**APPLICATION N° 31159/96**

Pierre MARAIS v/FRANCE

**DECISION** of 24 June 1996 on the admissibility of the application

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**Article 6, paragraph 1 of the Convention** *There is no lack of fairness on the part of a court in refusing to take evidence on the facts at issue, which are moreover clearly contradicted by historical facts of common knowledge, the assertion of which is as such defamatory*

**Article 6, paragraph 3 (a) of the Convention** *This provision does not require the observance of any particular formalities for informing the accused of the nature of the charges against him*

**Article 10, paragraph 1 of the Convention** *A conviction for complicity in the denial of a crime against humanity constitutes an interference with the exercise of the right to freedom of expression*

**Article 10, paragraph 2 of the Convention** *Conviction for complicity in the denial of a crime against humanity following publication of an article denying the existence of gas chambers in a concentration camp*

*Interference prescribed by law and necessary in a democratic society for the prevention of disorder and crime and for the protection of the reputation or rights of others The concept of necessity implies that the interference corresponds to a pressing social need and is proportionate to the aim pursued Margin of appreciation of the national authorities*

**Article 17 of the Convention** *Article 17 covers essentially those rights which would facilitate the attempt to derive therefrom a right to engage in activities aimed at the destruction of the rights and freedoms set forth in the Convention In the present case, reference to this Article to establish that an interference with freedom of expression was necessary in a democratic society*

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## THE FACTS

The applicant, a French citizen, born in 1921, is a retired engineer and lives in Saint Laurent de la Prée. He was represented before the Commission by Mr. Eric Delcroix, a lawyer practising in Paris.

### A. *Particular circumstances of the case*

The facts, as submitted by the applicant, may be summarised as follows.

In September 1992, the applicant had a three-page article, entitled "The lethal gas chamber at Struthof-Natzweiler, a special case" published in the 40th issue of the periodical "Révision". This article, which was about the Struthof concentration camp during the German occupation (1940-1945), ended as follows:

> "...
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> 1- This study does not aspire to scientific precision. Rather, it seeks to make up for the specialists' failure to apply themselves to the task of investigating the statements made by the former commandant of the camp, Josef Kramer, and publishing the results. The author has therefore endeavoured to fill a gap in the history of the deportations by using mildly provocative arguments designed to generate a response which may help establish the truth about the alleged gassings at Struthof-Natzweiler.
> 2- Although the basic chemical principle is sound, my research shows that it is implausible that it could have been used to effect the rapid and simultaneous asphyxiation of thirty people, given the vast quantity of water such an operation would have required.
> 3- A comparison with the gassing technique used in the United States to execute one convict alone illustrates the 'home-made' aspect of the method allegedly used by Kramer, whereas the Germans could not have been unaware of the sulphuric acid - hydrocyanic salt reaction, and, moreover, if the literature is to be believed, possessed large amounts of Zyklon B, an insecticide which, it is said, they used to execute millions of people in other concentration camps and which they could therefore also have used at Struthof.
> The alleged Struthof gassings do therefore appear to be a 'special case'."

On 25 January 1993 the Paris public prosecutor issued the applicant with a summons to appear before the 17th Criminal Division of Paris "tribunal de grande instance" for complicity in the denial of crimes against humanity, a punishable offence under section 24 *bis* of the Press Law of 29 July 1881. The offending extract from his article was attached to the summons. The editor of "Révision" was also prosecuted, on

the basis of the applicant's article and of other articles, for inciting to racial discrimination, defending war crimes, publishing racial insults, denying crimes against humanity and publishing racially defamatory statements

In a judgment of 10 June 1993, Paris Criminal Court sentenced the applicant to a fine of 10,000 French francs and ordered him to pay damages to the associations which had joined the proceedings as civil parties (Movement Against Racism and for Friendship among Peoples, Human Rights League, League against Racism and Anti Semitism)

In its decision, the court dismissed a number of arguments raised by the defence It held firstly that the actual text of the judgment delivered by the International Military Tribunal of Nuremberg on 1 October 1946, which is cited and incorporated in section 24 *bis* of the Law of 29 July 1881 as one of the elements of the offence in question, did not have to be published in the 'Journal officiel , as that judgment had been made public and contained well-documented historical facts of common knowledge

The court also held that section 24 *bis* was not incompatible with Article 10 of the Convention, on the grounds that

> Under the Law of 13 July 1990 it is an offence to deny crimes against humanity This measure was introduced as part of the fight against racism and reflects France s international commitments (International Convention on the Elimination of All Forms of Racism)
> Thus, the new section 24 *bis* of the 1881 Law subjects the exercise of the freedom of expression and opinion to restrictions which are necessary in a democratic society for the protection of the reputation or rights of others and for public safety within the meaning of Article 10 paragraph 2 of the Convention Statements which deny the existence of crimes against humanity insult the memory of the Nazis' victims and are liable to provoke disorder by spreading ideas which seek to restore the Nazi racial doctrine and discriminatory policy

On the merits, the court considered that despite the article's title, [the applicant] based his theories and conclusions on the confession of the Struthof camp commandant merely as a pretext for making the far more general assertion that the alleged gas chambers were technically improbable yet their existence was established in the judgment of 1 October 1946, in the chapter entitled Persecution of the Jews

The applicant appealed to Paris Court of Appeal, relying on Article 6 of the Convention and on the Declaration of the Rights of Man of 1789 on the ground that contrary to an 1870 Decree, the judgment delivered by the Nuremberg International Military Tribunal had not been published in the Journal officiel , that it had not been exhibited in the proceedings and that the legislature should not have given this judgment the status of indisputable truth and should not have imposed on the court

facts allegedly established by another court' He also submitted a ground of appeal based on Article 10 of the Convention

His appeal was dismissed on 2 December 1993, on the grounds that the court had no power to rule on the validity of the Constitution, that the court was bound by the statutory definition of an offence, pursuant to the principle of the separation of powers between the judiciary and the executive, which principle could not be deemed to impinge on its independence or impartiality, that the judgment of the Nuremberg International Military Tribunal did not have to be published, since the 1870 Decree to which the applicant referred did not apply to court decisions and that, lastly, the arguments based on Article 10 had already been dismissed in other cases by the Court of Cassation The court upheld the applicant's conviction and sentence and found, as regards the merits, that the author of the article had suggested in terms expressing grave doubts that the Jewish community had not in fact been exterminated by the Nazi regime and that gas chambers had not been used to this end

In a judgment of 7 November 1995, the Court of Cassation dismissed the applicant's appeal, on the following grounds in particular

> whereas the Court of Appeal acted correctly in dismissing, for the reasons set out in the grounds of appeal, the applicant's claim that, as the judgment of the Nuremberg International Military Tribunal had not been published in the 'Journal officiel of the French Republic and had not been exhibited in the proceedings, it was not binding on the court, whereas, firstly, the force of court decisions derive from the fact that they are pronounced and have become final, irrespective of whether or not court decisions are published - there being no such requirement under the Decree of 5 November 1870 governing the publication of decrees and laws and, secondly, a defendant charged under section 24 *bis* of the Law of 29 July 1881 cannot argue that he was unaware of the tenor of the judgment delivered by the Nuremberg International Military Tribunal on 1 October 1946 which, in accordance with Article 25 of the Charter of the Tribunal, was officially translated into French
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> whereas the provision under the above-mentioned Article 6 of the Convention for any criminal charge to be tried by an independent and impartial court established by law does not remove the courts' obligation to apply their domestic law unless the latter is incompatible with other provisions of the Convention, whereas this is not the case here, whereas provisions having legislative force are binding on the ordinary courts, which do not have power to rule on their constitutionality,

whereas although the first paragraph [of Article 10 of the Convention] guarantees everyone the right to freedom of expression, the second paragraph of that Article provides that as the exercise of that freedom carries with it duties and responsibilities it may be subject to such formalities conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society for, *inter alia*, the protection of morals and the rights of others whereas this is the purpose of section 24 *bis* of the Law of 29 July 1881

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whereas in convicting the accused, the court found, *inter alia*, that the author of the article had not confined himself to casting doubt on 'the alleged gassings committed in the Struthof camp in August 1943 but had also cast doubt on the use of gas chambers in other concentration camps to exterminate the Jewish community

B *Relevant domestic law*

Law of 29 July 1881 on the freedom of the press

Section 24 *bis* (as inserted by Law No 90 615 of 13 July 1990) Anyone who denies in any of the ways referred to in section 23 the existence of one or more crimes against humanity as defined in Article 6 of the Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945 and committed either by the members of an organisation declared criminal under Article 9 of that Charter or by a person convicted of such crimes by a French or international court shall be liable to punishment under section 24(6)
The court may also order the decision to be posted up or published, pursuant to section 131-35 of the Criminal Code '

## COMPLAINTS

1 The applicant complains that the courts convicted and sentenced him on the basis of, *inter alia*, a judgment given by the Nuremberg International Military Tribunal in a case in which he was not a party and against which he was unable to raise objections He claims that the courts which tried him were biased, that they preferred a prejudice to his publication and that they were critical of him for challenging the theory that people were gassed to death in the Struthof camp He relies on Article 6 para 1 of the Convention

2 The applicant claims that he was deprived of access to the Nuremberg judgment of 1 October 1946 and to the decisions relating to the commandants of the Struthof camp although those files appear to contain objective evidence supporting his (the

applicant's) chemical theory". He claims to have been the victim of a "witch-hunt" and relies on Article 6 para. 3 (a) of the Convention

3. The applicant submits, lastly, that "the freedom of expression cannot be restricted in such cases, where it attains its noblest heights, namely the expression of the spirit of inquiry in action" and that Article 10 para 2 of the Convention does not apply to "scientific research", as it should be possible to "prove or fabricate, support or refute" a theorem "in an inexhaustible free debate without which reason would become buried under fanaticism". He relies on Article 10 of the Convention.

## THE LAW

1 The applicant complains of a violation of his right to freedom of expression as guaranteed by Article 10 of the Convention, the relevant part of which provides that

> "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 for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others "

The Commission considers that the impugned measure is an interference with the applicant's exercise of his right to freedom of expression Such interference is in breach of Article 10, unless it is justified under paragraph 2, i e it must be "prescribed by law", have an aim or aims that are legitimate under Article 10 para 2 and be "necessary in a democratic society"

On the facts, the interference was "prescribed by law", namely, by section 24 *bis* of the Law of 29 July 1881, introduced by the Law of 13 July 1990

The interference also pursued legitimate aims under the Convention, i e "the prevention of disorder or crime" and "the protection of the reputation or rights of others". It remains to be considered whether the interference could be regarded as having been "necessary in a democratic society"

The Commission recalls that, contrary to the applicant's assertion that Article 10 para 2 of the Convention does not apply to "scientific research", assuming that this was a "scientific" publication, paragraph 2 of Article 10 makes no distinction as to the type of expression in question

The Commission recalls further that the adjective "necessary", within the meaning of Article 10 para. 2, implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether and to what extent an interference is necessary, but this margin goes hand in hand with a European supervision. Thus the measures taken at national level must be justifiable in principle and proportionate (cf., *inter alia*, Eur. Court H.R., Observer and Guardian v. the United Kingdom judgment of 26 November 1991, Series A no. 216, pp. 29-30, para. 59).

The Commission finds that the relevant provisions of the 1881 Law and their application in the present case aimed to secure the peaceful coexistence of the French population. The Commission has therefore also had regard to Article 17 of the Convention, which provides that:

> "Nothing in this 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."

Article 17 accordingly prevents a person from deriving from the Convention a right to engage in activities aimed at the destruction of any of the rights and freedoms set forth in the Convention (see, *inter alia*, No. 12194/86, Dec. 12.5.88, D.R. 56, p. 205, No. 12774/87, Dec. 12.10.89, D.R. 62, p. 216, No. 25096/94, Dec. 6.9.95, D.R. 82-B, p. 117).

The Commission notes the domestic courts' detailed findings as to the contents of the applicant's article in which his real aim, under cover of a scientific demonstration, was to deny that gas chambers had existed or had been used to commit genocide.

The Commission considers that the applicant's article runs counter to basic ideas of the Convention, as expressed in its preamble, namely justice and peace. It considers that the applicant attempts to deflect Article 10 from its real purpose by using his right to freedom of expression for ends which are contrary to the text and spirit of the Convention and which, if admitted, would contribute to the destruction of the rights and freedoms guaranteed by the Convention.

Therefore there were relevant and sufficient reasons for convicting the applicant and the interference was "necessary" in a democratic society within the meaning of Article 10 para. 2 of the Convention.

It follows that this complaint must be rejected as manifestly ill-founded, in accordance with Article 27 para. 2 of the Convention.

2 The applicant also complains that the courts convicted and sentenced him on the basis of, *inter alia*, a judgment given by the Nuremberg International Military Tribunal in a case in which he was not a party and against which judgment he was unable to raise objections He claims that the courts which tried him were biased, that they preferred a prejudice to his publication and that they were critical of him for challenging the theory that people were gassed to death in the Struthof camp He also claims that he was denied access to the Nuremberg judgment of 1 October 1946 and to the decisions relating to the commandants of the Struthof camp, although those files appear to contain objective evidence supporting his (the applicant's) chemical theory He relies on Article 6 paras 1 and 3 (a) of the Convention

As regards Article 6 para 3 (a) of the Convention, the Commission, which recalls that this provision does not require the observance of any particular formalities notes that the summons issued against the applicant on 25 January 1993 at the request of the Paris public prosecutor informed him in clear and precise terms of the nature and cause of the accusation against him

Moreover as regards Article 6 para 1 of the Convention in so far as the allegations have been substantiated and the Commission is competent to consider them, it has found no appearance of a violation of this provision In particular, the Commission recalls that there is no lack of fairness on the part of a court in refusing to take evidence on facts at issue, which are moreover clearly contradicted by historical facts of common knowledge the assertion of which is as such defamatory (see, *mutatis mutandis*, No 9235/81 Dec 16 7 82, D R 29 p 194)

It follows that this part of the application must also be rejected as manifestly ill founded in accordance with Article 27 para 2 of the Convention

For these reasons, the Commission, by a majority,

DECI ARES THE APPLICATION INADMISSIBLE