was prosecuted on the orders of Charles de Gaulle for betraying his country, whereas he had done all he could to save it.

– IF YOU HAVE FORGOTTEN...

– That, having escaped from Germany, he returned to France, however great the personal risk to himself, to defend himself against that monstrous accusation and to try to protect, by his presence, those who had obeyed his orders.

PEOPLE OF FRANCE, YOU HAVE SHORT MEMORIES

– IF YOU HAVE FORGOTTEN...

– That the prosecution, with the collusion of persons in the highest authority, used a forgery, as in the Dreyfus case, to secure his conviction and that at ninety years of age he was condemned, in haste, to death..."

B. The criminal proceedings against the applicants

1. The complaint which led to the prosecution

12. On 10 October 1984 the National Association of Former Members of the Resistance filed a criminal complaint, together with an application to join the proceedings as a civil party, against a Mr L., the publication manager of *Le Monde*, for publicly defending the crimes of collaboration with the enemy, and against Mr Lehideux as President of the Association for the Defence of the Memory of Marshal Pétain, Mr Isorni as the author of the text complained of and a Mr M., as President of the National Pétain-Verdun Association, for aiding and abetting a public defence of the crimes of collaboration with the enemy.

The civil party argued that the text was an apologia which contravened the criminal law since it tended to justify the policy of Marshal Pétain, who had been found guilty by the High Court of Justice on 15 August 1945 (see paragraph 9 above).

13. The applicants denied that their advertisement constituted a public defence of the crimes of collaboration with the enemy, but acknowledged that the spirit of the text was consistent with their aim of having the judgment of the High Court of Justice overturned and rehabilitating Marshal Pétain.

14. On 29 May 1985 the public prosecutor filed his final submissions recommending that the charges be dropped on the ground that the offence had not been made out.

He considered that "the political and historical light" in which the applicants had portrayed Philippe Pétain's policy during the period 1940 to 1944 was "radically different from the approach adopted by the High Court of Justice": "far from glorifying the policy of collaboration, the defendants ... [gave] credit to Marshal Pétain – the fact that their historical perception [might] appear incorrect, misguided or partisan being of little consequence – for his endeavours and actions to protect France and its people and his contribution to the country's liberation...". He added that, although their aim had been to enhance Philippe Pétain's image and praise his conduct during the Second World War, this positive assessment could be construed as a public defence of his actions "only by arbitrarily separating the image thus embellished from its supporting text and its link with the purely extrinsic information which, for the most part, was contained in the documents on the High Court's file". He concluded that "it might appear strange to commit for trial before the Criminal Court the authors and producers of a text which glorifies an individual, not for the crimes of which he was convicted, but for the beneficial actions which he is deemed to have performed for the good of France, its people and, secretly, the Allies".

15. The investigating judge did not follow the public prosecutor's submissions. In an order of 4 June 1985, he committed Mr L., the applicants and Mr M. for trial before the Criminal Court on charges, against the first defendant as principal and the others as accomplices, of making a public defence of the crimes of collaboration with the enemy, defined in section 24(3) of the Freedom of the Press Act of 29 July 1881.

The investigating judge observed: "a public defence means a speech or text which tends to defend or vindicate a doctrine or an action". He noted that the applicants had presented Marshal Pétain's policy during the period 1940 to 1944 in a favourable light, crediting him with endeavours and actions to protect France and its people, whereas the same events had been the subject of lengthy, detailed reasoning in the judgment of the High Court of Justice convicting Marshal Pétain. He therefore considered that the part of the published text referring to the 1940–45 period incorporated, developed and glorified the grounds of defence submitted by Pétain at his trial before the High Court of Justice and therefore amounted to a "justification of the actions and policies of Marshal Pétain, convicted under Articles 75 and 87 of the Criminal Code" then in force.

2. The Paris Criminal Court's judgment of 27 June 1986

16. On 27 June 1986 the Paris Criminal Court, the proceedings before which had been joined by the Resistance Action Committee and the National Federation of Deported and Interned Members of the Resistance and Patriots, as civil parties, acquitted the defendants and ruled that it lacked jurisdiction to deal with the civil parties' application.

The court stated that its task was "not to take sides in the historical controversy which, for more than forty years, has pitted the Resistance associations against Philippe Pétain's supporters", but to determine whether the offence had been made out in the instant case. In that connection, the court specified that, "according to the civil parties' and the public prosecutor's own submissions, the defendants [were] being prosecuted for their opinions..." and that "no restrictions [could] be imposed on freedom of expression other than those derived from statute, strictly interpreted...".

The court held that only the part of the text referring to the 1940–45 period could be construed as a public defence of the crimes of collaboration with the enemy. It noted that this part of the text was clearly a eulogy of Philippe Pétain, an appeal in his defence designed to create a shift in public opinion favourable to the reopening of his case. It considered, however, that the offence had not been made out, for the following reasons: the text contained "no attempt to justify collaboration with Nazi Germany", but stated that Marshal Pétain's aim had been to "facilitate the Allies' victory";

Marshal Pétain's collaboration with Nazi Germany was neither acknowledged nor presented in a favourable light; the fact that the judgment of the High Court of Justice constituted *res judicata* did not in any way prevent the defenders of Marshal Pétain's memory from criticising it; the text was part of a campaign in which the second applicant had been engaged since 1945 to have the judgment of the High Court of Justice overturned, an objective which was "perfectly legal".

The court emphasised, "for the avoidance of any doubt", that its judgment "should not be deemed to favour one of the arguments put forward in the historical controversy".

17. The National Association of Former Members of the Resistance and the Resistance Action Committee appealed.

3. The Paris Court of Appeal's judgment of 8 July 1987

18. In a judgment of 8 July 1987 the Paris Court of Appeal held, firstly, that the combined effect of Article 2 § 5 of the Code of Criminal Procedure and the Freedom of the Press Act of 29 July 1881 was that the civil parties did not have standing to trigger a public prosecution and, secondly, that the prosecutor's submissions on their complaint did not satisfy the formal requirements laid down on pain of nullity in the same Act. The court therefore declared the prosecution and subsequent proceedings null and void.

19. The National Association of Former Members of the Resistance and the Resistance Action Committee appealed on points of law against the above judgment.

4. The Court of Cassation's judgment of 20 December 1988

20. In a judgment of 20 December 1988 the Court of Cassation (Criminal Division) held that the Paris Court of Appeal had erred in law. Accordingly, it quashed the judgment of 8 July 1987 in its entirety and remitted the case to the same Court of Appeal with a differently constituted bench.

5. The Paris Court of Appeal's judgment of 26 January 1990

21. On 26 January 1990 the Paris Court of Appeal declared the two civil party applications admissible, set aside the acquittals and awarded the civil parties damages of one franc. It also ordered the publication of excerpts from the judgment in *Le Monde*.

In its judgment it held that the three constituent elements of the offence of making a public defence of the crimes of collaboration had been made out.

It found, firstly, that the public element had been made out owing to the fact that the text in question had been published in *Le Monde*.

It went on to say that the text contained an "apologia" for the crimes of collaboration, and that the mental element had been made out, for the following reasons:

> "The glorification of Pétain by the authors of this manifesto is conveyed by the celebration of what they seek to portray as great deeds; thus, equal prominence is given, for example, to the victory at Verdun and the defeat at Abd-el-Krim, attributed to Pétain like the securing of the armistice in 1940 and 'his policy', described as 'supremely skilful': 'He managed to send a personal representative to London on the very same day that he went to Montoire, thereby allowing France, in defeat, to maintain its position between the contradictory demands of the Germans and the Allies and, through his secret agreements with America, to prepare and contribute to its liberation, for which he had formed the army of Africa'. Praise of the Montoire policy is thus magnified by reference to its supposed results. This is indeed an unreserved eulogy of a policy which is none other than that of collaboration. The significance of the meeting between Pétain and Hitler at Montoire on 24 October 1940 to which the authors of the advertisement refer were specified as follows in a radio broadcast by Pétain of 30 October 1940:
>
> 'It is in honour and in order to maintain French unity, a ten-centuries-old unity, within the framework of constructive action for a *new European order* that I today embark upon the path of *collaboration.*'
>
> The order referred to here was none other than the Hitlerian order based on racism defined in *Mein Kampf*, to which Pétain had just officially subscribed in advance by signing, on 3 October 1940, the so-called Act relating to aliens of Jewish race, who were later to be interned in camps set up in France for that purpose, in order to facilitate their conveyance to the Nazi concentration camps which were their intended destination.
>
> Through the absence from the text of any criticism of these artfully concealed facts or even any attempt to distance its authors from them, this manifesto does indeed, therefore, implicitly but necessarily, contain an apologia for the crimes of collaboration committed, sometimes with the active participation and sometimes with the tacit consent of the Vichy Government, that is of Pétain and his zealots, in the very 'atrocities' and 'Nazi persecutions' to which the text refers.
>
> The court is forced to the above conclusion without taking sides in the historical controversy between those who think that Pétain was really playing a double game supposedly beneficial to the French and those who place reliance only on Pétain's avowed policies and publicly announced official decisions, regardless of the excuses that he was able to put forward or that his supporters now seek to cloak him in. Accordingly, this court finds that the advertisement in issue did contain the apologetic element of the offence charged.
>
> In addition, for the offence to be made out, the mental element must be established.

> The accused, headed by Jacques Isorni, the author of the manifesto, are seeking revision of the judgment given by the High Court of Justice on 14 August 1945, which sentenced Pétain to death, forfeiture of his civic rights and confiscation of his possessions for collusion with Germany, a power at war with France, with a view to furthering the enemy's designs, this conduct constituting offences defined by and punishable under Articles 75 and 87 of the Criminal Code.
>
> The accused, with the exception of [Mr L.], all claim responsibility for the text in issue and maintain that their object in publishing it was to create a shift in public opinion which, in their view, would increase support for a decision to reopen the case.
>
> This goal, pursued unremittingly by Jacques Isorni in particular, Pétain's former defence counsel before the High Court, who seeks to have a new judicial decision substituted for the High Court's judgment, is considered by that lawyer to be a sacred duty of the defence. However legitimate on his part and the part of those who expressed their support for his action their intention to have the case reopened may have been, it did not justify the use of unlawful means to further that aim, since they knew that by putting forward an unqualified and unrestricted eulogy of the policy of collaboration they were *ipso facto* justifying the crimes committed in furtherance of that policy, and therefore cannot have acted in good faith."

6. The Court of Cassation's judgment of 16 November 1993

22. The applicants, Mr M. and Mr L. appealed on points of law against the above judgment. In their statement of the grounds of appeal they relied on Article 10 of the Convention and complained that they had been convicted for their opinions. Their aim had been to defend what they considered to be just in the action of a convicted person, without glorifying war crimes or the crimes of collaboration of which he had been convicted in the judgment which they were seeking to have overturned. They asserted that the Court of Appeal had found them guilty of making an "implicit apologia", constituted more by what they had not said than by the content of the text itself, holding that the manifesto in issue "implicitly but necessarily" contained an apologia for the crimes of collaboration and convicting them for what they had not written and the criticisms they had not made, despite the fact that they had referred in their text to Nazi atrocities and barbarism.

23. On 16 November 1993 the Criminal Division of the Court of Cassation dismissed the appeals on the following grounds:

> "Having regard [to the] findings [of the Court of Appeal] the Court of Cassation, whose task is to determine whether the text prosecuted under section 24(3) of the Act of 29 July 1881 constitutes a public defence of the crimes contemplated in that Act, is satisfied from its examination of the article in question that the passage referred to by the Court of Appeal falls within the contemplation of the aforementioned Act. In presenting as praiseworthy a person convicted of collusion with the enemy, the text glorified his crime and, in so doing, publicly defended it. The mental element of the offence can be inferred from the deliberate nature of the acts on account of which the defendants were charged.

In delivering that judgment, the Court of Appeal did not exceed its powers. Nor did it infringe the right to freedom of expression protected by Article 10, paragraph 1, of the European Convention for the Protection of Human Rights and Fundamental Freedoms, since the exercise of that right may, under paragraph 2 of that Article, be subject to certain restrictions prescribed by law, where these are necessary, as in the instant case, in the interests of national security, territorial integrity or public safety."

II. RELEVANT DOMESTIC LAW

A. The Freedom of the Press Act of 29 July 1881

24. In 1984 section 23 of the Freedom of the Press Act of 29 July 1881 read as follows:

"Where a crime or major offence is committed, anyone who, by uttering speeches, cries or threats in a public place or assembly, or by means of a written or printed text, 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 assembly, or by means of a placard or notice exhibited in a place where it can be seen by the public, has directly and successfully incited another or others to commit the said crime or major offence shall be punished as an accomplice thereto."

25. At the same time, section 24 provided that "anyone who, by one of the means set out in section 23, has made a public defence of ... the crimes of collaboration with the enemy" was to be liable to one to five years' imprisonment and a fine of from three hundred to three hundred thousand francs.

26. The French courts have gradually clarified the conditions for the application of the provisions making public defence of a crime a criminal offence.

The Court of Cassation has ruled that public defence of the crimes defined in section 24(3) of the Act of 29 July 1881 is a separate offence from unsuccessful incitement to commit one of the crimes listed in sub-sections 1 and 2 of the same section and that the constituent elements of each of those offences must not be confused (*Crim*. 11 July 1972, *Bull. crim.* no. 236).

As early as 1912 the Criminal Division of the Court of Cassation held that public defence of a criminal amounted to public defence of his crime (*Crim.* 22 August 1912, *Bull. crim.* no. 46). That case-law was upheld by a decision to the effect that the glorification of a person on the basis of facts constituting one of the crimes or major offences listed in section 24(3) of the 1881 Act constituted the crime of public defence defined in and punishable under that Act (*Crim.* 24 October 1967, *Bull. crim.* no. 263).

Publication of a text which is likely to incite any reader to judge favourably the German National Socialist Party leaders convicted of war crimes by the Nuremberg International Tribunal and constitutes an attempt to justify their crimes in part is a public defence of war crimes (*Crim.* 14 January 1971, *Bull. crim.* no. 14).

A public defence of the crime of theft is made out where an article is published which, far from merely relating a criminal theft, presents it as a praiseworthy exploit and expresses the hope that the perpetrator will escape all punishment (*Crim.* 2 November 1978, *Bull. crim.* no. 294).

The offence is made out where an apologia is presented in indirect form (Paris, 25 February 1959, D. 1959. 552).

Lastly, it is the Court of Cassation's task to determine whether a text prosecuted under section 24(3) of the Act of 29 July 1881 partakes of the nature of a public defence of crime as defined therein (*Crim.* 11 July 1972, *Bull. crim.* no. 236).

27. Law no. 90-615 of 13 July 1990 ("the *loi Gayssot*") added to the Freedom of the Press Act a section 24 *bis* making liable to one year's imprisonment and a fine of 300,000 French francs, or one of those penalties only, those who "deny 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 pursuant to Article 9 of the Statute or by a person found guilty of such crimes by a French or international court".

Section 48-2 of the Freedom of the Press Act, also inserted by the *loi Gayssot*, provides: "Any association which has been lawfully registered for at least five years at the relevant time, and whose objects, according to its articles of association, include the defence of the moral interests and honour of the French Resistance or deportees, may exercise the rights conferred on civil parties in connection with public defence of war crimes, crimes against humanity or the crimes of collaboration with the enemy and in connection with the offence defined in section 24 *bis*."

B. The Criminal Code

28. Articles 75 and 87 of the Criminal Code, applied by the High Court of Justice in its judgment of 15 August 1945 convicting Marshal Pétain, provided at that time:

Article 75

"Any French citizen who colludes with a foreign power with a view to inciting it to engage in hostilities against France, or provides it with the necessary means, either by facilitating the penetration of foreign forces into French territory, or by undermining the loyalty of the army, navy or air force, or in any other manner, shall be guilty of treason and sentenced to death."

Article 87

"Any attempt to overthrow or change the government ..., or to incite citizens or inhabitants to take up arms against the imperial authority shall be punishable by deportation to a military fortress."

PROCEEDINGS BEFORE THE COMMISSION

29. Mr Lehideux and Mr Isorni applied to the Commission on 13 May 1994, complaining of a breach of Articles 6, 10 and, in substance, 7 of the Convention. In support of their application they produced a large number of documents, which included copies of several memoranda obtained from British official records describing contacts which took place in October and December 1940 between the then British government, led by Winston Churchill, and Louis Rougier, an emissary of Philippe Pétain.

30. On 24 June 1996 the Commission declared the Article 10 complaint admissible and declared the remainder of the application (no. 24662/94) inadmissible. In its report of 8 April 1997 (Article 31), it expressed the opinion that there had been a violation of Article 10 (twenty-three votes to eight). The full text of the Commission's opinion and of the six separate opinions contained in the report is reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT

31. In their memorial the Government asked the Court to dismiss the application lodged by Mr Lehideux and Mr Isorni, firstly as being incompatible with the provisions of the Convention pursuant to Article 17, and in the alternative because there had been no violation of Article 10.

32. The applicants asked the Court to hold that there had been a breach of Article 10 and to award them just satisfaction.

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1. *Note by the Registrar*. For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* 1998), but a copy of the Commission's report is obtainable from the registry.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

33. The applicants alleged that their conviction for "public defence of war crimes or the crimes of collaboration" had breached 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 and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

34. The Government asked the Court to dismiss the application, pursuant to Article 17 of the Convention, on the ground of incompatibility with the provisions of the Convention. At the very least, in their submission, paragraph 2 of Article 10 should be applied in the light of the obligations arising from Article 17.

A. Application of Article 17

35. The Government considered that the publication in issue infringed the very spirit of the Convention and the essential values of democracy. The application of Mr Lehideux and Mr Isorni was accordingly barred by Article 17, 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 justification given by the applicants for publishing the text in issue – that they sought to overturn Philippe Pétain's conviction – was unacceptable, as were their assertions about their text being a contribution to the historical debate. The text presented certain historical events in a manifestly erroneous manner, sometimes by lending them a significance they did not have, as in the way they had presented the Montoire meeting, and sometimes by ignoring events which were essential for an understanding of the relevant period of history, namely collaboration between the Vichy regime and Nazi Germany.

36. Before the Commission the applicants submitted that Article 17 could not be invoked against them, emphasising that a distinction should be drawn between the basis for the conviction of Philippe Pétain, the former Articles 75 and 87 of the Criminal Code, and the basis of their own conviction, the Press Act. They further emphasised that their text had by no means expressed approval of Nazi barbarism and its persecutions.

37. In its decision on the admissibility of the application (see paragraph 30 above), the Commission expressed the opinion that Article 17 could not prevent the applicants from relying on Article 10. It considered that the advertisement which had given rise to the applicants' conviction did not contain any terms of racial hatred or other statements calculated to destroy or restrict the rights and freedoms guaranteed by the Convention. As the Paris Court of Appeal had recognised in its judgment of 26 January 1990, the applicants' object had been to secure revision of Philippe Pétain's trial. Furthermore, it could not be deduced from the text that the applicants' expression of their ideas constituted an "activity" within the meaning of Article 17.

38. The Court will rule on the application of Article 17 in the light of all the circumstances of the case. It will accordingly begin by considering the question of compliance with Article 10, whose requirements it will however assess in the light of Article 17 (see, *mutatis mutandis*, the United Communist Party of Turkey and Others v. Turkey judgment of 30 January 1998, *Reports of Judgments and Decisions* 1998-I, p. 18, § 32).

B. Compliance with Article 10

39. The conviction in issue incontestably amounted to "interference" with the applicants' exercise of their right to freedom of expression. Those appearing before the Court agreed that it was "prescribed by law" and pursued several of the legitimate aims set forth in Article 10 § 2, namely protection of the reputation or rights of others and the prevention of disorder or crime.

The Court agrees. It must now, therefore, determine whether the interference was "necessary in a democratic society" for the achievement of those aims.

1. Arguments of the participants

(a) The applicants

40. The applicants argued that the text in issue reflected a historical opinion and imparted information about a subject of general interest. Their conviction had been intended to impose a "politically correct" version of history.

The text was a contribution to the historical controversy about the period 1940–44. Although there might be disagreement about its content, history was a field in which differences of opinion were desirable. The text had been based on exact historical facts, not misrepresented or incomplete facts as the Government had maintained. With particular regard to the omissions criticised by the Government, the applicants explained that their text had been intended only to promote the campaign for Philippe Pétain's retrial, without setting out to raise any other issues. In any event, since they had not distorted real historical events, they could not be assimilated or compared, in their action and their writings, to negationists or revisionists. Moreover, the courts that had dealt with their case had not all been convinced of their guilt.

In short, the applicants had not contested either Nazi atrocities and barbarism or the Holocaust. They had not endorsed a policy. They had merely said: "Perhaps something else took place", something other than what people thought, namely that, on account of his incomparable past record as a military leader, the man who had been the head of the French State could only have desired victory by the Allies.

(b) The Government

41. The Government submitted that, as regards in the first place the aim of the text in issue, the applicants were trying to justify the text after the event, claiming that it had been written with a view to applying for revision of Philippe Pétain's trial. That argument was inadmissible, because Mr Lehideux and Mr Isorni had not been convicted by the Paris Court of Appeal on account of their real or supposed aim in publishing the text but on account of the text itself. The Court of Appeal had said very clearly, in its judgment of 26 January 1990, that whatever the applicants' intention might have been in publishing the text, that intention did not justify them in eulogising the policy of collaboration.

That being said, neither the constitution of the Association for the Defence of the Memory of Marshal Pétain nor the text in issue referred at any point, in one way or another, to securing a retrial for Philippe Pétain.

42. The Government further asserted that there was no doubt that if the French authorities had been able to consider that the text published by the applicants in the 13 July 1984 issue of *Le Monde* was merely a contribution to a historical debate, its authors would never have been convicted. However, the publication of a text which was supposed to be a contribution to a public debate of a historical nature obliged its authors to observe a number of constraints and rules, taking into account facts deemed to be common knowledge at the time of writing. That had not been done in the present case, because neither the presentation of the text in issue nor its content satisfied the minimum requirements of objectivity.

In the first place, the text had appeared in the form of an advertisement. The repetition of certain phrases, and even the presentation, in terms of the typeface chosen, had been used to attract the reader's attention. A more serious criticism was that the content of the text itself, as was noted in the judgment convicting the applicants, constituted an unreserved eulogy of the policy conducted by the Vichy government, led by Philippe Pétain, although that policy had been one of collaboration by the State with the National Socialist regime. The applicants had gone about composing that eulogy in two different ways. Firstly, they had attempted to justify Philippe Pétain's decisions by trying to give them a different meaning; secondly, they had purely and simply omitted to mention historical facts which were a matter of common knowledge, and were inescapable and essential for any objective account of the policy concerned.

The Montoire episode illustrated the first method used by the applicants. They had tried to justify this argument by talk of a double-game policy supposedly followed at that time by the head of the Vichy government. At the time when the text was published, this theory had been refuted by all historians who had made a special study of the period.

As to the second method, it consisted in omission. Omitting to mention the racial legislation enacted in October 1940 was a perfect example. By omitting in particular to make any reference in a publication glorifying Philippe Pétain to what was – in the words of the American historian Robert Paxton – "the blackest mark on the whole Vichy experience", namely its active anti-Semitism, the applicants had deliberately chosen to remain silent about the most scandalous acts of the Vichy government, which were recognised as real historical events and had also objectively served the interests of the National Socialist regime.

In other words, although Mr Lehideux and Mr Isorni were not negationists, in order to glorify Philippe Pétain's record during the Second World War they had been impelled to deny, by deliberately omitting to mention it, the existence of his policy of collaboration with the Third Reich. Such a denial was unacceptable to all those who had paid the price of that policy with their lives or the lives of their relatives, either because they had been marked out as its victims or because they had chosen to fight against it.

43. In order to assess the necessity of interference with the applicants' freedom of expression, the national authorities, in the Government's submission, had had a wider margin of appreciation, for two reasons. Firstly, the text in issue had been published in the form of an advertisement. Secondly, it had referred to a particularly grim page of the history of France. This had still been a very painful part of the collective memory at the time of the applicants' conviction, and remained so, given the difficulty in France of determining who was responsible, whether isolated individuals or entire institutions, for the policy of collaboration with the National Socialist regime.

Irrespective of its content, the text dealt with a very specific field – the history of a State. That field, by its very nature, was impossible to define objectively in European terms, so that there could be no uniform conception of the requirements arising from Article 10. Quite obviously, the countries of Europe could not have a uniform conception of the requirements relating to "protection of the rights of others" in connection with the effects of a publication in a national daily newspaper on the role played by Philippe Pétain during the Second World War.

At all events, the penalty eventually imposed had been purely symbolic, since Mr Lehideux and Mr Isorni had been ordered to pay all in all to each of the two associations which had joined the proceedings as civil parties the sum of one franc in damages and to pay for publication in *Le Monde* of the judgment against them.

(c) The Commission

44. The Commission considered that a number of factors took the present case outside the scope of commercial or advertising material. Apart from the fact that the prosecution had been based on the Freedom of the Press Act, the article had concerned a politician and historical events, and had invited the reader to write to two associations in order to bring about a shift in public opinion favourable to revision of Philippe Pétain's trial.

Consequently, although the text was presented in the form of a separate advertisement and contained repeated phrases calculated to arrest the reader's attention, its content and purpose did not bring it within the competitive or commercial domains, or even into that of professional advertising within the meaning of the Court's case-law (see the Barthold v. Germany judgment of 25 March 1985, Series A no. 90; the markt intern Verlag GmbH and Klaus Beermann v. Germany judgment of 20 November 1989, Series A no. 165; the Casado Coca v. Spain judgment of 24 February 1994, Series A no. 285-A; and the Jacubowski v. Germany judgment of 23 June 1994, Series A no. 291-A).

45. According to the Commission, the correctness or incorrectness of the facts presented by the applicants – which it was not in any way its task to verify – had not been the basis on which they were convicted. The Court of Appeal had criticised the applicants more for their non-exhaustive presentation of facts relating to a specific period of history than for distorting or denying established historical events.

The applicants had expressed themselves on behalf of two associations which had been legally constituted in France and whose object was, precisely, to have Marshal Pétain's case reopened; they could not therefore be denied the right to pursue this object through the press or any other medium of communication. Moreover, the applicants had not failed to mention in the text and distance themselves from "Nazi atrocities and persecutions".

Lastly, the Commission emphasised the importance, in a democratic society, of historical debate about a public figure in respect of whom, as was the case with Philippe Pétain, different opinions had been and might be expressed. For these reasons, the Commission expressed the opinion that there had been a violation of Article 10.

2. The Court's assessment

46. The Court notes that, according to the Government, the eulogy the applicants were guilty of was produced by two different methods: the authors of the publication in issue had sometimes tried to justify Philippe Pétain's decisions by endeavouring to give them a different meaning and at other times had purely and simply omitted to mention historical facts which were a matter of common knowledge, and were inescapable and essential for any objective account of the policy concerned.

47. The first technique had been used in the passage concerning Philippe Pétain's policy at Montoire. By describing this policy in the text as "supremely skilful", the applicants had lent credence to the so-called "double game" theory, even though they knew that by 1984 all historians, both French and non-French, refuted that theory.

The Court considers that it is not its task to settle this point, which is part of an ongoing debate among historians about the events in question and their interpretation. As such, it 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. In the present case, it does not appear that the applicants attempted to deny or revise what they themselves referred to in their publication as "Nazi atrocities and persecutions" or "German omnipotence and barbarism". In describing Philippe Pétain's policy as "supremely skilful", the authors of the text were rather supporting one of the conflicting theories in the debate about the role of the head of the Vichy government, the so-called "double game" theory.

48. Moreover, the Court notes that the applicants did not act in their personal capacities, as the only names which appeared at the foot of the text in issue were those of the Association for the Defence of the Memory of Marshal Pétain and the National Pétain-Verdun Association, to which readers were invited to write. Since these associations were legally constituted and sought to promote the rehabilitation of Philippe Pétain, it was scarcely surprising to find them supporting, in a publication which they had paid for, one of the rival historical theories, the one which was most favourable to the man whose memory they sought to defend. Besides, readers were given a clear indication of how matters stood by the inclusion of the associations' names at the foot of the page and by the word "Advertisement" which appeared at the top of the page.

In any event, the Paris Court of Appeal noted that the applicants' aim, in publishing the text in issue, had been "to create a shift in public opinion which, in their view, would increase support for a decision to reopen the case". It went on to say: "However legitimate … their intention to have the case reopened may have been, it did not justify the use of unlawful means to further that aim…" (see paragraph 21 above).

49. The Court notes that in its judgment of 26 January 1990 the Paris Court of Appeal ruled "without taking sides in the historical controversy between those who think that Pétain was really playing a double game supposedly beneficial to the French and those who place reliance only on Pétain's avowed policies and publicly announced official decisions, regardless of the excuses that he was able to put forward or that his supporters now seek to cloak him in" (see paragraph 21 above).

In support of the conviction the Paris Court of Appeal, in reasoning later upheld by the Court of Cassation, placed rather more emphasis on the second method criticised by the Government, namely the omission of essential historical facts, which, it found, had constituted the apologia in

issue. Thus, after noting "an unreserved eulogy of [the Montoire] policy, which [was] none other than that of collaboration" the Court of Appeal held that "by putting forward an unqualified and unrestricted eulogy of the policy of collaboration [the applicants] were *ipso facto* justifying the crimes committed in furtherance of that policy". At another point in its judgment it held: "this manifesto does indeed, therefore, implicitly but necessarily, contain an apologia for the crimes of collaboration"; that apologia resulted from "the absence from the text of any criticism of these artfully concealed facts or even any attempt to distance its authors from them", the facts concerned being the support Pétain gave to "the Hitlerian order based on racism" by signing on 3 October 1940 the so-called Act relating to aliens of Jewish race (see paragraph 21 above).

50. The Court does not have to express an opinion on the constituent elements of the offence under French law of publicly defending the crimes of collaboration. Moreover, 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 Kemmache v. France (no. 3) judgment of 24 November 1994, Series A no. 296-C, p. 87, § 37). The Court's role is limited to verifying whether the interference which resulted from the applicants' conviction of that offence can be regarded as "necessary in a democratic society".

51. The adjective "necessary", within the meaning of Article 10 § 2, implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10.

In exercising its supervisory jurisdiction, the Court must look at the impugned interference in the light of the case as a whole, including the content of the remarks held against the applicants and the context in which they made them. In particular, it must determine whether the interference in issue was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it were "relevant and sufficient". In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts (see, among many other authorities, the Zana v. Turkey judgment of 25 November 1997, *Reports* 1997-VII, pp. 2547–48, § 51).

The Court must accordingly first examine the content of the remarks in issue and then determine whether it justified the applicants' conviction, having regard to the fact that the State could have used means other than a criminal penalty (see, *mutatis mutandis*, the Socialist Party and Others v. Turkey judgment of 25 May 1998, *Reports* 1998-III, p. 1256, § 44).

52. With regard, firstly, to the content of the publication, the Court notes its unilateral character. Since the text presented Philippe Pétain in an entirely favourable light and did not mention any of the offences he had been accused of, and for which he had been sentenced to death by the High Court of Justice, it could without any doubt be regarded as polemical. In that connection, however, the Court reiterates that Article 10 protects not only the substance of the ideas and information expressed but also the form in which they are conveyed (see the De Haes and Gijsels v. Belgium judgment of 24 February 1997, *Reports* 1997-I, p. 236, § 48).

The Court notes that the Paris Court of Appeal's judgment convicting the applicants was mainly based on the fact that the authors of the text had not distanced themselves from or criticised certain aspects of Philippe Pétain's conduct, and especially the fact that they had put nothing in the text about other events, particularly the signing "on 3 October 1940, [of] the so-called Act relating to aliens of Jewish race, who were later to be interned in camps set up in France for that purpose, in order to facilitate their conveyance to the Nazi concentration camps which were their intended destination". The Court must accordingly consider whether these criticisms could justify the interference complained of.

53. There is no doubt that, like any other remark directed against the Convention's underlying values (see, *mutatis mutandis*, the Jersild v. Denmark judgment of 23 September 1994, Series A no. 298, p. 25, § 35), the justification of a pro-Nazi policy could not be allowed to enjoy the protection afforded by Article 10. In the present case, however, the applicants explicitly stated their disapproval of "Nazi atrocities and persecutions" and of "German omnipotence and barbarism". Thus they were not so much praising a policy as a man, and doing so for a purpose – namely securing revision of Philippe Pétain's conviction – whose pertinence and legitimacy at least, if not the means employed to achieve it, were recognised by the Court of Appeal.

54. As to the omissions for which the authors of the text were criticised, the Court does not intend to rule on them in the abstract. These were not omissions about facts of no consequence but about events directly linked with the Holocaust. Admittedly, the authors of the text did refer to "Nazi barbarism", but without indicating that Philippe Pétain had knowingly contributed to it, particularly through his responsibility for the persecution and deportation to the death camps of tens of thousands of Jews in France. The gravity of these facts, which constitute crimes against

humanity, increases the gravity of any attempt to draw a veil over them. Although it is morally reprehensible, however, the fact that the text made no mention of them must be assessed in the light of a number of other circumstances of the case.

55. These include the fact that, as the Government observed, "this page of the history of France remains very painful in the collective memory, given the difficulties the country experienced in determining who was responsible, whether isolated individuals or entire institutions, for the policy of collaboration with Nazi Germany".

In that connection it should be pointed out, however, that it was for the prosecution, whose role it is to represent all the sensibilities which make up the general interest and to assess the rights of others, to put that case during the domestic proceedings. But the prosecuting authorities first decided not to proceed with the case against the applicants in the Criminal Court (see paragraph 14 above), then refrained from appealing against the acquittal pronounced by that court (see paragraphs 16 and 17 above) and from appealing to the Court of Cassation against the Paris Court of Appeal's judgment of 8 July 1987 (see paragraphs 18 and 19 above).

The Court further notes that the events referred to in the publication in issue had occurred more than forty years before. Even though remarks like those the applicants made are always likely to reopen the controversy and bring back memories of past sufferings, the lapse of time makes it inappropriate to deal with such remarks, forty years on, with the same severity as ten or twenty years previously. That forms part of the efforts that every country must make to debate its own history openly and dispassionately. The Court reiterates in that connection that, subject to paragraph 2 of Article 10, freedom of expression is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb; such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society" (see, among many other authorities, the Open Door and Dublin Well Woman v. Ireland judgment of 29 October 1992, Series A no. 246-A, p. 30, § 71, and the Vogt v. Germany judgment of 26 September 1995, Series A no. 323, p. 25, § 52).

56. Furthermore, the publication in issue corresponds directly to the object of the associations which produced it, the Association for the Defence of the Memory of Marshal Pétain and the National Pétain-Verdun Association. These associations are legally constituted and no proceedings have been brought against them, either before or after 1984, for pursuing their objects.

57. Lastly, the Court notes the seriousness of a criminal conviction for publicly defending the crimes of collaboration, having regard to the existence of other means of intervention and rebuttal, particularly through civil remedies.

58. In short, the Court considers the applicants' criminal conviction disproportionate and, as such, unnecessary in a democratic society. There has therefore been a breach of Article 10.

Having reached that conclusion, the Court considers that it is not appropriate to apply Article 17.

II. APPLICATION OF ARTICLE 50 OF THE CONVENTION

59. Under Article 50 of the Convention,

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage and costs and expenses

60. The applicants claimed one franc as symbolic compensation for non-pecuniary damage. In respect of the costs and expenses incurred as a result of the proceedings before the Convention institutions, they claimed 165,000 French francs (FRF), that is FRF 90,000 for lawyers' fees and FRF 75,000 for research and documentation, journeys to London, reproduction costs and postal charges, journeys to Strasbourg and "various services".

61. The Delegate of the Commission submitted that the finding of a violation of Article 10 would constitute sufficient compensation for non-pecuniary damage.

62. The Government also considered that, if the Court were to find a violation, the non-pecuniary damage would be sufficiently made good by that finding. As to costs and expenses, they left the matter to the Court's discretion.

63. The Court considers that the non-pecuniary damage suffered by the applicants is sufficiently made good by the finding of a breach of Article 10. It assesses costs and expenses, on an equitable basis, at FRF 100,000.

B. Default interest

64. According to the information available to the Court, the statutory rate of interest in France at the date of adoption of the present judgment is 3.36% per annum.

FOR THESE REASONS, THE COURT

1. *Holds* by fifteen votes to six that there has been a breach of Article 10 of the Convention;

2. *Holds* unanimously that the finding of a breach in itself constitutes sufficient just satisfaction for the non-pecuniary damage sustained by the applicants;

3. *Holds* unanimously
   (a) that the respondent State is to pay the applicants, within three months, 100,000 (one hundred thousand) French francs for costs and expenses;
   (b) that simple interest at an annual rate of 3.36% shall be payable on this sum from the expiry of the above-mentioned three months until settlement;

4. *Dismisses* unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 23 September 1998.

Signed: Rudolf BERNHARDT
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 § 2 of the Convention and Rule 53 § 2 of Rules of Court A, the following separate opinions are annexed to this judgment:
(a) concurring opinion of Mr De Meyer;
(b) concurring opinion of Mr Jambrek;
(c) joint dissenting opinion of Mr Foighel, Mr Loizou and Sir John Freeland;
(d) dissenting opinion of Mr Morenilla;
(e) dissenting opinion of Mr Casadevall.

Initialled: R. B.
Initialled: H. P.

CONCURRING OPINION OF JUDGE DE MEYER

(*Translation*)

Freedom of expression implies just as much the right to present a public figure in a favourable light as the right to present him in an unfavourable light. Similarly, it implies just as much the right to disapprove of a judicial decision concerning him as the right to approve of it.

In particular, those who wish to serve the memory of such a figure and promote his rehabilitation cannot be forbidden to express themselves freely and in public to that effect.

It is natural that those who wish to impart ideas of this kind should direct attention to the merits of the person concerned or what they consider to be his merits. They cannot be required to mention in addition his errors and faults, whether real or supposed, or some of them.

What "pressing social need" could make things different where Pétain is concerned?

That is enough for me to be able to find in this case a manifest infringement of the freedom of expression.

CONCURRING OPINION OF JUDGE JAMBREK

1. I agreed with the majority that the applicants' criminal conviction was disproportionate and, as such, unnecessary in a democratic society, and that there had therefore been a breach of their right to freedom of expression, as protected by Article 10 of the Convention. In particular, I agreed that conviction of public defence of war crimes pursued the legitimate aims of the protection of the reputation or rights of others and the prevention of disorder or crime set forth in the second paragraph of Article 10 of the Convention.

The Court assessed requirements for compliance with Article 10 in the light of Article 17, and the latter in the light of all the circumstances of the case (paragraph 38 of the judgment). Having reached the conclusion of a breach of Article 10, the Court considered that it was not appropriate to apply Article 17 (paragraph 58 of the judgment).

Article 17 may, as the Court noted, "remove the protection of Article 10" from certain expressive acts, such as, for example, any attempt to deny or revise in a publication "Nazi atrocities and persecutions" or "German omnipotence and barbarism" (paragraph 47 of the judgment) or even the Holocaust would represent.

The events in question and their interpretation in the Court's view do not belong to the category of established historical facts whose negation or revision would in itself aim at the destruction of certain rights and freedoms set forth in the Convention or at their limitation to a greater extent than is provided for in the Convention; they rather represent a part of an ongoing debate among historians.

2. In order that Article 17 may be applied, the aim of the offending actions must be to spread violence or hatred, to resort to illegal or undemocratic methods, to encourage the use of violence, to undermine the nation's democratic and pluralist political system, or to pursue objectives that are racist or likely to destroy the rights and freedoms of others (see the United Communist Party of Turkey and Others v. Turkey judgment of 30 January 1998, *Reports of Judgments and Decisions* 1998-I, p. 16, § 23).

Therefore, the requirements of Article 17 are strictly scrutinised, and rightly so.

The Court, in its case-law on Article 10, has always affirmed that freedom of expression is one of the essential foundations of democratic society and should be interpreted broadly where the actions of journalists or members of parliament or political or historical debate are concerned. Even in the case of controversial views, the principle must be respected. The best protection for democracies against the resurgence of the racist, anti-Semitic and subversive doctrines which originated in the totalitarian regimes of national-socialist or communist persuasion remains the possibility of

engaging in a free critique which reveals the real dangers and the ways to forestall them. Democracies, unlike dictatorships, can cope with the sharpest controversies and promote what should be the democratic ideal resulting from the European Convention on Human Rights.

3. On the other hand, the requirements of Article 17 also reflect concern for the defence of democratic society and its institutions.

The European Convention was drafted as a response to the experience of world-wide, and especially European, totalitarian regimes prior to and during the Second World War. One of its tasks was, according to Rolv Ryssdal, to "sound the alarm at their resurgence" (Rolv Ryssdal, "The Expanding Role of the European Court of Human Rights", in Asbjorn Eide and Jan Helgesen (eds.), *The Future of Human Rights Protection in a Changing World*, Oslo, Norwegian University Press, 1991). It could be assumed that this original aim also corresponds to the more recent dangers to the European principles of democracy and the rule of law.

The Court recognised quite early in its jurisprudence that both the historical context in which the Convention was concluded and new developments require "a just balance between the protection of the general interest of the community and the respect due to fundamental human rights, while attaching particular importance to the latter" (judgment of 23 July 1968 in the "Belgian Linguistic" case, Series A no. 6, p. 32, § 5). Ten years later it similarly held that "some compromise between the requirements for defending democratic society and individual rights is inherent in the system of the Convention", referring also to the Preamble to the Convention statement that "Fundamental Freedoms … are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which [the Contracting States] depend" (in the Klass and Others v. Germany judgment of 6 September 1978, Series A no. 28, p. 28, § 59).

It is also noteworthy that the Court within the same context gave credence to the principle of a "democracy capable of defending itself" (*wehrhafte Demokratie*). In this connection the Court took into account "Germany's experience under the Weimar Republic and during the bitter period that followed the collapse of that regime up to the adoption of the Basic Law in 1949. Germany wished to avoid a repetition of those experiences by founding its new State on the idea that it should be a 'democracy capable of defending itself'" (in the Vogt v. Germany judgment of 26 September 1995, Series A no. 323, p. 28, § 59).

4. In conclusion, while I would firmly agree that the requirements of Article 17 of the Convention should be applied with strict scrutiny, the spirit in which that Article was drafted should be respected, and its relevance upheld.

JOINT DISSENTING OPINION OF JUDGES FOIGHEL, LOIZOU AND Sir John FREELAND

1. We agree that the conviction and sentencing of the applicants in this case amounted to an interference with their right to freedom of expression as guaranteed by Article 10 of the Convention and that the restriction which this interference represented is to be regarded as having been "prescribed by law" in the sense of paragraph 2 of that Article and as having pursued a legitimate aim under that paragraph. Where we differ from the majority is in the assessment of whether the interference is to be treated as "necessary in a democratic society".

2. As to that question, it should first be noted that the text in question was published as a full-page advertisement, paid for by the applicants' associations, in the edition of *Le Monde* for 13 July 1984. The text contained a series of slogans, in capital letters and bold type (People of France, you have short memories if you have forgotten…), interspersed with short passages in laudatory terms purporting to summarise episodes in the career of Philippe Pétain. It was clearly intended to drum up support for the applicants' associations and, no doubt to that end, concluded with an invitation to readers to write to those associations. Nowhere, however, did it say anything about the reopening of the case of Philippe Pétain, which has been claimed by the applicants to have been the purpose of the advertisement. Nor can it be regarded as in any valid sense a contribution to genuine historical debate, given its wholly one-sided and promotional character.

3. Secondly, it perhaps needs to be said that it is not for the Court to decide whether the conviction of the applicants of apology for serious offences of collaboration was or was not justified as a matter of French law. That conviction proceeded from the judgment of the Paris Court of Appeal of 26 January 1990, in which the text of the advertisement was carefully analysed, and was upheld by the Court of Cassation in its judgment of 16 November 1993. The relevant question for our Court is whether the Convention test of necessity in a democratic society is satisfied in the case of this outcome in the domestic courts.

4. As is clear from the Court's case-law, the adjective "necessary", as part of the test of necessity in a democratic society, is to be understood as implying a "pressing social need" and it is in the first place for the national authorities to determine whether the interference in issue corresponds to such a need, for which they enjoy a greater or lesser margin of appreciation. In cases involving the right to freedom of expression the Court has generally been particularly restrictive in its approach to the margin of

appreciation, although it has been prepared to accept a wider margin in relation to issues likely to offend personal convictions in the religious or moral domain. That latter category, based as it is on the principle that the margin of appreciation is wider where the aim pursued cannot be objectively defined on the European scale, is in our view not to be regarded as confined to those particular issues. It may include an issue such as that in question in the present case, where the aim pursued arose out of historical circumstances peculiar to France and where the French authorities were uniquely well placed, by virtue of their direct and continuous contact with the vital forces of their country, to assess the consequences for the protection of the rights of other groups, such as the associations of former Resistance fighters and of deportees who were civil parties to the domestic proceedings, and more generally for the process of healing the wounds and divisions in French society resulting from the events of the 1940s. We would particularly underline that Article 10 § 2 of the Convention refers not only to the protection of the rights of others but also to the duties and responsibilities which accompany the exercise of the freedom of expression; and we consider it entirely justifiable – indeed, only natural – that in circumstances such as those of the present case full and sympathetic account should be taken of the extent of offensiveness of the publication to the sensitivities of groups of victims affected by it.

5. Are the French authorities, then, to be regarded as having exceeded their margin of appreciation by virtue of the facts that the legislature has (as part of a law which was primarily concerned to establish an amnesty for serious offences of collaboration) criminalised acts of apology for such offences and that the courts have determined the publication of an advertisement in the terms in question to constitute such an act and imposed the penalties which they did? It has (unsurprisingly) not been argued before the Court that the criminalisation of acts of apology for serious offences of collaboration in itself went beyond the margin of appreciation. As regards the content of the advertisement, the applicants have, in order to distance Philippe Pétain from personal responsibility for the darker side of what was done in France during the Vichy era and as part of the vindication of his actions during the period, pointed to the references in the text to "Nazi atrocities and persecutions" and its claim that he afforded protection to the French people from "German omnipotence and barbarism". Yet, as the Paris Court of Appeal observed in its judgment of 26 January 1990, the text said

nothing at all about the notorious racist, and in particular anti-Jewish, activities undertaken by the Pétain regime itself[1], beginning with the Act relating to aliens of Jewish race which was signed by him on 3 October 1940.

6. The distortion inherent in this contrasting silence about one of the most unsavoury features of the Pétain regime is capable of being understood as amounting to implicit support for what was done. Even if such a distortion is, however, insufficient, because too indirect or remote, to constitute an "activity or … act aimed at the destruction of any of the rights and freedoms set forth" in the Convention, within the meaning of its Article 17, so as to disable the applicants from relying on Article 10, the principle which underlies Article 17 is a factor which can properly be taken into account in the assessment of the exercise of the margin of appreciation and the existence of necessity. That principle is one of firm discouragement of the promotion of values hostile to those embodied in the Convention. Having regard to the conclusions reached in the judgment of the Paris Court of Appeal of 26 January 1990 as to the effect to be given to the wording of the advertisement, and having regard to the concern which the French authorities, with their particular familiarity with the historical background and current context, could legitimately have to demonstrate that racism and, in particular, anti-Semitism, are not to be condoned, we consider that the margin of appreciation should not be treated as having been exceeded and that the test of necessity in a democratic society has been satisfied in this case.

7. On the question of proportionality, we would note only that the penalty imposed by the Paris Court of Appeal was limited to the requirement of a symbolic payment of one franc to the civil parties and the ordering of publication of excerpts from that Court's judgment in *Le Monde*.

8. We would add that our conclusion on the question of necessity in a democratic society is confined to the circumstances of the present case and should of course not be understood as suggesting in any way that it is permissible to restrict genuine debate about controversial historical figures. Such debate about the role of Philippe Pétain has been, and no doubt will continue to be, engaged in vigorously in France.

9. For the reasons indicated above, we voted against the finding of a violation of Article 10 of the Convention in this case.

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1. "Undoubtedly, the ugliest side of Vichy's abortive moral revolution was its vicious racism, and in particular its own special brand of anti-Semitism. Recent research has established beyond question that, far from being a Nazi imposition, Vichy's anti-Semitism was entirely home-grown and in certain respects even exceeded German requirements" (*Twentieth Century France: Politics and Society* 1898–1991 by James F. McMillan, pp. 138–39. See also *Vichy France and the Jews* by Michael R. Marrus and Robert O. Paxton, particularly pp. 365–72).

DISSENTING OPINION OF JUDGE MORENILLA

(*Translation*)

1. I regret that I am unable to agree with the finding of a violation of Article 10 of the Convention, in the very special circumstances of the present case. In my opinion, the national courts were in a better position than our Court to rule on any criminal consequences of publication of the advertisement in question and, accordingly, to assess the necessity of ordering the applicants, for publicly defending the crimes of collaboration with the enemy (section 24 of the Freedom of the Press Act of 29 July 1881), to pay the civil parties the sum of one franc in damages and to have the judgment published at their expense. European supervision consists, as our Court has said repeatedly since its Handyside v. the United Kingdom judgment of 7 December 1976, in reviewing under Article 10 "the decisions [the national courts] delivered in the exercise of their power of appreciation" (Series A no. 24, p. 23, § 50).

2. As the President of the Commission, Mr Trechsel, observed in his dissenting opinion, referring to our *Sunday Times* v. the United Kingdom (no. 1) judgment of 26 April 1979 (Series A no. 30, p. 36, § 59), the margin of appreciation of the Contracting States is wider where the aim pursued cannot be objectively defined on a European scale. In the present case, assessment of how a country's history should be presented and of the effect of a publication on the feelings of the population in an important sector of society, with a view to determining the necessity in a democratic society of imposing a restriction like the one in issue, is a matter for the judicial authorities of that country, who are "called upon to interpret and apply the laws in force" (see the Handyside judgment previously cited, p. 22, § 48).

3. On the other hand, I agree with the rest of the opinion of the majority, in particular their view that the applicants' conviction for aiding and abetting a public defence of the crimes of collaboration with the enemy amounted to interference with their right to impart information or ideas, notwithstanding the rather symbolic nature of the penalty. I nevertheless abstain, for the reasons set out above, from making a personal assessment of the text of the advertisement, which was signed by two associations legally constituted under domestic law, or of its effect on contemporary European society, more than half a century after the historical events it referred to.

DISSENTING OPINION OF JUDGE CASADEVALL

(*Translation*)

1. With the minority, bearing in mind the presentation of the facts and the content of the text in issue, I consider that there has been no breach of Article 10 of the Convention in the present case. The interference was prescribed by domestic law, pursued a legitimate aim and was, in my opinion, necessary for the purposes of paragraph 2 of Article 10.

2. That second paragraph provides that exercise of the freedom of expression – a right which carries with it duties and responsibilities – may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law, as measures necessary for the protection of certain legally protected interests.

3. The possibility of prescribing interference, and the State's margin of appreciation, which is wider in certain fields[1], lead me to consider that the national courts were best placed to assess the facts and the social consequences of publication of the text in issue, since, as the Government emphasised in their memorial, "…those circumstances refer to past events and to France's debate with its own history". With regard to the severity which should be shown, I do not accept the idea, put forward by the majority in paragraph 55 of the judgment, that the need for severity diminishes with the passage of time ("… forty years on …").

4. Quite clearly, the text does not take the form of an article of substance, making a serious historical analysis, but of an advertisement (whose insertion in *Le Monde* was paid for) with passages in large, bold type, expressly urging readers to write to the two associations named at the foot of the page – the usual practice where advertisements are concerned.

5. It cannot be maintained that this text was likely to contribute to any debate of general interest for the French people and their history. In the recent case of Hertel v. Switzerland (judgment of 25 August 1998, *Reports* 1998-VI) the issue was different: the applicant in that case had been subjected to censorship for publishing in a specialist magazine, distributed mainly to subscribers, an article in which he had put forward a technical and scientific argument – whether this was correct or incorrect being of no consequence – relating to an environmental and public-health question.

1. "In assessing this question, the Court recalls that the domestic margin of appreciation is not identical as regards each of the aims listed in Article 10 § 2" (Worm v. Austria judgment of 29 August 1997, *Reports of Judgments and Decisions* 1997-V, p. 1551, § 49).

6. It is not for me to judge the text of the advertisement, still less to make a historical analysis of the content, for which I would not be qualified. However, the Government pointed out in their observations that it contained manifest errors, falsehoods and above all omissions which had made it possible to paint a portrait scarcely compatible with, and indeed even contrary to, the historical reality. These are facts which were considered and assessed by the French courts before they convicted the applicants.

7. In the Zana v. Turkey case (judgment of 25 November 1997, *Reports* 1997-VII) the Court analysed what the applicant had said during a press interview. It observed: "Those words could be interpreted in several ways but, at all events, they are both contradictory and ambiguous…" (see paragraph 58) and "That statement cannot, however, be looked at in isolation. It had a special significance in the circumstances of the case, as the applicant must have realised" (see paragraph 59). It concluded that the punishment imposed on the applicant could reasonably be regarded as answering a pressing social need and that the reasons adduced by the national authorities were relevant and sufficient (see paragraph 61) having regard to the margin of appreciation which national authorities had "… in such a case …" (see paragraph 62). That case concerned a public defence of an act punishable as a serious crime under national law. A similar analysis was required, in my opinion, in the present case. In any event, the applicants were ordered only to pay the civil parties the symbolic sum of one franc and to have the judgment published at their expense.

8. It should also be noted, as Mr Geus pointed out (report of the Commission, p. 2918), that there was a manifest contradiction between the content of the advertisement and the aim allegedly pursued by its authors.

9. Lastly, I share the concerns expressed by the President of the Commission, Mr Trechsel, in his dissenting opinion, regarding the very disturbing favourable conjuncture which apparently obtains at present for certain extreme-right ideas in Europe.