



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

COURT (CHAMBER)

CASE OF HAMER v. FRANCE

(Application no. 19953/92)

JUDGMENT

STRASBOURG

7 August 1996

In the case of Hamer v. France ¹,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A ², as a Chamber composed of the following judges:

Mr R. BERNHARDT, *President*,

Mr L.-E. PETTITI,

Mr A. SPIELMANN,

Mr N. VALTICOS,

Mr S.K. MARTENS,

Mr A.B. BAKA,

Mr G. MIFSUD BONNICI,

Mr J. MAKARCZYK,

Mr B. REPIK,

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

Having deliberated in private on 22 February and 27 June 1996,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 12 April 1995, within the three-month period laid down by Article 32 para. 1 and Article 47 of the Convention (art. 32-1, art. 47). It originated in an application (no. 19953/92) against the French Republic lodged with the Commission under Article 25 (art. 25) by a German national, Ms Birgit Hamer, on 10 March 1992.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby France recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by

¹ The case is numbered 34/1995/540/626. 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 A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

the respondent State of its obligations under Article 6 para. 1 of the Convention (art. 6-1).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicant stated that she wished to take part in the proceedings and designated the lawyer who would represent her (Rule 30). The German Government, having been notified by the Registrar of their right to intervene (Article 48 (b) of the Convention and Rule 33 para. 3 (b)) (art. 48-b), did not indicate any intention of so doing.

3. The Chamber to be constituted included ex officio Mr L.-E. Pettiti, the elected judge of French nationality (Article 43 of the Convention) (art. 43), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 para. 4 (b)). On 5 May 1995, 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 A. Spielmann, Mr N. Valticos, Mr S.K. Martens, Mr F. Bigi, Mr A.B. Baka, Mr J. Makarczyk and Mr B. Repik (Article 43 in fine of the Convention and Rule 21 para. 5) (art. 43). Subsequently Mr G. Mifsud Bonnici, substitute judge, replaced Mr Bigi, who had died (Rules 22 para. 1 and 24 para. 1).

4. As President of the Chamber (Rule 21 para. 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the French Government ("the Government"), the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicant's and the Government's memorials on 19 and 20 October 1995 respectively.

On 7 December 1995 the Commission produced the file on the proceedings before it, as requested by the Registrar on the President's instructions.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 20 February 1996. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr J.-F. DOBELLE, Deputy Director of Legal Affairs, Ministry of Foreign Affairs,	<i>Agent,</i>
Mrs M. DUBROCARD, magistrat, on secondment to the Legal Affairs Department, Ministry of Foreign Affairs,	
Mr G. BITTI, member of the Human Rights Office, European and International Affairs Department, Ministry of Justice,	<i>Counsel,</i>
Mrs N. BERTHÉLÉMY-Dupuis, magistrat, on secondment to the Human Rights Office, European and International Affairs Department, Ministry of Justice,	<i>Observer;</i>

(b) for the Commission

Mr H. DANELIUS,

Delegate;

(c) for the applicant

Ms S. HUBIN-Paugam, avocate,

Counsel.

The Court heard addresses by Mr Danelius, Ms Hubin-Paugam and Mr Dobelle.

AS TO THE FACTS

I. CIRCUMSTANCES OF THE CASE

6. On 17 August 1978 four yachts were moored in Palma Cove in the eastern part of the island of Cavallo, one of the Lavezzi Islands, which lie off the coast of southern Corsica. Three of these yachts - the Cocke, the Master and the Mapagia - were moored alongside each other; the fourth, the Aniram, was the property of Prince Victor-Emmanuel of Savoy, who lived in Geneva.

7. In the night of 17 to 18 August 1978, on leaving a restaurant where he had spent the evening, Prince Victor-Emmanuel noticed that a rubber dinghy belonging to him was moored, for no reason that he knew of, to the stern of the Cocke. Having armed himself with a rifle classified as a military weapon and fitted with a cartridge clip containing thirty-one cartridges, he brought his boat alongside the Cocke to try to recover his property. Confronting a passenger who had been woken by the manoeuvre, Prince Victor-Emmanuel fired twice. The Cocke's passenger, avoiding the shots, threw himself on his assailant and both men fell into the water.

8. However, one of the bullets very seriously wounded a nineteen-year-old German youth, Mr Dirk Hamer, who had been asleep on the deck of the Mapagia. Prince Victor-Emmanuel called for the emergency services and Mr Hamer was admitted to Porto-Vecchio Hospital at about 6 a.m., in a deep coma, with no measurable pulse or blood pressure, the accident having occurred about four hours before. On 19 August 1978 he was transferred to Marseilles Northern Hospital in a very alarming condition. On 30 August 1978, against the advice of the doctors at that hospital, Mr Hamer, whose parents were also doctors, was taken to Heidelberg University Hospital.

9. Intensive care was of no avail, and Mr Hamer died on 7 December 1978 without ever being able to give evidence. An autopsy carried out on 11 December 1978 showed that the bullet wound had been the cause of death.

10. Ms Birgit Hamer, a German national, is the sister of the deceased. At the time of the above events she was living with her family in Rome; she later moved to Germany.

A. The investigation proceedings (19 August 1978 -2 February 1987)

1. First period (Judge Breton)

11. On 18 August 1978 at 7 a.m. Prince Victor-Emmanuel was taken into police custody.

12. On 19 August 1978 Mr Breton, an investigating judge at the Ajaccio tribunal de grande instance, charged him with assault occasioning actual bodily harm and possessing and carrying a category I weapon; at the end of this first examination he remanded Prince Victor-Emmanuel in custody.

13. Between 20 and 29 August 1978 the investigating judge questioned the accused twice, took statements from witnesses and appointed experts to conduct a medical examination of the victim and produce a technical report on the gun. He also issued warrants authorising the police to take statements from witnesses and the victim.

14. In a letter of 28 August 1978 Prince Victor-Emmanuel admitted civil liability for the accident in which Mr Hamer had been injured on 18 August 1978. On 5 September 1978 the accused paid 500,000 French francs (FRF) to the victim's family.

15. On 6 September 1978 the Ajaccio public prosecutor filed a supplementary application requesting further investigative measures.

16. On 8 September and 12 December 1978 the investigating judge ordered experts to produce a medical and psychological report on the accused and an analysis of the bullet extracted from the victim. On 11 September, 10 November and 7 and 8 December 1978 he issued letters of request, including two international ones. In these he asked for a statement to be taken from the victim and for the bullet extracted from him to be handed over; and then, after Mr Hamer's death on 7 December 1978, he asked for an autopsy of his body to be carried out.

17. On 4 October 1978 the investigating judge again questioned the accused, who was released under judicial supervision on the following day. Further interviews took place on 12 October and 4 December 1979. On 10 January, 14 February and 1 and 11 June 1979 the investigating judge instructed experts to translate documents in German and Italian.

18. Prince Victor-Emmanuel was questioned again on 26 February 1979.

19. On 17 May and 25 June 1979 the investigating judge issued international letters of request; in the first of these he asked for a copy of an application in which Mr Hamer's family had sought to commence

civil-party proceedings and in the other he asked for witnesses to be questioned. On 20 June and 10 July 1979 he questioned witnesses.

20. On 25 June 1979, in the light of the victim's death certificate, he sent the file to the public prosecutor. On 29 June the investigating judge questioned the accused.

21. On 20 July and 12 December 1979 the investigating judge instructed experts to translate documents in German and Italian. On 26 October 1979 he ordered the appointment of new experts to produce an additional ballistic report that had been sought by the defence on 28 September 1979; on the same day he issued an international letter of request asking for a copy of the autopsy report, which had been requested by the defence.

22. On 26 November 1979 Ms Hamer, her father, her mother and her sister joined the proceedings as civil parties by applying to the investigating judge.

23. On 1 February 1980 Prince Victor-Emmanuel's lawyer asked Mr Breton to order the ballistic experts to carry out a further investigation. On 21 February 1980 the investigating judge asked the experts already instructed how the further investigation requested by the defence could be carried out. In a report of 28 February 1980 the judge noted the failure of the applicant and her family to appear as civil parties.

24. On 20 March 1980 Mr Breton questioned the victim's father, and on 15 April and 10 September 1980 he instructed experts to translate documents in Italian and English.

25. On 3 June 1980 the public prosecutor wrote to the German judicial authorities reminding them of the international letter of request of 26 October 1979.

26. On 22 September 1980 the investigating judge notified the public prosecutor of the defence's request for an additional expert opinion. On 8 November 1980 the public prosecutor filed submissions in favour of granting that request.

27. On 19 and 25 November 1980 and 21 January 1981 Mr Breton wrote to the accused's lawyer, the director of the forensic laboratory and experts who might be capable of authenticating a boat part lodged as an exhibit by the defence. On 29 January and 4 February 1981 the experts wrote back stating that they were not competent to do this.

28. On 6 March 1981 the public prosecutor filed a supplementary application. On 10 March 1981 the investigating judge charged Prince Victor-Emmanuel with fatal wounding. A report of 11 March 1981 recorded the fact that the applicant and her family had failed to appear as civil parties.

29. On 31 March 1981 the accused's lawyer filed an opinion criticising the autopsy report and requested that three new experts be appointed in order to determine the causes of Mr Hamer's death.

30. On 15 May and 2 June 1981 the investigating judge issued letters of request asking for the victim's medical file to be handed over and for witnesses to be questioned. On 12 October he made two orders refusing an additional ballistic report and a fresh expert opinion in connection with the autopsy report as sought by the defence on 1 February 1980 and 31 March 1981 respectively.

31. On 14 October 1981 the accused appealed against the above orders, which the Indictment Division of the Bastia Court of Appeal upheld on 17 December 1981.

On 18 May 1982 the Criminal Division of the Court of Cassation dismissed an appeal on points of law lodged by Prince Victor-Emmanuel.

32. On 5 April 1982 the investigating judge appointed experts to translate documents in German. He questioned a new witness on 27 September 1982. On 27 December 1982 he made an order rejecting both an application by the accused for an order that there was no case to answer and an application of 8 October 1982 for a new ballistic report.

33. On an appeal by the accused, the Indictment Division held a hearing on 24 February 1983. On 28 April 1983 it ordered that the proceedings should be recommenced because one of the judges had been replaced. In a judgment of 30 June 1983 it upheld the impugned order.

On 17 October 1983 the President of the Court of Cassation made an order in which he ruled that, as the file stood, an appeal on points of law by the applicant against the above judgment was inadmissible and directed that the proceedings should continue.

34. On 6 August 1983 the public prosecutor filed submissions requesting further investigative measures.

35. The investigating judge questioned the accused on 6 October 1983 and, at the defence's request, ordered a further medical report on 7 October 1983. On 25 and 29 November 1983 he issued letters of request asking for the accused's curriculum vitae to be established and his sister questioned.

2. Second period (Judge de Valon)

36. On 2 July 1984 the case was assigned to a new investigating judge, Mrs de Valon. In a report of 18 July 1984 the judge noted the failure of the applicant and her family to appear as civil parties.

37. The investigating judge questioned the accused on 16 August 1984. On 21 November 1984 she made an order rejecting an application by the defence for a fresh expert report. On 15 January 1985 she sent the file to the public prosecutor.

38. On 27 March, 25 June, 7 and 27 November 1985 and 22 April 1986 the investigating judge issued letters of request, including an international one, asking for witnesses to be questioned and various inquiries made. On 23 March 1986 the letter of request of 27 November 1985 was executed in

Italy and a reconstruction of the events by means of diagrams and sketches took place on the same day.

39. On 24 June 1986 the investigating judge questioned three witnesses. On 30 June 1986 she appointed an expert to translate documents relating to the execution of the international letter of request of 27 November 1985.

3. Third period (Judge Tissot)

40. On 7 January 1987 the case was assigned to a third investigating judge, Mrs Tissot. On 28 January 1987 she sent the file to the public prosecutor.

41. On 30 January 1987 the Ajaccio public prosecutor submitted his final application, in which he asked for the file to be transmitted to the Principal Public Prosecutor at the Bastia Court of Appeal.

42. On 2 February 1987 the investigating judge made an order transmitting the file to the Principal Public Prosecutor.

B. The trial proceedings (30 September 1988 - 2 July 1992)

1. Committal for trial

(a) Before the Indictment Division of the Bastia Court of Appeal

43. On 30 September 1988 the Principal Public Prosecutor at the Bastia Court of Appeal sent his counterpart at the Rome Court of Appeal a notice informing the civil parties of the date of the hearing before the Indictment Division of the Bastia Court of Appeal, set down for 30 November 1988. The accused's lawyers were also notified.

44. On 21 and 29 November 1988 respectively the defence and the civil parties requested that the hearing set down for 30 November 1988 be put back, as the accused had not received the file and the applicant and her family, who lived in Germany, had not been notified of the hearing. On 30 November 1988 the Indictment Division adjourned the case to a hearing on 25 January 1989.

45. On 23 January 1989 the civil parties informed the President of the Indictment Division that they had not been notified of the hearing on 25 January 1989, which was accordingly adjourned until 19 April 1989. On 19 April 1989 the case was adjourned to a later date on account of a general strike by the administrative services in Corsica.

46. On 28 June 1989 the Indictment Division of the Bastia Court of Appeal delivered an interlocutory judgment dismissing procedural objections raised by the defence.

47. On 11 October 1989 it indicted Prince Victor-Emmanuel on charges of fatal wounding and offences relating to offensive weapons, and committed him for trial in the Corse-du-Sud Assize Court.

(b) In the Court of Cassation

48. On 23 January 1990 the Criminal Division of the Court of Cassation upheld an appeal on points of law lodged by the accused on 9 November 1989, giving the following reasons:

"But in the light of those findings, which do not make out the deliberate intent to assault or use violence against any person, the Indictment Division could not, without contradicting itself, hold that there was sufficient evidence to prove Victor-Emmanuel of Savoy guilty of the offence defined in Article 311 para. 1 of the Criminal Code; accordingly, it gave no legal basis for its decision, which falls to be quashed."

It remitted the case to the Indictment Division of the Paris Court of Appeal.

(c) Before the Indictment Division of the Paris Court of Appeal

49. On 8 June 1990 the Indictment Division of the Paris Court of Appeal adjourned the case until 26 September 1990; in the event, the hearing set down for that date took place on 25 September 1990.

50. On 12 October 1990 the Paris Indictment Division committed Prince Victor-Emmanuel for trial at the Paris Assize Court on the same charges.

51. On 23 October and 14 November 1990 the Principal Public Prosecutor at the Paris Court of Appeal instructed experts to translate into German the judgment and the notice of service on the civil parties.

(d) In the Court of Cassation

52. On 5 February 1991 the Criminal Division of the Court of Cassation dismissed an appeal on points of law lodged by the accused against the Paris Indictment Division's judgment of 12 October 1990, on the following grounds:

"The Indictment Division deduced from those findings that the assault allegedly made by the accused on Nicolas Pende [the Cocke's passenger] was intentional and that there was a causal connection between that assault and the death of Dirk Hamer.

That being the case, the Indictment Division, which replied insufficient detail to the main arguments in the pleading filed, assessed the weight of the evidence set before it. It established that there was sufficient evidence to prove Victor-Emmanuel of Savoy guilty, if the facts were made out, of the offence defined both in the last paragraph of the former Article 309 of the Criminal Code, which was applicable at the material time, and in the first paragraph of Article 311 of that Code, as amended by the Law of 2 February 1981."

2. The trial at the Paris Assize Court

53. Between 3 June and 4 November 1991 ten experts, twenty-eight witnesses and the four members of the victim's family, as civil parties, were summoned.

54. On 18 November 1991 the Paris Assize Court sentenced Prince Victor-Emmanuel to six months' imprisonment, suspended, for unauthorised possession and carrying of a US30MI rifle, a category I military weapon, and ordered its confiscation. It also found that there were extenuating circumstances. It acquitted Prince Victor-Emmanuel of fatal wounding and unintentional homicide, ruling that he had not "by clumsiness, carelessness, inattention or negligence, unintentionally caused the death of Mr Dirk Hamer".

55. After giving judgment in the criminal proceedings, the Assize Court judges did not hold a hearing on the civil issues.

The applicant's lawyer maintains that the termination of the trial prevented her from filing the submissions she had prepared on the award of damages; she thereupon telephoned the Advocate-General, who informed her that she could not raise the issue of the accused's civil liability.

According to the Government, the fact that there was no hearing on the civil issues was due to the lack of any application to that effect, which should have been lodged with the Assize Court's registry.

3. The judgment of the Court of Cassation

56. On 2 July 1992 the Criminal Division of the Court of Cassation ruled that an appeal on points of law lodged by the civil parties, with the exception of the applicant, was inadmissible on the following grounds:

"The notice of appeal is directed at 'all the civil provisions' of the criminal judgment delivered in the proceedings against Victor-Emmanuel of Savoy. The judgment concerned does not contain any provision relating to civil matters. That being the case, and no other judgment having been given on the submissions of the civil parties, the latter, under Article 567 of the Code of Criminal Procedure, have no standing to contest the decision on the criminal proceedings and the costs payable to the State."

On 10 July 1992 the judgment was served on the civil parties and Prince Victor-Emmanuel.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The principles governing civil-party applications

57. Article 2 of the Code of Criminal Procedure ("CCP") provides:

"All those who have personally suffered from the damage directly caused by a serious offence [crime], less serious offence [délit] or petty offence [contravention]

may bring civil-party proceedings [action civile] to seek compensation for such damage.

Discontinuance of such proceedings can neither terminate nor stay the criminal proceedings, without prejudice to the cases provided for in paragraph 3 of Article 6 [CCP]."

However, in the case of petty offences, only the prosecuting authority may set in motion the criminal proceedings.

Article 6 para. 3 CCP provides:

"[Criminal proceedings] may, in addition, be discontinued by settlement where express provision is made for this possibility. They may likewise be discontinued in the event of withdrawal of the complaint where the complaint was an essential condition for the proceedings to be brought."

58. In French law the victim of an offence can bring civil-party proceedings either by intervention, that is by applying to the investigating judge, the Indictment Division or the trial court for leave to join pending criminal proceedings, or as private prosecutor, that is by directly summoning the alleged offender to appear in the trial court or by laying an information with the investigating judge together with an application to join the proceedings as a civil party, where no criminal proceedings have yet been instituted.

59. A civil-party application, which has the effect of suspending proceedings in the civil courts, may be opposed by the prosecution, by the person placed under investigation (Law no. 93-2 of 4 January 1993 reforming criminal procedure substituted the expression "placing under investigation" for "charging") or by another civil party, or the investigating judge may, of his own motion, declare it inadmissible in an order which must state reasons and which is open to appeal (Article 87 CCP). A decision by the judicial authority investigating an offence to allow an application to join the proceedings as a civil party does not in any way bind the trial court as to the admissibility of that application.

60. Intervention by a civil party may be grounded on nothing more than a concern to support the prosecution case and to secure a declaration of the accused's guilt. Accordingly, it is accepted in case-law that a civil-party application is admissible even where no claim for damages will lie. The right to seek reparation for damage is merely a possibility afforded to the victim, who is free to decide not to make use of it (Court of Cassation, Criminal Division ("Cass. crim."), 10 October 1968, Bulletin ("Bull.") no. 249; Cass. crim. 15 October 1970, Dalloz (D.) 1970).

"In modern legal analysis, derived from both statute and case-law, a distinction is drawn between the lodging of a civil-party application and civil-party proceedings, or rather, to avoid all ambiguity, an action for reparation. When dealing with the admissibility of a civil-party application and the admissibility and merits of an action for reparation, it is no longer possible, without risk of confusion, to refer to both as

civil-party proceedings, unless that term is understood in the broad sense of participation by the civil party in the criminal proceedings.

For how can it be maintained that the injured party brings any kind of 'civil proceedings' when he merely calls, as he is expressly authorised to do, for the offender to be punished or, if not punished, at least declared guilty. He may later, perhaps, in other courts, take advantage of the criminal judgment, but in the criminal court he has made no claim which can be characterised as civil.

Lastly, from the theoretical point of view, the above analysis renders obsolete the controversy about the nature of civil-party proceedings, which some commentators have held to be two-fold ... while others say their nature is unmixed ... The truth is that a civil-party application is vindictive in character, whereas the purpose of an action for reparation is to obtain compensation." (Extraits des Juris-Classeurs de procédure pénale 1990, vol. 10, paras. 25-27)

61. Lodging a civil-party application gives the victim the status of party to the criminal proceedings. He is informed about the investigative measures taken and has access to the file under the same conditions as the person under investigation. He may appeal against orders of the investigating judge that are adverse to him and against judicial decisions concerning his civil interests.

B. The Assize Court's judgment on civil-party proceedings

62. The CCP contains the following relevant provisions:

Article 371

"Once the Assize Court has given judgment in the criminal proceedings, it shall rule, in the jury's absence, on the claims for damages lodged either by a civil party against the accused or by an acquitted defendant against the civil party, after the parties and the prosecution have been heard.

The court may delegate one of its members to hear the parties, inspect the file and submit his report at a hearing, when the parties may still submit observations, after which the prosecution shall be heard."

Article 372

"Where the trial ends in acquittal or discharge, the civil party may seek compensation for damage resulting from the defendant's fault, as made out by the acts which gave rise to the prosecution."

The Assize Court has jurisdiction under Article 372 CCP to rule on a claim for damages lodged by a civil party against a defendant who has been acquitted on both the main charge of fatal wounding and the alternative charge of causing death by negligence. The not-guilty verdict of the court and the jury, for which no reasons are given, does not exclude either the existence of the acts which gave rise to the prosecution or the possibility

that the victim's death may have been caused by a non-intentional tort (Cass. crim. 3 December 1959, Bull. 531).

The Assize Court must, after acquitting the accused, respond to any submissions made by the civil party, where the latter maintains his claim for damages, by ascertaining whether, on account of the acts which gave rise to the prosecution, divested of all their criminal attributes, the accused has committed a fault distinct from the alleged criminal offence for which he has been tried (Cass. crim. 14 January 1981, Bull. 24).

The Assize Court may, after acquitting the accused, order him to pay damages, provided that its decision is based on the acts which have given rise to the prosecution, that it is consistent with the not-guilty verdict and that it specifies the fault on which its order is grounded, which must be distinct from the serious criminal offence of which he has been finally acquitted (Cass. crim. 26 February 1969, Bull. 97; Cass. crim. 11 March 1987, Bull. 121).

A not-guilty verdict and acquittal do not prevent the Assize Court from considering whether the same act, divested of all the circumstances which gave it a criminal character, does not at least constitute prejudice such as to engage the accused's civil liability if the court finds that he has committed a fault (Cass. crim. 15 December 1982, Bull. 293; Cass. crim. 7 October 1987, Bull. 341).

When dealing with an application by the civil party after the accused's acquittal, the Assize Court is under no obligation to ascertain whether the latter has committed a fault distinct from the serious criminal offence of which he has been finally acquitted if the civil party has not asked it to do so (Cass. crim. 13 April 1988, Bull. 157).

63. The Court of Cassation has held that submissions quantifying claims for damages filed after judgment has been given in criminal proceedings are admissible if the civil party has joined those proceedings before judgment (Cass. crim. 19 October 1950, Bull. 50 no. 238; Cass. crim. 24 October 1952, Bull. 52 no. 232).

C. The basis of civil proceedings

64. The Civil Code contains the following relevant provisions:

Article 1382

"Any act committed by a person that causes damages to another shall render the person through whose fault the damage was caused liable to make reparation for it."

Article 1384

"Liability is incurred not only for the damage caused by one's own act but also for that caused by persons for whom one is responsible or by things one has in one's keeping."

PROCEEDINGS BEFORE THE COMMISSION

65. Ms Hamer applied to the Commission on 10 March 1992. She alleged that her case had not been heard within a reasonable time as required by Article 6 para. 1 of the Convention (art. 6-1).

66. The Commission declared the application (no. 19953/92) admissible on 9 March 1994. In its report of 21 February 1995 (Article 31) (art. 31), it expressed the opinion by thirteen votes to ten that there had been a violation of Article 6 para. 1 (art. 6-1). The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment³.

FINAL SUBMISSIONS TO THE COURT BY THE GOVERNMENT

67. In their memorial the Government asked the Court to

"hold that the application lodged by Ms Hamer is incompatible ratione materiae with the provisions of the Convention, or in the alternative that it is ill-founded"

AS TO THE LAW**I. ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 (art. 6-1) OF THE CONVENTION**

68. Ms Hamer complained of the length of criminal proceedings brought against Prince Victor-Emmanuel of Savoy which she had joined as a civil party, considering it contrary to Article 6 para. 1 of the Convention (art. 6-1), which provides:

³ For practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions 1996-III), but a copy of the Commission's report is obtainable from the registry.

"In the determination of his civil rights and obligations ...,everyone is entitled to a ... hearing within a reasonable timeby [a] ... tribunal ..."

69. Before determining, if need be, the question of compliance with Article 6 para. 1 (art. 6-1), the Court must decide whether that provision (art. 6-1) is applicable.

70. Ms Hamer maintained that her civil-party application implied not only her participation in the criminal proceedings but also a claim for civil reparation for her brother's death. In spite of the payment of a sum of money by Prince Victor-Emmanuel to her family, she had always intended to claim damages. The accused's acquittal and the fact that the Assize Court held no hearing on the civil issues had prevented her from lodging a claim for damages; in addition, it was no longer open to her to bring an action for damages in a civil court. The outcome of the criminal proceedings had therefore been decisive for her right to compensation for pecuniary and non-pecuniary damage.

71. According to the Government, the object of Ms Hamer's civil-party application had never been to settle a dispute over a civil right. The lack of any explicit compensation claim by the applicant, when it was open to her to lodge one even after the accused's acquittal, either with the Assize Court or with the civil courts, showed that the sole object of her civil-party application had been to associate herself with the criminal prosecution and secure Prince Victor-Emmanuel's conviction. That was not a civil right and accordingly did not come within the scope of Article 6 para. 1 (art. 6-1).

72. The Commission considered irrelevant the fact that Ms Hamer had not expressly asserted a right to compensation, given that under French law her civil-party application evidenced her intention to seek compensation for the damage caused by a criminal offence. Moreover, although the accused's acquittal by the Assize Court had prevented the applicant from obtaining damages, that in no way implied that her initial application was not "civil" in character.

73. The Court reiterates that, according to the principles laid down in its case-law (see, as the most recent authority, the *Acquaviva v. France* judgment of 21 November 1995, Series A no. 333-A, p. 14, para. 46), it must ascertain whether there was a dispute ("contestatation") over a "civil right" which can be said, at least on arguable grounds, to be recognised under domestic law. The dispute must be genuine and serious; it may relate not only to the existence of a right but also to its scope and the manner of its exercise; and, finally, the outcome of the proceedings must be directly decisive for the right in question.

74. The Court notes that French law draws a distinction between a civil-party application only and civil-party proceedings in which it is also sought to obtain compensation for the damage sustained as a result of an offence (see paragraph 60 above). Accordingly, the admissibility of a civil-party application does not absolve the person who makes it - if he

wishes to assert his right to financial reparation - from the obligation to lodge a claim for that purpose with a court which will consider the merits of his civil action.

75. At no stage in the proceedings did Ms Hamer, who had joined them by lodging a civil-party application with the investigating judge on 26 November 1979, as had her parents and sister (see paragraph 22 above), claim damages or make known any intention of so doing. Nor did she ever object to the settlement reached between her family and Prince Victor-Emmanuel, who had acknowledged his civil liability and paid them compensation on 5 September 1978 (see paragraph 14 above). Nor did she express any reservations on that subject.

76. The applicant could have claimed damages either during the investigation proceedings or at the trial in the Assize Court on 18 November 1991. Even after the judgment acquitting Prince Victor-Emmanuel she could have filed written submissions to that effect with the registry of the Assize Court, which would then have held a hearing in its civil composition and ruled on the case (see paragraphs 62-63 above). She could also have lodged her claim for damages with the civil courts at a later date (see paragraph 64 above).

77. In that respect the present case must be distinguished from other similar cases the Court has had to deal with in which the outcome of the proceedings was decisive for the "civil right" in question. The cases of *Tomasi v. France* and *Acquaviva v. France*, in particular (judgment of 27 August 1992, Series A no. 241-A, p. 43, para. 121, and judgment cited above, pp. 14-15, para. 47), ended with judgments in which it was held that there was no case to answer, whereas in the present case the accused was committed for trial. In the *Acquaviva* case, more particularly, the finding of self-defence by the Indictment Division of the Versailles Court of Appeal deprived the civil parties of any right to sue for compensation (*ibid.*).

78. In the present case, a contrario, the outcome of the proceedings was not decisive, for the purposes of Article 6 para. 1 (art. 6-1), for the establishment of Ms Hamer's right to compensation. As the applicant never asserted that right, there was therefore no dispute ("contestation") over a "civil right".

79. Accordingly, Article 6 para. 1 (art. 6-1) was not applicable.

FOR THESE REASONS, THE COURT

Holds by six votes to three that Article 6 para. 1 of the Convention (art. 6-1) was not applicable to the proceedings complained of and was accordingly not breached.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 7 August 1996.

Rudolf BERNHARDT
President

Herbert PETZOLD
Registrar

In accordance with Article 51 para. 2 of the Convention (art. 51-2) and Rule 53 para. 2 of Rules of Court A, the following separate opinions are annexed to this judgment:

- (a) dissenting opinion of Mr Martens;
- (b) dissenting opinion of Mr Repik, joined by Mr Spielmann.

R. B.
H. P.

DISSENTING OPINION OF JUDGE MARTENS

Introduction

1. In the night of 17 to 18 August 1978 the applicant's brother, Mr Dirk Hamer, was seriously wounded by a bullet presumably fired by Prince Victor-Emmanuel of Savoy. On 7 December 1978 Mr Hamer died from his injuries.

2. On 26 November 1979 the applicant joined the criminal proceedings against the Prince which had already been instituted by the prosecuting authorities¹ on 19 August 1978. She did so by personally writing a letter to the investigating judge making a civil-party application to join those proceedings and by having a barrister make before that magistrate a declaration to the same effect.

3. Article 2 CCP provides that "all those who have personally suffered from the damage directly caused" by certain offences may bring civil-party proceedings to seek compensation for such damage. Article 85 CCP lays down that "everyone who claims to have suffered damage" from those offences may lay a complaint and submit a civil-party application to the investigating judge. However, neither the applicant's letter nor her lawyer's declaration specified in what respect or to what extent the applicant claimed to have personally suffered prejudice as a direct consequence of the offences of which the Prince had been accused. A fortiori, these documents did not contain any claim for damages whatsoever. Nevertheless, the application was evidently allowed. That necessarily implies that in the investigating judge's opinion the mere fact that the applicant's brother had died as a result of injuries presumably inflicted by the accused enabled him to accept as possible the existence of damage personally suffered by the applicant and of a direct causal link between that damage and the offences of which the Prince had been accused². Apparently, the prosecuting authority and the accused were of the same opinion for at no stage of the criminal proceedings did they oppose the applicant's participation as a civil party in those proceedings.

¹ It may be of some importance to stress that it was not the applicant who initiated the criminal proceedings: by making her civil-party application she joined criminal proceedings which had already been instituted long before on the initiative of the prosecuting authorities. The pertinence thereof is that there can be little doubt that part of the problems raised by the notion of civil action within the meaning of Article 2 of the Code of Criminal Procedure (CCP - see paragraph 12 below) stems from the peculiar feature of French law that (under Article 1 para. 2 CCP) criminal proceedings may be set in motion on the initiative of the victim (see on this point, inter alia: *Traité de droit civil*, Geneviève Viney, *Introduction à la responsabilité*, 2nd ed., 1995, paras. 77 et seq.).

² See *Crim.* 9 February 1961, *D.* 1961.306; 17 October 1972, *D.* 1973, *Somm.* 61; 29 April 1986, *Bull. crim.* 144; 5 March 1990, *ibid.*, 103.

4. On 18 November 1991 the Paris Assize Court acquitted the Prince of fatal wounding and unintentional homicide, ruling that he had not "by clumsiness, carelessness, inattention or negligence, unintentionally caused the death of Mr Dirk Hamer". Notwithstanding this acquittal, the Paris Assize Court remained competent, under Article 372 CCP, to examine whether - on the basis of the facts³ underlying the accusation - under civil law a claim for damages could be allowed against the former accused, provided that such a claim was presented by the civil party concerned⁴. However, the applicant never presented any claim for damages.

5. Before the Convention organs she now complains about the inordinate length of the criminal proceedings, this length, in her opinion, being such that it practically obliterated her chances of getting a judgment for damages against the Prince. The Government contended that Article 6 (art. 6) was not applicable because, as the applicant had never formulated any claim for damages, it had to be assumed that she had joined the criminal proceedings as a civil party for the sole purpose of ensuring that the accused would be convicted. 6. Thus the Government again defend the proposition - as they did in the case of *Acquaviva v. France*⁵ - that civil-party applications made for the purpose of obtaining damages fall within, whilst such applications only made for the purpose of seeing to it that the accused is convicted fall outside the ambit of Article 6 (art. 6).

7. In the *Acquaviva* case the Court did not examine the Government's proposition. It held that Article 6 (art. 6) was applicable on the basis of a combination of three arguments which, if they have anything at all to do with the distinction advanced at that time and now again by the French Government, seem to imply that the Court accepted that the *Acquavivas* ultimately intended to seek compensation⁶.

In the present case, however, the Court did examine and has, moreover, approved that proposition. Paragraphs 74 and 75 of its judgment make it clear that in the Court's opinion whether or not Article 6 (art. 6) is applicable depends exclusively on the intentions of the civil party when joining the criminal proceedings. If that party joins in order to claim

³ Under the consistent case-law of the French Court of Cassation the acquittal does not prevent the Assize Court from examining whether those facts "stripped of the circumstances making up their criminal character" nevertheless constitute a tort entailing the acquitted accused's liability under civil law, provided that his culpability can be established: *Crim.* 11 January 1984, *Bull. crim.* 17; *Crim.* 7 October 1987, *ibid.*, 341; *D.* 1988.104; *Crim.* 20 October 1993, *Bull. crim.* 298. See further: Gaston Stefani, Georges Levasseur and Bernard Bouloc, *Procédure pénale* (Précis Dalloz, 16th ed., 1996), paras. 238 and 721, and Geneviève Viney, *op. cit.* (see note 1), p. 133

⁴ According to the European Court's judgment (see paragraphs 76 and 63) a civil party may even present such a claim after the trial has been closed by the pronouncement of the acquittal: in such cases the Assize Court holds a civil hearing

⁵ Judgment of 21 November 1995, Series A no. 333-A, pp. 13-14, para. 42

⁶ See paragraph 47 of the judgment referred to in note 5

financial compensation for the damage suffered as a consequence of the offence, then Article 6 (art. 6) protects his interests right from the beginning of the criminal proceedings, that is from the start of the preliminary proceedings before the investigating judge. But when the civil party does not intend to claim financial compensation, then Article 6 (art. 6) does not protect his interests for then the criminal proceedings cannot be deemed to imply a determination of his civil rights within the meaning of Article 6 (art. 6).

8. To my regret I fundamentally disagree.

In my opinion the applicant would have been entitled to the protection enshrined in Article 6 of the Convention (art. 6) even if she had indeed joined the criminal proceedings merely in order to have the Prince's guilt established (which, moreover, I do not accept).

With due respect I think that the Court has

- (a) disregarded its own doctrine concerning the role of Article 6 para. 1 (art. 6-1) and the - autonomous - key notion of "civil rights";
- (b) not taken sufficient account of the specific features of national law;
- (c) not heeded the requirement that judicial interpretations should provide legal certainty; and
- (d) misconstrued the facts of the case.

I will elucidate each of these four criticisms in turn.

A. Are the interests of a civil party to criminal proceedings not claiming financial compensation protected under Article 6 (art. 6)?

9. A first point to make is that - as the Court notes in paragraph 61 of its judgment - under French law a civil-party application has the effect of making the applicant under such an application a party to the criminal proceedings: consequently, he cannot be heard as a witness on oath (Article 335-6° CCP) and has various rights and duties as a party, such as the right to call witnesses, to question those of the defence, to have his counsel present his version of the facts and to appeal⁷. This opportunity to join, as a party, criminal proceedings which in principle are proceedings between two parties only, the prosecuting authorities and the accused, is intended to promote the interests of victims of crime⁸. Moreover, French law allows such victims to join criminal proceedings without claiming financial compensation for the damage personally suffered as a direct result of the offences for which the accused is prosecuted (see paragraph 60 of the Court's judgment and paragraph 12 below). As regards their position as a party to the criminal proceedings this makes no difference at all⁹.

⁷ See Gaston Stefani, Georges Levasseur and Bernard Bouloc, *op. cit.* (see note 3), para. 237, and Geneviève Viney, *op. cit.* (see note 1), para. 102.

⁸ See, in this context, Geneviève Viney, *op. cit.* (see note 1), para. 160

⁹ See Geneviève Viney, *op. cit.* (see note 1), para. 111.

Since its *Delcourt v. Belgium* judgment of 17 January 1970, Series A no. 11¹⁰, the Court has time and again stressed that in a democratic society the right to fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6 para. 1 (art. 6-1) would not correspond to the aim and the purpose of that provision (art. 6-1). The effect of the test accepted by the Court is, however, that although certain victims of crime are, under national law, permitted to participate as a party with full rights and obligations in the criminal proceedings against the perpetrator of that crime, yet, unlike the interests of the other parties to those proceedings, their interests are not protected by Article 6 para. 1 (art. 6-1). If ever there was a restrictive interpretation of that provision (art. 6-1) this is one ¹¹!

10. The Court has, moreover, repeatedly stressed the increasing sensitivity to the fair administration of justice¹². I would add that there generally is also an increasing awareness of the need to strengthen the position of victims of crime¹³. The test accepted by the Court runs counter to this trend. That test implies that the interests of a victim of crime are more meritorious, more deserving of protection, when the victim intends to claim financial compensation for the damage he has suffered than when he does not intend to seek such compensation but to content himself with seeking satisfaction by assisting in securing the perpetrator's conviction.

11. The test accepted by the Court implies that for the purpose of applying Article 6 of the Convention (art. 6) there are two essentially different kinds of civil party to criminal proceedings: one which joins these proceedings in order to have its civil rights determined and one which does so to further essentially different objectives. In view of the points I made in paragraphs 9 and 10 above, this distinction could only be accepted if the Court had been compelled to conclude that national law makes that unavoidable. After all, the very purpose of holding that the notion of "civil right" in Article 6 para. 1 (art. 6-1) is an autonomous one is to ensure that the protection enshrined in that provision (art. 6-1) is as broad as possible.

Here again the Court has opted for an unnecessarily restrictive interpretation, this time of the concept of "civil rights". From the viewpoint of the Court there are, in my opinion, no compelling grounds to assume that the right under Article 2 CCP is not a civil right under French law. There are certainly no good grounds for holding that this right is no civil right within the autonomous meaning of that concept under the Convention.

¹⁰ See p. 15, para. 25

¹¹ In this context I quote from one of the most recent handbooks on the Convention, Donna Gomien, David Harris, Leo Zwaak, *Law and Practice of the European Convention on Human Rights and the European Social Charter* (Council of Europe, 1996), pp. 157-58: "... it is important to remember that the Article [= Article 6] (art. 6) ... protects the rights of the individual subject to court proceedings as a party." (emphasis added)

¹² See, among other authorities, the *Bulut v. Austria* judgment of 22 February 1996, Reports of Judgments and Decisions 1996-II, p. 359, para. 47.

¹³ See note 8

12. Before I elucidate my opinion with respect to the first aspect, I should explain why I said, in paragraph 11 above, "[f]rom the viewpoint of the Court". The reason was that this case confronts us with a particular feature of the French legal system: the extreme succinctness of the judgments of the Court of Cassation. Since that court usually restricts itself to formulating the rule to be applied, it is not infrequently difficult to grasp the precise implications of its decisions. Consequently, learned writers may be rather divided on how the Court of Cassation's judgments should be explained as well as on what should be deduced from them. In such cases it is rather difficult for an international court like the European Court of Human Rights to assess what exactly is the national law. It cannot but try to form an opinion, but it should be clear that, being confronted with different opinions of learned writers and left without decisive guidance from the Court of Cassation, it necessarily has to do so with a certain reticence, a freedom it should be allowed since, after all, it is not deciding questions of French law.

Now, the evolution of the case-law of the Court of Cassation in respect of the notion of civil action within the meaning of Article 2 CCP is such that French learned authors are profoundly divided as to the nature of the right under that provision. Some, admittedly, distinguish two different kinds of civil action, one for non-material and one for material purposes. The Court accepts their view (see paragraphs 74 and 60 of its judgment) without considering whether it is compelling. It does not even discuss the opposite view, although there are other learned authors - and not the least authoritative - who fundamentally disagree and maintain that the civil action within the meaning of Article 2 CCP is and remains "essentially an action for reparation, even if sometimes it is used less in order to obtain compensation than in order to have the perpetrator of the crime punished, which is the case if the victim only claims symbolic compensation, one franc damages, or joins proceedings before a criminal tribunal which has no jurisdiction to deal with a claim for damages"¹⁴.

And indeed, seen from outside, neither the provisions of the CCP nor the system of French law seem to make it compelling to distinguish two fundamentally different kinds of civil action within the context of criminal proceedings. On the contrary, those provisions¹⁵ and that system both seem to suggest that the civil action, even if it is instituted before a criminal court and even if, consequently, it is to a certain extent moulded by the rules of criminal procedure, essentially remains the very same action for reparation

¹⁴ See Gaston Stefani, Georges Levasseur and Bernard Bouloc, *op. cit.* (see note 3), para. 162 in fine.

¹⁵ See, for example, Article 10 CCP: "The limitation period for a civil action is that of the Civil Code. However, that action can no longer be brought before the criminal courts after expiry of the limitation period for prosecution."

as laid down in Article 1382 of the Civil Code, thus having an essentially civil character.

In this context it is worth while noting that under the consistent case-law of the civil courts the next of kin of a person who has been injured or killed are entitled to claim compensation for the non-material damage which they themselves suffered personally as a consequence of that injury or death¹⁶. The criminal courts have - finally - also adopted that view¹⁷. And indeed Article 3, second paragraph, CCP underlines that "a civil action may be instituted for all kinds of damage, material, corporeal or non-material, which result from the facts which have given rise to the criminal proceedings".

Now, it is a commonplace of legal thinking that in principle a sum of money can only be an imperfect form of satisfaction in respect of non-material damages of the kind under discussion. Likewise, it is generally accepted that, as an English judge put it:

"Many plaintiffs have mixed motives for bringing actions and a claim for damages may often be a subsidiary matter to the establishing as a matter of principle of the liability of the defendant whom the plaintiff believes to have wronged him."

It is not surprising, therefore, that in France there is a very firm tradition in this kind of case whereby plaintiffs claim and courts allow a merely symbolic financial compensation of only one franc¹⁸. Such judgments have sometimes been criticised by the Court of Cassation, but that has not put an

¹⁶ There was a time when the civil courts in this connection differentiated between death and injury; in the former case the next of kin were entitled to non-material damages for interference with their feelings of affection, in the latter they were not. That doctrine has, however, been abandoned. See for this evolution the excellent report of Mr Justice Ponsard to the Plenary of the Court of Cassation which gave judgment on 12 January 1979, *Juris-Classeur périodique* 1980, 19335 (see, on this judgment, note 13).

¹⁷ In respect of the civil action under Article 2 CCP the Court of Cassation once followed the civil courts' doctrine referred to in note 16 where death had been caused. However, in its (plenary) judgment of 12 January 1979 referred to in note 16 it refused to let the evolution of the case-law of the civil courts referred to in that note influence the admissibility of civil actions under Article 2 CCP: it stressed that only those who had personally suffered damage directly caused by the offence could make a civil-party application, noted that in an injury case the victim's wife had not been wounded herself and therefore was not a victim of the offence, and accordingly held that she should not have been admitted as a civil party; the fact that she could claim damages in the civil courts was immaterial (see the comprehensive note by Mme M. Cartier, *Juris-Classeur périodique* 1980, 19335). However, the Court of Cassation abandoned this (much criticised) doctrine in its judgment of 9 February 1989, *Bull. crim.* 63, *D.* 1989.614, note by Bruneau. Since then it has followed the civil courts in injury cases also: under Article 2 CCP the next of kin may make a civil-party application with respect to damage suffered as a result of having had to see their relative suffer from his injuries (see also *Crim.* 23 May 1991, *D.* 1992, *Somm.* 95, *Comm. Pradel*). See on this evolution also: Mme C. Roca, *D.* 1991. *Chr.* pp. 85 et seq., and Geneviève Viney, *op. cit.* (see note 1), para. 85, and especially para. 87.

¹⁸ See, for instance, P. Chambon, note under *Ch. crim.* 9 October 1978, *D.* 1979.185 (under III)

end to the practice, which, on the contrary, has found formulas which escape the Court of Cassation's censure¹⁹. Moreover, the idea behind this practice has been approved by a good many learned authors²⁰. The result is that at present the prohibition on symbolic compensation is itself to a large extent symbolic, whilst the Court of Cassation itself seems to be inclined to condone the idea²¹.

In a development consistent with this trend, the Court of Cassation in its judgment of 8 June 1971 allowed plaintiffs to join criminal proceedings as civil parties for the sole purpose "of supporting the prosecution case and ensuring that the guilt of the accused is established"²². The Court of Cassation underlined that under Article 2 CCP victims are completely free either to claim financial compensation or not to submit such a claim.

In other words, it seems at least arguable: (a) that French criminal law has moulded the civil right to reparation of non-material damage suffered as a result of another's "fault" - for instance sorrow at the killing or maiming of a next of kin - so as to encompass a right to have the guilt of the wrongdoer established, but (b) that, in doing so, it has kept intact its essentially civil character.

13. But even if this outsider's evaluation would be open to doubt under French law, why should the victim's right to have the guilt of the wrongdoer established not be classified as a civil right within the autonomous meaning of Article 6 (art. 6)? Rights flowing from tort have consistently been held to be civil rights²³, so why should the victim's right to have the guilt of the wrongdoer established in court not come within this autonomous notion, irrespective of the kind of court concerned? Why should the rights flowing from tort be limited to the right to financial compensation? Has not the European Court of Human Rights itself repeatedly held that a judgment finding a violation constitutes in itself sufficient just satisfaction with respect to non-material damage suffered as a result of that violation?

14. From all this the Court should have concluded,

firstly, that whether or not a victim claims financial compensation after being admitted as a (civil) party to the criminal proceedings against the perpetrator of a punishable act which has caused him non-material damage, he is at any rate asserting a right to (a form of) compensation which, if not a

¹⁹ See, inter alia, Y. Chartier, *La réparation du préjudice* (Dalloz, 1983), para. 471, who refers to the report of Mr Justice Dauvergne with regard to the Court of Cassation's judgment of 16 May 1974, D. 1974.513

²⁰ See, in addition to those referred to in note 14, Mazeaud and Tunc, *Traité théorique et pratique de la responsabilité civile* (6th ed.), para. 319 in fine

²¹ See *Traité de droit civil*, V, Geneviève Viney, *Les obligations; La responsabilité: effets* (1984), para. 64

²² *Crim.* 8 June 1971, D. 1971, jur., p. 594

²³ See Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights* (Butterworths, 1995), p. 177.

purely civil right already under French law, at any event comes within the autonomous notion of civil right under Article 6 para. 1 (art. 6-1);

and, secondly, that to that extent the criminal proceedings must be deemed to imply a determination of the victim's civil rights within the meaning of that provision (art. 6-1).

B. The specific features of national law

15. The test accepted by the Court disregards, firstly, the fact that Article 85 CCP allows a civil-party application to be made even during the preliminary proceedings before the investigating judge although that judge lacks jurisdiction to adjudicate²⁴ (to submit a claim for financial compensation during these proceedings is therefore pointless) and, secondly, the fact that during trial such a claim can be submitted at any time up to the end of the hearing. In other words: the victim is free to postpone the choice which, according to the Court of Cassation, is implied in Article 2 CCP till the very last moment of the criminal proceedings. That cannot but imply that up till that moment the criminal proceedings must, right from their beginning, meet the requirements of Article 6 (art. 6) also in respect of the civil party. However, under the interpretation now accepted by the Court, the victim will only be allowed to bring a complaint for a failure to meet these requirements in the period before he had made his choice, if the victim succeeds in persuading the Convention institutions that during that period he had already formed the intention of submitting a claim for financial compensation. That is odd where the victim ultimately opts for financial compensation; it is also odd where the victim finally chooses not to present such a claim, because that choice may, of course, be influenced by deficiencies of the criminal proceedings which fall within the ambit of Article 6 (art. 6): an excessive duration of those proceedings, as we have in the present case, being only one of those deficiencies; lack of impartiality, violation of the principle of equality of arms are other, obvious examples of deficiencies which may in the end lead a victim to change his mind and decide - as under national law he is free to do without losing his standing as a civil party - not to submit a claim for financial compensation.

C. Legal certainty

16. I would have thought it was obvious that the requirement of legal certainty makes it impossible for the applicability of the guarantees of Article 6 (art. 6) to be made to depend on so moot a factor as the subjective intentions of the civil party. The arguments which we have been forced to

²⁴ See Gaston Stefani, Georges Levasseur and Bernard Bouloc, *op. cit.* (see note 5), para. 171

read and listen to well illustrate the point. The Government try to deduce that the applicant never intended to claim financial compensation from the fact that she never did submit such a claim. The applicant, however, answers that she intended to submit such a claim all along but that when, after twelve years, the defendant was acquitted, she felt that she no longer had a real chance and therefore gave up. That would seem a reasonable explanation, especially when one considers that pursuing a claim for financial compensation after acquittal may entail the risk of having to pay the costs of the ensuing further proceedings if the claim fails. Under these circumstances the mere fact that the applicant did not after all submit a claim for financial compensation does not prove - and cannot prove - that at the time when she joined the criminal proceedings as a civil party she did not ultimately intend to do so. What the Government have requested the Court to do is to deny the applicant the protection of the Convention on grounds that must necessarily remain subjective and speculative. I am still quite unable to understand why the Court has acceded to that request.

D. The facts of the case

17. The point I have been trying to make in paragraph 16 above may be further illustrated by saying that, like Judge Repik, I think that, on the face of the facts of the case as they have been presented to us, it is likely that the applicant did indeed always intend to present a claim for financial compensation. In that respect I agree with his analysis, which I adopt.

18. The foregoing considerations have, I hope, made it clear why I have voted against finding Article 6 (art. 6) not applicable. For the reasons why I consider that Article 6 (art. 6) was violated I also refer to the dissenting opinion of Judge Repik: I agree with his reasons for finding a violation of Article 6 (art. 6).

DISSENTING OPINION OF JUDGE REPIK, JOINED BY
JUDGE SPIELMANN

(Translation)

I regret that I am unable to agree with the majority's opinion that Article 6 para. 1 (art. 6-1) is not applicable in the case.

In the case of *Acquaviva v. France* (judgment of 21 November 1995, Series A no. 333-A) the parents of the victim of a homicide lodged a complaint together with an application to join the proceedings as a civil party. "... They wished to discover the circumstances of their son's death and requested a reconstruction of the events; they did not seek damages" (p. 7, para. 8). Subsequently they raised no claim for compensation nor did they ever mention an intention of doing so at the appropriate stage of the proceedings. The proceedings ended with a ruling that there was no case to answer, on the ground that the accused could claim to have been acting in self-defence. That finding - which excluded all criminal and civil responsibility - deprived the applicants of any right to bring proceedings for compensation in the civil courts. The Court concluded that the applicants "set in motion judicial criminal proceedings with a view to securing a conviction, which was a prior condition for obtaining compensation, and retained the right to submit a claim for damages up to and during the trial" (previously cited judgment, pp. 14-15, para. 47).

The message of the above judgment must be read in the context of French legislation, with its specific features, as interpreted by the domestic courts. Case-law draws a distinction between the victim's right to lodge a civil-party application and the right to claim compensation for damage. This means that it is possible to bring civil-party proceedings for the sole purpose of helping to secure a proper conviction¹. If the victim also wishes to claim compensation for the prejudice sustained, he must in addition file a claim for damages, which may either be included in the civil-party application or submitted later in a separate document. In the latter case French law allows the victim to file his claim even after the criminal judgment has been delivered (see paragraph 63 of the judgment), unlike the position in certain other legal systems which require the victim to specify at the outset the basis on which he is participating in the proceedings and/or oblige him to file his claim for damages at an earlier stage of the proceedings². If

¹ See paragraph 60 of the judgment and *Procédures pénales en Europe*, ed. M. Delmas-Marty, PUF, Paris, 1995, pp. 230-31.

² Czech law and Slovakian law distinguish between the position of a person harmed by the offence as such, but who has not sustained any economic loss on that account (Article 43 para. 1 of the Code of Criminal Procedure - CCP), and the position of a person whose economic interests are affected by the offence and who therefore, under national law, has an arguable right to an award of damages (Article 43 para. 2 CCP). It has to be determined

compensation is a possible issue but the proceedings end with a result other than a conviction, the consequence of the French system is that there is no objective criterion for ascertaining what the true object of the victim was at the time when he made his civil-party application, unless he has already lodged his claim for compensation or has in some other way made known during the proceedings his intention to claim compensation at the appropriate time.

In the case of *Tomasi v. France* (judgment of 27 August 1992, Series A no. 241-A) the applicant lodged a complaint together with an application to join the proceedings as a civil party. The proceedings ended with a ruling that there was no case to answer. During the proceedings the applicant never made any explicit claim for pecuniary reparation or expressed in any other way his intention to do so at the appropriate stage of the proceedings. Nor was any civil action for compensation brought by the applicant in the civil courts after the ruling that there was no case to answer, although this was theoretically possible (see paragraph 118 of the Commission's opinion). However, the Court based its ruling on an interpretation of national law different from that given in the present case, to the effect that Article 85 of the French CCP, which provided for the lodging of a complaint together with an application to join the proceedings as a civil party, simply applied Article 2 of the same Code, which laid down the conditions for bringing civil-party proceedings (see paragraph 121 of the judgment). That interpretation means in substance that a civil-party application implies a civil action for compensation in respect of the damage caused by the offence.

On the essential points the present case does not differ from the cases mentioned above. The applicant lodged a civil-party application in circumstances where compensation was a possible issue. The proceedings did not end in a conviction, which is normally a precondition for the award of compensation in criminal proceedings. Like Mr Tomasi and Mr and Mrs Acquaviva, the applicant did not submit an explicit claim for compensation during the proceedings, but she was not estopped from submitting such a claim even after the Assize Court's judgment. Her conduct did not belie her assertion that in the event of a conviction she would have submitted such a claim.

Admittedly, there are certain points which distinguish the present case from the *Tomasi* and *Acquaviva* cases, but none of these particular circumstances can justify a different conclusion. I shall examine them in turn below.

The applicant did not lodge a complaint but joined the proceedings already brought by the prosecuting authorities. That by no means excludes

at the latest by the beginning of the trial, in which of these two capacities the victim is taking part in the proceedings. In German law a claim for damages must be submitted, orally or in writing, before the trial opens (Article 403 CCP).

the possibility of a subsequent compensation claim, nor does it prove that the applicant had no intention of submitting such a claim.

Payment of FRF 500,000 to the applicant's family by the accused did not deprive her of the right to claim a further sum in damages. At the hearing the Government Agent himself admitted this.

The proceedings ended at a more advanced stage than the proceedings in the above-mentioned cases, namely with a judgment of the trial court acquitting the accused. Unlike the position in those cases, the applicant theoretically had the right to bring a civil action not only in the civil courts but also in the criminal court (Article 372 CCP). The majority's main argument is based on the fact that the applicant did not make use of either of these remedies.

Logically, the applicant's subsequent inaction by no means proves that if the outcome of the proceedings had been more favourable, that is if the accused had been convicted, she would not have claimed compensation. But even if it is accepted that the applicant's passive conduct after the acquittal constitutes evidence of some kind as to her initial intention, the value of that evidence must be assessed in the light of the reasons why she did not bring the civil action that was theoretically open to her.

According to the applicant, and this has not been denied by the Government, the defence managed to adduce evidence in the Assize Court which proved that the fatal bullet could not have come from the accused's gun, or at least cast doubt on the possibility. That being so, a compensation claim made to the criminal court had practically no prospects of success. The same would probably have been true of an action brought in the civil courts. Moreover, the applicant might understandably have felt discouraged by the prospect of further - probably lengthy and expensive - proceedings after criminal proceedings which had already lasted eleven years.

But there is more. Unlike the position in the above-mentioned cases, the applicant submitted evidence in support of her assertion that she was ready to file her compensation claim after delivery of the conviction she was expecting. She produced a copy of the pleading prepared to be submitted to the Assize Court after the accused's conviction. Her lawyer asserted that she contacted the Advocate-General seeking an explanation why the Assize Court had not held a hearing on the civil issues after delivery of the judgment acquitting the accused (see paragraph 55 of the judgment). The Government did not contest this. They only criticised the applicant's lawyer for not following the correct procedure, in that she applied to the Advocate-General and not to the registry of the Assize Court. But however muddled the way the applicant's lawyer went about her work may seem, her actions nevertheless reveal the intention to claim compensation in the event of a conviction.

More generally, if the victim is given such latitude in choosing when to file a compensation claim, the State rather than the victim should suffer the

consequences where the proceedings do not end in a conviction and doubt remains about the victim's intention at the time when the civil-party application was initially lodged. A victim cannot be reproached for not filing a compensation claim while the criminal proceedings were pending if he is entitled to wait until their conclusion in order to do so. A victim who duly exercises his statutory rights cannot be deprived of the protection of Article 6 para. 1 (art. 6-1) on the pretext that he must do more.

In short, I can see no valid reason to depart in this case from the Court's existing case-law. The Court's ruling to the contrary seems to me all the more regrettable as the victim - who deserves at least as much protection as the accused - is not expressly protected by the Convention in criminal proceedings and the protection which has been inferred by means of the Court's case-law is thereby weakened.

Article 6 para. 1 (art. 6-1) being applicable, it is clear that the applicant's case was not heard and determined within a reasonable time. In that respect I agree with the Commission's opinion.