UNITED
NATIONS

CCPR

International covenant on civil and political rights

Distr.
RESTRICTED*

CCPR/C/58/D/550/1993
16 December 1996

ENGLISH
Original: ENGLISH/FRENCH/
SPANISH

HUMAN RIGHTS COMMITTEE
Fifty-eighth session
21 October-8 November 1996

VIEWS

Communication No. 550/1993

Submitted by: Robert Faurisson

Victim: The author

State party: France

Date of communication: 2 January 1993 (initial submission)

Date of adoption of Views: 8 November 1996

On 8 November 1996, the Human Rights Committee adopted its Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 550/1993. The text of the Views is appended to the present document.

[ANNEX]

* Made public by decision of the Human Rights Committee.

ANNEX

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights
- Fifty-eighth session -

concerning

Communication No. 550/1993 * **

Submitted by: Robert Faurisson

Victim: The author

State party: France

Date of communication: 2 January 1993 (initial submission)

Date of decision on admissibility: 19 July 1995

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 8 November 1996,

Having concluded its consideration of communication No. 550/1993 submitted to the Human Rights Committee by Mr. Robert Faurisson under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication, dated 2 January 1993, is Robert Faurisson, born in the United Kingdom in 1929 and with dual French/British citizenship, currently residing in Vichy, France. He claims to be a victim of violations of his human rights by France. The author does not invoke specific provisions of the Covenant.

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* Pursuant to rule 85 of the Committee's rules of procedure, Committee members Christine Chanet and Thomas Buergenthal did not participate in the consideration of the case. A statement made by Mr. Buergenthal is appended to the present document.

** The text of five individual opinions, signed by seven Committee members, is appended to the present document.

The facts as submitted by the author

2.1 The author was a professor of literature at the Sorbonne University in Paris until 1973 and at the University of Lyon until 1991, when he was removed from his chair. Aware of the historical significance of the Holocaust, he has sought proof of the methods of killings, in particular by gas asphyxiation. While he does not contest the use of gas for purposes of disinfection, he doubts the existence of gas chambers for extermination purposes (" chambres à gaz homicides ") at Auschwitz and in other Nazi concentration camps.

2.2 The author submits that his opinions have been rejected in numerous academic journals and ridiculed in the daily press, notably in France; nonetheless, he continues to question the existence of extermination gas chambers. As a result of public discussion of his opinions and the polemics accompanying these debates, he states that, since 1978, he has become the target of death threats and that on eight occasions he has been physically assaulted. On one occasion in 1989, he claims to have suffered serious injuries, including a broken jaw, for which he was hospitalized. He contends that although these attacks were brought to the attention of the competent judicial authorities, they were not seriously investigated and none of those responsible for the assaults has been arrested or prosecuted. On 23 November 1992, the Court of Appeal of Riom followed the request of the prosecutor of the Tribunal de Grande Instance of Cusset and decreed the closure of the proceedings (ordonnance de non-lieu) which the authorities had initiated against X.

2.3 On 13 July 1990, the French legislature passed the so-called "Gayssot Act", which amends the law on the Freedom of the Press of 1881 by adding an article 24 bis; the latter makes it an offence to contest the existence of the category of crimes against humanity as defined in the London Charter of 8 August 1945, on the basis of which Nazi leaders were tried and convicted by the International Military Tribunal at Nuremberg in 1945-1946. The author submits that, in essence, the "Gayssot Act" promotes the Nuremberg trial and judgment to the status of dogma, by imposing criminal sanctions on those who dare to challenge its findings and premises. Mr. Faurisson contends that he has ample reason to believe that the records of the Nuremberg trial can indeed be challenged and that the evidence used against Nazi leaders is open to question, as is, according to him, the evidence about the number of victims exterminated at Auschwitz.

2.4 In substantiation of the claim that the Nuremberg records cannot be taken as infallible, he cites, by way of example, the indictment which charged the Germans with the Katyn massacre, and refers to the introduction by the Soviet prosecutor of documents purporting to show that the Germans had killed the Polish prisoners of war at Katyn (Nuremberg document USSR-054). The Soviet authorship of this crime, he points out, is now established beyond doubt. The author further notes that, among the members of the Soviet Katyn (Lyssenko) Commission, which had adduced proof of the purported German responsibility for the Katyn massacre, were Professors Burdenko and Nicolas, who also testified that the Germans had used gas chambers at Auschwitz for the extermination of four million persons (Document USSR-006). Subsequently, he asserts, the estimated number of victims at Auschwitz has been revised downward to approximately one million.

2.5 Shortly after the enactment of the "Gayssot Act", Mr. Faurisson was interviewed by the French monthly magazine Le Choc du Mois, which published the interview in its Number 32 issue of September 1990. Besides expressing his concern that the new law constituted a threat to freedom of research and freedom of expression, the author reiterated his personal conviction that there were no homicidal gas chambers for the extermination of Jews in Nazi concentration camps. Following the publication of this interview, eleven associations of French resistance fighters and of deportees to German concentration camps filed a private criminal action against Mr. Faurisson and Patrice Boizeau, the editor of the magazine Le Choc du Mois. By judgment of 18 April 1991, the 17th Chambre Correctionnelle du Tribunal de Grande Instance de Paris convicted Messrs. Faurisson and Boizeau of having committed the crime of "contestation de crimes contre l'humanité" and imposed on them fines and costs amounting to FF 326,832.

2.6 The conviction was based, inter alia, on the following Faurisson statements:

> "... No one will have me admit that two plus two make five, that the earth is flat, or that the Nuremberg Tribunal was infallible. I have excellent reasons not to believe in this policy of extermination of Jews or in the magic gas chamber ..."
>
> "I would wish to see that 100 per cent of all French citizens realize that the myth of the gas chambers is a dishonest fabrication (' est une gredinerie '), endorsed by the victorious powers of Nuremberg in 1945-46 and officialized on 14 July 1990 by the current French Government, with the approval of the 'court historians'".

2.7 The author and Mr. Boizeau appealed their conviction to the Court of Appeal of Paris (Eleventh Chamber). On 9 December 1992, the Eleventh Chamber, under the Presidency of Mrs. Françoise Simon, upheld the conviction and fined Messrs. Faurisson and Boizeau a total of FF 374,045.50. This sum included compensation for immaterial damage to the eleven plaintiff associations. The Court of Appeal did, inter alia, examine the facts in the light of articles 6 and 10 of the European Convention of Human Rights and Fundamental Freedoms and concluded that the court of first instance had evaluated them correctly. The author adds that, in addition to this penalty, he incurred considerable additional expenses, including attorney's fees for his defence and hospitalization costs as a result of injuries sustained when he was assaulted by members of Bétar and Tagar on the first day of the trial.

2.8 The author observes that the "Gayssot Act" has come under attack even in the French National Assembly. Thus, in June 1991, Mr. Jacques Toubon, a member of Parliament for the Rassemblement pour la République (RPR) and currently the French Minister of Justice, called for the abrogation of the Act. Mr. Faurisson also refers to the criticism of the Gayssot Act by Mrs. Simone Veil, herself an Auschwitz survivor, and by one of the leading legal representatives of a Jewish association. In this context, the author associates himself with a suggestion put forward by Mr. Philippe Costa, another French citizen tried under article 24 bis and acquitted by the Court of Appeal of Paris on 18 February 1993, to the effect that the Gayssot Act be

replaced by legislation specifically protecting all those who might become victims of incitement to racial hatred and in particular to anti-semitism, without obstructing historical research and discussion.

2.9 Mr. Faurisson acknowledges that it would still be open to him to appeal to the Court of Cassation; he claims, however, that he does not have the FF 20,000 of lawyers' fees which such an appeal would require, and that in any event, given the climate in which the trial at first instance and the appeal took place, a further appeal to the Court of Cassation would be futile. He assumes that even if the Court of Cassation were to quash the judgments of the lower instances, it would undoubtedly order a re-trial, which would produce the same results as the initial trial in 1991.

The complaint

3.1 The author contends that the "Gayssot Act" curtails his right to freedom of expression and academic freedom in general, and considers that the law targets him personally ("lex Faurissonia"). He complains that the incriminated provision constitutes unacceptable censorship, obstructing and penalizing historical research.

3.2 In respect of the judicial proceedings, Mr. Faurisson questions, in particular, the impartiality of the Court of Appeal (Eleventh Chamber). Thus, he contends that the President of the Chamber turned her face away from him throughout his testimony and did not allow him to read any document in court, not even excerpts from the Nuremberg verdict, which he submits was of importance for his defence.

3.3 The author states that, on the basis of separate private criminal actions filed by different organizations, both he and Mr. Boizeau are being prosecuted for the same interview of September 1990 in two other judicial instances which, at the time of submission of the communication, were scheduled to be heard in June 1993. This he considers to be a clear violation of the principle ne bis in idem .

3.4 Finally, the author submits that he continues to be subjected to threats and physical aggressions to such an extent that his life is in danger. Thus, he claims to have been assaulted by French citizens on 22 May 1993 in Stockholm, and again on 30 May 1993 in Paris.

State party's submission on the question of admissibility and author's comments thereon

4.1 In its submission under rule 91, the State party provides a chronological overview of the facts of the case and explains the ratio legis of the law of 13 July 1990. In this latter context, it observes that the law in question fills a gap in the panoply of criminal sanctions, by criminalizing the acts of those who question the genocide of the Jews and the existence of gas chambers. In the latter context, it adds that the so-called "revisionist" theses had previously escaped any criminal qualification, in that they could not be subsumed under the prohibition of (racial) discrimination, of incitement to racial hatred, or glorification of war crimes or crimes against humanity.

4.2 The State party further observes that in order to avoid making it an offence to manifest an opinion (" délit d'opinion "), the legislature chose to determine precisely the material element of the offence, by criminalizing only the negation (" contestation "), by one of the means enumerated in article 23 of the law on the Freedom of the Press of 1881, of one or several of the crimes against humanity in the sense of article 6 of the Statute of the International Military Tribunal. The role of the judge seized of allegations of facts that might be subsumed under the new law is not to intervene in an academic or an historical debate, but to ascertain whether the contested publications of words negate the existence of crimes against humanity recognized by international judicial instances. The State party points out that the law of 13 July 1990 was noted with appreciation by the Committee on the Elimination of Racial Discrimination in March 1994.

4.3 The State party submits that the communication is inadmissible on the basis of non-exhaustion of domestic remedies in so far as the alleged violation of Mr. Faurisson's freedom of expression is concerned, as he did not appeal his case to the Court of Cassation. It recalls the Committee's jurisprudence that mere doubts about the effectiveness of available remedies do not absolve an author from availing himself of them. Furthermore, it contends that there is no basis for the author's doubt that recourse to the Court of Cassation could not provide him with judicial redress.

4.4 In this context, the State party notes that while the Court of Cassation indeed does not examine facts and evidence in a case, it does ascertain whether the law was applied correctly to the facts, and can determine that there was a violation of the law, of which the Covenant is an integral part (art, 55 of the French Constitution of 4 June 1958). Article 55 stipulates that international treaties take precedence over domestic laws, and according to a judgment of the Court of Cassation of 24 May 1975, domestic laws contrary to an international treaty shall not be applied, even if the internal law was adopted after the conclusion of the treaty. Thus, the author remained free to invoke the Covenant before the Court of Cassation, as the Covenant takes precedence over the law of 13 July 1990.

4.5 As to the costs of an appeal to the Court of Cassation, the State party notes that pursuant to articles 584 and 585 of the Code of Criminal Procedure, it is not mandatory for a convicted person to be represented by counsel before the Court of Cassation. Furthermore, it observes that legal aid would be available to the author, upon sufficiently motivated request, in accordance with the provisions of Law 91-647 of 10 July 1991 (especially para. 10 thereof). The author did not file any such request, and in the absence of information about his financial resources, the State party contends that nothing would allow the conclusion that an application for legal aid, had it been filed, would not have been granted.

4.6 Concerning the alleged violation of article 14, paragraph 7, the State party underlines that the principle of " ne bis in idem " is firmly anchored in French law, which has been confirmed by the Court of Cassation in numerous judgments (see in particular article 6 of the Code of Criminal Procedure).

4.7 Thus, if new complaints and criminal actions against the author were entertained by the courts, for facts already judged by the Court of Appeal of Paris on 9 December 1992, then, the State party affirms, the prosecutor and the court would have to invoke, ex officio, the principle of " non bis in idem " and thereby annul the new proceedings.

4.8 The State party dismisses the author's allegation that he was a target of other criminal procedures based on the same facts as manifestly abusive, in the sense that the sole existence of the judgment of 9 December 1992 is sufficient to preclude further prosecution. In any event, the State party argues that Mr. Faurisson failed to produce any proof of such prosecution.

5.1 In his comments on the State party's submission, the author argues that the editor-in-chief of the magazine Le Choc, which published the disputed interview in September 1990, did appeal to the Court of Cassation; on 20 December 1994, the Criminal Chamber of the Court of Cassation dismissed the appeal. The author was informed of this decision by registered letter of 21 February 1995 from the Registry of the Court of Appeal of Paris.

5.2 Mr. Faurisson reiterates that assistance of legal counsel in proceedings before the Court of Cassation is, if not necessarily required by law, indispensable in practice: if the Court may only determine whether the law was applied correctly to the facts of a case, the accused must have specialized legal knowledge himself so as to follow the hearing. On the question of legal aid, the author simply notes that such aid is generally not granted to individuals with the salary of a university professor, even if this salary is, in his own situation, severely reduced by an avalanche of fines, punitive damages and other legal fees.

5.3 The author observes that he invokes less a violation of the right to freedom of expression, which does admit of some restrictions, but of his right to freedom of opinion and to doubt, as well as freedom of academic research. The latter, he contends, may not, by its very nature, be subjected to limitations. However, the Law of 13 July 1990, unlike comparable legislation in Germany, Belgium, Switzerland or Austria, does limit the freedom to doubt and to carry out historical research in strict terms. Thus, it elevates to the rank of infallible dogma the proceedings and the verdict of the International Military Tribunal sitting at Nuremberg. The author notes that the proceedings of the Tribunal, its way of collecting and evaluating evidence, and the personalities of the judges themselves have been subjected to trenchant criticism over the years, to such an extent that one could call the proceedings a " mascarade " (... " la sinistre et déshonorante mascarade judiciaire de Nuremberg ").

5.4 The author dismisses as absurd and illogical the ratio legis adduced by the State party, in that it even prohibits historians from proving, rather than negating, the existence of the Shoah or the mass extermination of Jews in the gas chambers. He contends that in the way it was drafted and is applied, the law endorses the orthodox Jewish version of the history of the Second World War once and for all.

5.5 As to the alleged violation of article 14, paragraph 7, the author reaffirms that one and the same interview published in one and the same publication resulted in three (distinct) proceedings before the

XVIIth Criminal Chamber of the Tribunal de Grande Instance of Paris. These cases were registered under the following registry codes: (1) P. 90 302 0325/0; (2) P. 90 302 0324/1; and (3) P. 90 271 0780/1. On 10 April 1992, the Tribunal decided to suspend the proceedings in as much as the author was concerned for the last two cases, pending a decision on the author's appeal against the judgment in the first case. The proceedings remained suspended after the judgment of the Court of Appeal, until the dismissal of the appeal filed by the journal Le Choc du Mois by the Court of Cassation on 20 December 1994. Since then, the procedure in the last two cases has resumed, and hearings took place on 27 January and 19 May 1995. Another hearing was scheduled for 17 October 1995.

The Committee's admissibility decision

6.1 During its fifty-fourth session, the Committee considered the admissibility of the communication. It noted that, at the time of the submission of the communication on 2 January 1993, the author had not appealed the judgment of the Court of Appeal of Paris (Eleventh Chamber) of 9 December 1992 to the Court of Cassation. The author argued that he did not have the means to secure legal representation for that purpose and that such an appeal would, at any rate, be futile. As to the first argument, the Committee noted that it was open to the author to seek legal aid, which he did not. As to the latter argument the Committee referred to its constant jurisprudence that mere doubts about the effectiveness of a remedy do not absolve an author from resorting to it. At the time of submission, therefore, the communication did not meet the requirement of exhaustion of domestic remedies set out in article 5, paragraph 2 (b), of the Optional Protocol. In the meantime, however, the author's co-accused, the Editor-in-Chief of the magazine Le Choc, which published the disputed interview in September 1990, had appealed to the Court of Cassation, which, on 20 December 1994, dismissed the appeal. The judgment delivered by the Criminal Chamber of the Court of Cassation reveals that the court concluded that the law was applied correctly to the facts, that the law was constitutional and that its application was not inconsistent with the French Republic's obligations under international human rights treaties, with specific reference to the provisions of article 10 of the European Convention on Human Rights, which provisions protect the right to freedom of opinion and expression in terms which are similar to the terms used in article 19 of the International Covenant on Civil and Political Rights for the same purpose. In the circumstances, the Committee held that it would not be reasonable to require the author to have recourse to the Court of Cassation on the same matter. That remedy could no longer be seen as an effective remedy within the meaning of article 5, paragraph 2 (b), of the Optional Protocol, i.e. a remedy that would provide the author with a reasonable prospect of judicial redress. The communication, therefore, no longer suffered from the initial bar of non-exhaustion of domestic remedies, in so far as it appeared to raise issues under article 19 of the Covenant.

6.2 The Committee considered that the author had sufficiently substantiated, for purposes of admissibility, his complaint about alleged violations of his right to freedom of expression, opinion and of academic research. These allegations should, accordingly, be considered on their merits.

6.3 On the other hand, the Committee found that the author had failed, for purposes of admissibility, to substantiate his claim that his right not to be

tried twice for the same offence had been violated. The facts of the case did not reveal that he had invoked that right in the proceedings that were pending against him. The Committee noted the State party's submission that the prosecutor and the court would be obliged to apply the principle of "non bis in idem" if invoked and to annul the new proceedings if they related to the same facts as those judged by the Court of Appeal of Paris on 9 December 1992. The author, therefore, had no claim in this respect under article 2 of the Optional Protocol.

6.4 Similarly, the Committee found that the author had failed, for purposes of admissibility, to substantiate his claims related to the alleged partiality of judges on the Eleventh Chamber of the Court of Appeal of Paris and the alleged reluctance of the judicial authorities to investigate aggressions to which he claims to have been subjected. In this respect, also, the author had no claim under article 2 of the Optional Protocol.

6.5 On 19 July 1995, therefore, the Human Rights Committee declared the communication admissible in as much as it appeared to raise issues under article 19 of the Covenant.

State party's observations on the merits and author's comments thereon

7.1 In its submission under article 4, paragraph 2, of the Optional Protocol, the State party considers that the author's claim should be dismissed as incompatible ratione materiae with the provisions of the Covenant, and subsidiarily as manifestly ill-founded.

7.2 The State party once again explains the legislative history of the "Gayssot Act". It notes, in this context, that anti-racism legislation adopted by France during the 1980s was considered insufficient to prosecute and punish, inter alia, the trivialization of Nazi crimes committed during the Second World War. The Law adopted on 13 July 1990 responded to the preoccupations of the French legislator vis-à-vis the development, for several years, of "revisionism", mostly through individuals who justified their writings by their (perceived) status as historians, and who challenged the existence of the Shoah. To the Government, these revisionist theses constitute "a subtle form of contemporary anti-semitism" ("... constituent une forme subtile de l'antisémitisme contemporain") which, prior to 13 July 1990, could not be prosecuted under any of the existing provisions of French criminal legislation.

7.3 The legislator thus sought to fill a legal vacuum, while attempting to define the new provisions against revisionism in as precise a manner as possible. The former Minister of Justice, Mr. Arpaillange, had aptly summarized the position of the then Government by stating that it was impossible not to devote oneself fully to the fight against racism, adding that racism did not constitute an opinion but an aggression, and that every time racism was allowed to express itself publicly, the public order was immediately and severely threatened. It was exactly because Mr. Faurisson expressed his anti-semitism through the publication of his revisionist theses in journals and magazines and thereby tarnished the memory of the victims of Nazism, that he was convicted in application of the Law of 13 July 1990.

7.4 The State party recalls that article 5, paragraph 1, of the Covenant allows a State party to deny any group or individual any right to engage in activities aimed at the destruction of any of the rights and freedoms recognized in the Covenant; similar wording is found in article 17 of the European Convention on Human Rights and Fundamental Freedoms. The State party refers to a case examined by the European Commission of Human Rights 1/ which in its opinion presents many similarities with the present case and whose ratio decidendi could be used for the determination of Mr. Faurisson's case. In this case, the European Commission observed that article 17 of the European Convention concerned essentially those rights which would enable those invoking them to exercise activities which effectively aim at the destruction of the rights recognized by the Convention ("... vise essentiellement les droits qui permettraient, si on les invoquait, d'essayer d'en tirer le droit de se livrer effectivement à des activités visant à la destruction des droits ou libertés reconnus dans la Convention"). It held that the authors, who were prosecuted for possession of pamphlets whose content incited to racial hatred and who had invoked their right to freedom of expression, could not invoke article 10 of the European Convention (the equivalent of article 19 of the Covenant), as they were claiming this right in order to exercise activities contrary to the letter and the spirit of the Convention.

7.5 Applying these arguments to the case of Mr. Faurisson, the State party notes that the tenor of the interview with the author which was published in Le Choc (in September 1990) was correctly qualified by the Court of Appeal of Paris as falling under the scope of application of article 24 bis of the Law of 29 July 1881, as modified by the Law of 13 July 1990. By challenging the reality of the extermination of Jews during the Second World War, the author incites his readers to anti-semitic behaviour ("... conduit ses lecteurs sur la voie de comportements antisémites") contrary to the Covenant and other international conventions ratified by France.

7.6 To the State party, the author's judgment on the ratio legis of the Law of 13 July 1990, as contained in his submission of 14 June 1995 to the Committee, i.e. that the law casts in concrete the orthodox Jewish version of the history of the Second World War, clearly reveals the demarche adopted by the author: under the guise of historical research, he seeks to accuse the Jewish people of having falsified and distorted the facts of the Second World War and thereby having created the myth of the extermination of the Jews. That Mr. Faurisson designated a former Chief Rabbi (Grand rabbin) as the author of the law of 13 July 1990, whereas the law is of parliamentary origin, is another illustration of the author's methods to fuel anti-semitic propaganda.

7.7 On the basis of the above, the State party concludes that the author's "activities", within the meaning of article 5 of the Covenant, clearly contain elements of racial discrimination, which is prohibited under the Covenant and other international human rights instruments. The State party invokes article 26 and in particular article 20, paragraph 2, of the Covenant, which stipulates that "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law". Furthermore, the State party recalls that it is a party to the International Convention on the Elimination of All Forms of Racial Discrimination; under article 4 of this Convention, States parties "shall declare an offence punishable by law all dissemination of ideas based on

racial superiority or hatred" (para. 4 (a)). The Committee on the Elimination of Racial Discrimination specifically welcomed the adoption of the Law of 13 July 1990 during the examination of the periodic report of France in 1994. In the light of the above, the State party concludes that it merely complied with its international obligations by making the (public) denial of crimes against humanity a criminal offence.

7.8 The State party further recalls the decision of the Human Rights Committee in case No. 104/1981, 2/ where the Committee had held that "the opinions which Mr. T. seeks to disseminate through the telephone system clearly constitute the advocacy of racial or religious hatred which Canada has an obligation under article 20 (2) of the Covenant to prohibit", and that the claim of the author based on article 19 was inadmissible as incompatible with the provisions of the Covenant. This reasoning, the State party submits, should be applied to the case of Mr. Faurisson.

7.9 On a subsidiary basis, the State party contends that the author's claim under article 19 is manifestly without merits. It notes that the right to freedom of expression laid down in article 19 of the Covenant is not without limits (cf. art. 19, para. 3), and that French legislation regulating the exercise of this right is perfectly consonant with the principles laid down in article 19; this has been confirmed by a decision of the French Constitutional Court of 10 and 11 October 1984. 3/ In the instant case, the limitations on Mr. Faurisson's right to freedom of expression flow from the Law of 13 July 1990.

7.10 The State party emphasizes that the text of the Law of 13 July 1990 reveals that the offence of which the author was convicted is defined in precise terms and is based on objective criteria, so as to avoid the creation of a category of offences linked merely to expression of opinions ("délit d'opinion "). The committal of the offence necessitates (a) the denial of crimes against humanity, as defined and recognized internationally, and (b) that these crimes against humanity have been adjudicated by judicial instances. In other words, the Law of 13 July 1990 does not punish the expression of an opinion, but the denial of a historical reality universally recognized. The adoption of the provision was necessary in the State party's opinion, not only to protect the rights and the reputation of others, but also to protect public order and morals.

7.11 In this context, the State party recalls once more the virulent terms in which the author, in his submission of 14 June 1995 to the Committee, had criticized the judgment of the International Tribunal of Nuremberg, dismissing it as a sinister and dishonouring judicial sham ("... la sinistre et déshonorante mascarade judiciaire de Nuremberg "). In so doing, he not only challenged the validity of the judgment of the Nuremberg Tribunal, but also unlawfully attacked the reputation and the memory of the victims of Nazism.

7.12 In support of its arguments, the State party refers to decisions of the European Commission of Human Rights addressing the interpretation of article 10 of the European Convention (the equivalent of para. 19 of the Covenant). In a case decided on 16 July 1982, 4/ which concerned the prohibition, by judicial decision, of display and sale of brochures arguing that the assassination of millions of Jews during the Second World War was a Zionist fabrication, the Commission held that "it was neither arbitrary nor

unreasonable to consider the pamphlets displayed by the applicant as a defamatory attack against the Jewish community and against each individual member of this community. By describing the historical fact of the assassination of millions of Jews, a fact which was even admitted by the applicant himself, as a lie and zionist swindle, the pamphlets in question not only gave a distorted picture of the relevant historical facts but also contained an attack on the reputation of all those ... described as liars and swindlers ...". The Commission further justified the restrictions on the applicant's freedom of expression, arguing that the "restriction was ... not only covered by a legitimate purpose recognized by the Convention (namely the protection of the reputation of others), but could also be considered as necessary in a democratic society. Such a society rests on the principles of tolerance and broad-mindedness which the pamphlets in question clearly failed to observe. The protection of these principles may be especially indicated vis-à-vis groups which have historically suffered from discrimination ...".

7.13 The State party notes that identical considerations transpire from the judgment of the Court of Appeal of Paris of 9 December 1992, which confirmed the conviction of Mr. Faurisson, by reference, inter alia, to article 10 of the European Convention and to the International Convention on the Elimination of All Forms of Racial Discrimination. It concludes that the author's conviction was fully justified, not only by the necessity of securing respect for the judgment of the International Military Tribunal at Nuremberg, and through it the memory of the survivors and the descendants of the victims of Nazism, but also by the necessity of maintaining social cohesion and public order.

8.1 In his comments, the author asserts that the State party's observations are based on a misunderstanding: he concedes that the freedoms of opinion and of expression indeed have some limits, but that he invokes less these freedoms than the freedom to doubt and the freedom of research which, to his mind, do not permit any restrictions. The latter freedoms are violated by the Law of 13 July 1990 which elevates to the level of only and unchallengeable truth what a group of individuals, judges of an international military tribunal, had decreed in advance as being authentic. Mr. Faurisson notes that the Spanish and United Kingdom Governments have recently recognized that anti-revisionist legislation of the French model is a step backward both for the law and for history.

8.2 The author reiterates that the desire to fight anti-semitism cannot justify any limitations on the freedom of research on a subject which is of obvious interest to Jewish organizations: the author qualifies as "exorbitant" the "privilege of censorship" from which the representatives of the Jewish community in France benefit. He observes that no other subject he is aware of has ever become a virtual taboo for research, following a request by another political or religious community. To him, no law should be allowed to prohibit the publication of studies on any subject, under the pretext that there is nothing to research on it.

8.3 Mr. Faurisson asserts that the State party has failed to provide the slightest element of proof that his own writings and theses constitute a "subtle form of contemporary anti-semitism" (see para. 7.2 above) or incite the public to anti-semitic behaviour (see para. 7.5 above). He accuses the State party of hybris in dismissing his research and writings as

"pseudo-scientific" (" prétendument scientifique "), and adds that he does not deny anything but merely challenges what the State party refers to as a "universally recognized reality" (" une réalité universellement reconnue "). The author further observes that the revisionist school has, over the past two decades, been able to dismiss as doubtful or wrong so many elements of the "universally recognized reality" that the impugned law becomes all the more unjustifiable.

8.4 The author denies that there is any valid legislation which would prevent him from challenging the verdict and the judgment of the International Tribunal at Nuremberg. He challenges the State party's argument that the basis for such prohibition precisely is the Law of 13 July 1990 as pure tautology and petitio principis . He further notes that even French jurisdictions have admitted that the procedures before and decisions of the International Tribunal could justifiably be criticized. 5/

8.5 The author observes that on the occasion of a recent revisionist affair (case of Roger Garaudy), the vast majority of French intellectuals as well as representatives of the French League for Human Rights have publicly voiced their opposition to the maintenance of the Law of 13 July 1990.

8.6 As to the violations of his right to freedom of expression and opinion, the author notes that this freedom remains severely limited: thus, he is denied the right of reply in the major media, and judicial procedures in his case are tending to become closed proceedings ("... mes procès tendent à devenir des procès à huis-clos "). Precisely because of the applicability of the Law of 13 July 1990, it has become an offence to provide column space to the author or to report the nature of his defence arguments during his trials. Mr. Faurisson notes that he sued the newspaper Libération for having refused to grant him a right of reply; he was convicted in first instance and on appeal and ordered to pay a fine to the newspaper's director. Mr. Faurisson concludes that he is, in his own country, "buried alive".

8.7 Mr. Faurisson argues that it would be wrong to examine his case and his situation purely in the light of legal concepts. He suggests that his case should be examined in a larger context: by way of example, he invokes the case of Galileo, whose discoveries were true, and any law, which would have enabled his conviction, would have been by its very nature wrong or absurd. Mr. Faurisson contends that the Law of 13 July 1990 was hastily drafted and put together by three individuals and that the draft law did not pass muster in the National Assembly when introduced in early May 1990. He submits that it was only after the profanation of the Jewish cemetery at Carpentras (Vaucluse) on 10 May 1990 and the alleged "shameless exploitation" ("exploitation nauséabonde ") of this event by the then Minister of the Interior, P. Joxe, and the President of the National Assembly, L. Fabius, that the law passed. If adopted under such circumstances, the author concludes, it cannot but follow that it must one day disappear, just as the "myth" of the gas chambers at Auschwitz.

8.8 In a further submission dated 3 July 1996 the State party explains the purposes pursued by the Act of 13 July 1990. It points out that the introduction of the Act was in fact intended to serve the struggle against anti-semitism. In this context the State party refers to a statement made

by the then Minister of Justice, Mr. Arpaillange, before the Senate characterizing the denial of the existence of the Holocaust as the contemporary expression of racism and anti-semitism.

8.9 In his comments of 11 July 1996 made on the State party's submission the author reiterates his earlier arguments; inter alia he again challenges the "accepted" version of the extermination of the Jews, because of its lack of evidence. In this context he refers for example to the fact that a decree ordering the extermination has never been found, and it has never been proven how it was technically possible to kill so many people by gas-asphyxiation. He further recalls that visitors to Auschwitz have been made to believe that the gas chamber they see there is authentic, whereas the authorities know that it is a reconstruction, built on a different spot than the original is said to have been. He concludes that as a historian, interested in the facts, he is not willing to accept the traditional version of events and has no choice but to contest it.

Examination of the merits

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as it is required to do under article 5, paragraph 1, of the Optional Protocol.

9.2 The Committee takes note of public debates in France, including negative comments made by French parliamentarians on the Gayssot Act, as well as of arguments put forward in other, mainly European, countries which support and oppose the introduction of similar legislations.

9.3 Although it does not contest that the application of the terms of the Gayssot Act, which, in their effect, make it a criminal offence to challenge the conclusions and the verdict of the International Military Tribunal at Nuremberg, may lead, under different conditions than the facts of the instant case, to decisions or measures incompatible with the Covenant, the Committee is not called upon to criticize in the abstract laws enacted by States parties. The task of the Committee under the Optional Protocol is to ascertain whether the conditions of the restrictions imposed on the right to freedom of expression are met in the communications which are brought before it.

9.4 Any restriction on the right to freedom of expression must cumulatively meet the following conditions: it must be provided by law, it must address one of the aims set out in paragraph 3 (a) and (b) of article 19, and must be necessary to achieve a legitimate purpose.

9.5 The restriction on the author's freedom of expression was indeed provided by law i.e. the Act of 13 July 1990. It is the constant jurisprudence of the Committee that the restrictive law itself must be in compliance with the provisions of the Covenant. In this regard the Committee concludes, on the basis of the reading of the judgment of the 17th Chambre correctionnelle du Tribunal de grande instance de Paris that the finding of the author's guilt was based on his following two statements: "... I have excellent reasons not to believe in the policy of extermination of Jews or in the magic gas chambers ... I wish to see that 100 per cent of the French citizens realize that the myth of the gas chambers is a dishonest

fabrication". His conviction therefore did not encroach upon his right to hold and express an opinion in general, rather the court convicted Mr. Faurisson for having violated the rights and reputation of others. For these reasons the Committee is satisfied that the Gayssot Act, as read, interpreted and applied to the author's case by the French courts, is in compliance with the provisions of the Covenant.

9.6 To assess whether the restrictions placed on the author's freedom of expression by his criminal conviction were applied for the purposes provided for by the Covenant, the Committee begins by noting, as it did in its General Comment 10 that the rights for the protection of which restrictions on the freedom of expression are permitted by article 19, paragraph 3, may relate to the interests of other persons or to those of the community as a whole. Since the statements made by the author, read in their full context, were of a nature as to raise or strengthen anti-semitic feelings, the restriction served the respect of the Jewish community to live free from fear of an atmosphere of anti-semitism. The Committee therefore concludes that the restriction of the author's freedom of expression was permissible under article 19, paragraph 3 (a), of the Covenant.

9.7 Lastly the Committee needs to consider whether the restriction of the author's freedom of expression was necessary. The Committee noted the State party's argument contending that the introduction of the Gayssot Act was intended to serve the struggle against racism and anti-semitism. It also noted the statement of a member of the French Government, the then Minister of Justice, which characterized the denial of the existence of the Holocaust as the principal vehicle for anti-semitism. In the absence in the material before it of any argument undermining the validity of the State party's position as to the necessity of the restriction, the Committee is satisfied that the restriction of Mr. Faurisson's freedom of expression was necessary within the meaning of article 19, paragraph 3, of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee do not reveal a violation by France of article 19, paragraph 3, of the Covenant.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

A. Statement by Mr. Thomas Buergenthal

As a survivor of the concentration camps of Auschwitz and Sachsenhausen whose father, maternal grandparents and many other family members were killed in the Nazi Holocaust, I have no choice but to recuse myself from participating in the decision of this case.

Thomas Buergenthal [signed]
[Original: English]

B. Individual opinion by Nisuke Ando *(concurring)*

While I do not oppose the adoption of the Views by the Human Rights Committee in the present case, I would like to express my concern about the danger that the French legislation in question, the Gayssot Act, might entail. As I understand it, the Act criminalises the negation ("contestation" in French), by one of the means enumerated in article 23 of the Law on the Freedom of the Press of 1881, of one or several of the crimes against humanity in the sense of article 6 of the Statute of the International Military Tribunal of Nuremberg (see para. 4.2). In my view the term "negation" ("contestation"), if loosely interpreted, could comprise various forms of expression of opinions and thus has a possibility of threatening or encroaching the right to freedom of expression, which constitutes an indispensable prerequisite for the proper functioning of a democratic society. In order to eliminate this possibility it would probably be better to replace the Act with a specific legislation prohibiting well-defined acts of anti-semitism or with a provision of the criminal code protecting the rights or reputations of others in general.

Nisuke Ando [signed]
[Original: English]

C. Individual opinion by Elizabeth Evatt and David Kretzmer, co-signed by Eckart Klein *(concurring)*

1. While we concur in the view of the Committee that in the particular circumstances of this case the right to freedom of expression of the author was not violated, given the importance of the issues involved we have decided to append our separate, concurring, opinion.

2. Any restriction on the right to freedom of expression must cumulatively meet the following conditions: it must be provided by law, it must address one of the aims set out in paragraph 3 (a) and (b) of article 19, and it must be necessary to achieve that aim. In this case we are concerned with the restriction on the author's freedom of expression arising from his conviction for his statements in the interview published in Le Choc du Mois. As this conviction was based on the prohibition laid down in the Gayssot Act, it was indeed a restriction provided by law. The main issue is whether the restriction has been shown by the State party to be necessary, in terms of article 19, paragraph 3 (a), for respect of the rights or reputations of others.

3. The State party has argued that the author's conviction was justified "by the necessity of securing respect for the judgment of the International Military Tribunal at Nuremburg, and through it the memory of the survivors and the descendants of the victims of Nazism." While we entertain no doubt whatsoever that the author's statements are highly offensive both to Holocaust survivors and to descendants of Holocaust victims (as well as to many others), the question under the Covenant is whether a restriction on freedom of expression in order to achieve this purpose may be regarded as a restriction necessary for the respect of the rights of others.

4. Every individual has the right to be free not only from discrimination on grounds of race, religion and national origins, but also from incitement to

such discrimination. This is stated expressly in article 7 of the Universal Declaration of Human Rights. It is implicit in the obligation placed on States parties under article 20, paragraph 2, of the Covenant to prohibit by law any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. The crime for which the author was convicted under the Gayssot Act does not expressly include the element of incitement, nor do the statements which served as the basis for the conviction fall clearly within the boundaries of incitement, which the State party was bound to prohibit, in accordance with article 20, paragraph 2. However, there may be circumstances in which the right of a person to be free from incitement to discrimination on grounds of race, religion or national origins cannot be fully protected by a narrow, explicit law on incitement that falls precisely within the boundaries of article 20, paragraph 2. This is the case where, in a particular social and historical context, statements that do not meet the strict legal criteria of incitement can be shown to constitute part of a pattern of incitement against a given racial, religious or national group, or where those interested in spreading hostility and hatred adopt sophisticated forms of speech that are not punishable under the law against racial incitement, even though their effect may be as pernicious as explicit incitement, if not more so.

5. In the discussion in the French Senate on the Gayssot Act the then Minister of Justice, Mr. Arpaillange, explained that the said law, which, inter alia, prohibits denial of the Holocaust, was needed since Holocaust denial is a contemporary expression of racism and anti-semitism. Furthermore, the influence of the author's statements on racial or religious hatred was considered by the Paris Court of Appeal, which held that by virtue of the fact that such statements propagate ideas tending to revive Nazi doctrine and the policy of racial discrimination, they tend to disrupt the harmonious coexistence of different groups in France.

6. The notion that in the conditions of present-day France, Holocaust denial may constitute a form of incitement to anti-semitism cannot be dismissed. This is a consequence not of the mere challenge to well-documented historical facts, established both by historians of different persuasions and backgrounds as well as by international and domestic tribunals, but of the context, in which it is implied, under the guise of impartial academic research, that the victims of Nazism were guilty of dishonest fabrication, that the story of their victimization is a myth and that the gas chambers in which so many people were murdered are "magic".

7. The Committee correctly points out, as it did in its General Comment 10, that the right for the protection of which restrictions on freedom of expression are permitted by article 19, paragraph 3, may relate to the interests of a community as a whole. This is especially the case in which the right protected is the right to be free from racial, national or religious incitement. The French courts examined the statements made by the author and came to the conclusion that his statements were of a nature as to raise or strengthen anti-semitic tendencies. It appears therefore that the restriction on the author's freedom of expression served to protect the right of the Jewish community in France to live free from fear of incitement to anti-semitism. This leads us to the conclusion that the State party has shown

that the aim of the restrictions on the author's freedom of expression was to respect the right of others, mentioned in article 19, paragraph 3. The more difficult question is whether imposing liability for such statements was necessary in order to protect that right.

8. The power given to States parties under article 19, paragraph 3, to place restrictions on freedom of expression, must not be interpreted as license to prohibit unpopular speech, or speech which some sections of the population find offensive. Much offensive speech may be regarded as speech that impinges on one of the values mentioned in article 19, paragraph 3 (a) or (b) (the rights or reputations of others, national security, ordre public, public health or morals). The Covenant therefore stipulates that the purpose of protecting one of those values is not, of itself, sufficient reason to restrict expression. The restriction must be necessary to protect the given value. This requirement of necessity implies an element of proportionality. The scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect. It must not exceed that needed to protect that value. As the Committee stated in its General Comment 10, the restriction must not put the very right itself in jeopardy.

9. The Gayssot Act is phrased in the widest language and would seem to prohibit publication of bona fide research connected with matters decided by the Nuremburg Tribunal. Even if the purpose of this prohibition is to protect the right to be free from incitement to anti-semitism, the restrictions imposed do not meet the proportionality test. They do not link liability to the intent of the author, nor to the tendency of the publication to incite to anti-semitism. Furthermore, the legitimate object of the law could certainly have been achieved by a less drastic provision that would not imply that the State party had attempted to turn historical truths and experiences into legislative dogma that may not be challenged, no matter what the object behind that challenge, nor its likely consequences. In the present case we are not concerned, however, with the Gayssot Act, in abstracto, but only with the restriction placed on the freedom of expression of the author by his conviction for his statements in the interview in Le Choc du Mois. Does this restriction meet the proportionality test?

10. The French courts examined the author's statements in great detail. Their decisions, and the interview itself, refute the author's argument that he is only driven by his interest in historical research. In the interview the author demanded that historians "particularly Jewish historians" ("les historiens, en particulier juifs") who agree that some of the findings of the Nuremburg Tribunal were mistaken be prosecuted. The author referred to the "magic gas chamber" ("la magique chambre à gaz") and to "the myth of the gas chambers" ("le mythe des chambres à gaz"), that was a "dirty trick" ("une gredinerie") endorsed by the victors in Nuremburg. The author has, in these statements, singled out Jewish historians over others, and has clearly implied that the Jews, the victims of the Nazis, concocted the story of gas chambers for their own purposes. While there is every reason to maintain protection of bona fide historical research against restriction, even when it challenges accepted historical truths and by so doing offends people, anti-semitic allegations of the sort made by the author, which violate the rights of others in the way described, do not have the same claim to protection against restriction. The restrictions placed on the author did not curb the core of

his right to freedom of expression, nor did they in any way affect his freedom of research; they were intimately linked to the value they were meant to protect - the right to be free from incitement to racism or anti-semitism; protecting that value could not have been achieved in the circumstances by less drastic means. It is for these reasons that we joined the Committee in concluding that, in the specific circumstances of the case, the restrictions on the author's freedom of expression met the proportionality test and were necessary in order to protect the rights of others.

Elizabeth Evatt [signed]
David Kretzmer [signed]
Eckart Klein [signed]
[Original: English]

D. Individual opinion by Cecilia Medina Quiroga *(concurring)*

1. I concur with the Committee's opinion in this case and wish to associate myself with the individual opinion formulated by Ms. Evatt and Mr. Kretzmer as being the one that most clearly expresses my own thoughts.

2. I would like to add that a determining factor for my position is the fact that, although the wording of the Gayssot Act might, in application, constitute a clear violation of article 19 of the Covenant, the French court which tried Mr. Faurisson interpreted and applied that Act in the light of the provisions of the Covenant, thereby adapting the Act to France's international obligations with regard to freedom of expression.

Cecilia Medina Quiroga [signed]
[Original: Spanish]

E. Individual opinion by Rajsoomer Lallah *(concurring)*

1. I have reservations on the approach adopted by the Committee in arriving at its conclusions. I also reach the same conclusions for different reasons.

2. It is perhaps necessary to identify, in the first place, what restrictions or prohibitions a State party may legitimately impose, by law, on the right to freedom of expression or opinion, whether under article 19, paragraph 3, or 20, paragraph 2, of the Covenant; and, secondly, where the non-observance of such restrictions or prohibitions is criminalized by law, what are the elements of the offence that the law must, in its formulation, provide for so that an individual may know what these elements are and so that he may be able to defend himself, in respect of those elements, by virtue of the fundamental right to a fair trial by a Court conferred upon him under article 14 of the Covenant.

3. The Committee, and indeed my colleagues Evatt and Kretzmer whose separate opinion I have had the advantage of reading, have properly analyzed the purposes for which restrictions may legitimately be imposed under article 19, paragraph 3, of the Covenant. They have also properly underlined the requirement that the restrictions must be necessary to achieve those purposes. I need not add anything further on this particular aspect of the matter.

4. In so far as restrictions or prohibitions in pursuance of article 20, paragraph 2, are concerned, the element of necessity is merged with the very nature of the expression which may legitimately be prohibited by law, that is to say, the expression must amount to advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

5. The second question as to what the law must provide for, in its formulation, is a more difficult one. I would see no great difficulty in the formulation of a law which prohibits, in the very terms of article 20, paragraph 2, the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. The formulation becomes more problematic for the purposes of article 19, paragraph 3. Because, here, it is not, as is the case under article 20, paragraph 2, the particular expression that may be restricted but rather the adverse effect that the expression must necessarily have on the specified objects or interests which paragraphs (a) and (b) are designed to protect. It is the prejudice to these objects or interests which becomes the material element of the restriction or prohibition and, consequently, of the offence.

6. As my colleagues Evatt and Kretzmer have noted, the Gayssot Act is formulated in the widest terms and would seem to prohibit publication of _bona fide_ research connected with principles and matters decided by the Nuremberg Tribunal. It creates an absolute liability in respect of which no defence appears to be possible. It does not link liability either to the intent of the author nor to the prejudice that it causes to respect for the rights or reputations of others as required under article 19, paragraph 3 (a), or to the protection of national security or of public order or of public health or morals as required under article 19, paragraph 3 (b).

7. What is significant in the Gayssot Act is that it appears to criminalize, in substance, any challenge to the conclusions and the verdict of the Nuremberg Tribunal. In its effects, the Act criminalizes the bare denial of historical facts. The assumption, in the provisions of the Act, that the denial is necessarily anti-semitic or incites anti-semitism is a Parliamentary or legislative judgment and is not a matter left to adjudication or judgment by the Courts. For this reason, the Act would appear, in principle, to put in jeopardy the right of any person accused of a breach of the Act to be tried by an independent Court.

8. I am conscious, however, that the Act must not be read _in abstracto_ but in its application to the author. In this regard, the next question to be examined is whether any deficiencies in the Act, in its application to the author, were or were not remedied by the Courts.

9. It would appear, as also noted by my colleagues Evatt and Kretzmer that the author's statements on racial or religious hatred were considered by the French Courts. Those Courts came to the conclusion that the statements propagated ideas tending to revive Nazi doctrine and the policy of racial discrimination. The statements were also found to have been of such a nature as to raise or strengthen anti-semitic tendencies. It is beyond doubt that, on the basis of the findings of the French Courts, the statements of the author amounted to the advocacy of racial or religious hatred constituting incitement, at the very least, to hostility and discrimination towards people

of the Jewish faith which France was entitled under article 20, paragraph 2, of the Covenant to proscribe. In this regard, in considering this aspect of the matter and reaching the conclusions which they did, the French Courts would appear to have, quite properly, arrogated back to themselves the power to decide a question which the Legislature had purported to decide by a legislative judgement.

10. Whatever deficiencies, therefore, which the Act contained were, in the case of the author, remedied by the Courts. When considering a communication under the Optional Protocol what must be considered is the action of the State as such, irrespective of whether the State had acted through its legislative arm or its judicial arm or through both.

11. I conclude, therefore, that the creation of the offence provided for in the Gayssot Act, as it has been applied by the Courts to the author's case, falls more appropriately, in my view, within the powers of France under article 20, paragraph 2, of the Covenant. The result is that there has, for this reason, been no violation by France under the Covenant.

12. I am aware that the communication of the author was declared admissible only with regard to article 19. I note, however, that no particular article was specified by the author when submitting his communication. And, in the course of the exchange of observations by both the author and the State party, the substance of matters relevant to article 20, paragraph 2, were also mooted or brought in issue. I would see no substantive or procedural difficulty in invoking article 20, paragraph 2.

13. Recourse to restrictions that are, in principle, permissible under article 19, paragraph 3, bristles with difficulties, tending to destroy the very existence of the right sought to be restricted. The right to freedom of opinion and expression is a most valuable right and may turn out to be too fragile for survival in the face of the too frequently professed necessity for its restriction in the wide range of areas envisaged under paragraphs (a) and (b) of article 19, paragraph 3.

Rajsoomer Lallah [signed]
[Original: English]

F. Individual opinion by Prafullachandra Bhagwati *(concurring)*

The facts giving rise to this communication have been set out in detail in the majority opinion of the Committee and it would be an idle exercise for me to reiterate the same over again. I will, instead, proceed straight away to deal with the question of law raised by the author of the communication. The question is whether the conviction of the author under the Gayssot Act was violative of article 19, paragraph 2, of the International Covenant on Civil and Political Rights.

Article 19, paragraph 2, declares that everyone shall have the right to freedom of expression which includes freedom to impart information and ideas of all kinds through any media, but restrictions can be imposed on this freedom under article 19, paragraph 3, provided such restrictions cumulatively

meet the following conditions: (1) they must be provided for by law, (2) they must address one of the aims enumerated in paragraph 3 (a) and 3 (b) of article 19 and (3) they must be necessary to achieve a legitimate purpose, this last requirement introducing the principle of proportionality.

The Gayssot Act was passed by the French Legislature on 13 July 1990 amending the law on the Freedom of the Press by adding an article 24 bis which made it an offence to contest the existence of the category of crimes against humanity as defined in the London Charter of 8 August 1945 on the basis of which Nazi leaders were tried and convicted by the International Military Tribunal at Nuremberg in 1945-46. The Gayssot Act thus provided restriction on freedom of expression by making it an offence to speak or write denying the existence of the Holocaust or of gas asphyxiation of Jews in gas chambers by Nazis. The author was convicted for breach of the provisions of the Gayssot Act and it was therefore breach of this restriction on which the finding of guilt recorded against him was based. The offending statements made by the author on which his conviction was based were the following:

> "... No one will have me admit that two plus two make five, that the earth is flat or that the Nuremberg trial was infallible. I have excellent reasons not to believe in this policy of extermination of Jews or in the magic gas chamber ..."
>
> "I would wish to see that 100 per cent of all French citizens realize that the myth of the gas chambers is a dishonest fabrication ('est une gredinerie'), endorsed by the victorious powers of Nuremberg in 1945-46 and officialized on 14 July 1990 by the current French Government with the approval of the Court historians."

These statements were clearly in breach of the restriction imposed by the Gayssot Act and were therefore plainly covered by the prohibition under the Gayssot Act. But the question is whether the restriction imposed by the Gayssot Act which formed the basis of the conviction of the author, satisfied the other two elements in article 19, paragraph 3, in order to pass the test of permissible restriction.

The second element in article 19, paragraph 3, requires that the restriction imposed by the Gayssot Act must address one of the aims enumerated in paragraph 3 (a) and (b) of article 19. It must be necessary (a) for respect of the rights or reputations of others or (b) for the protection of national security or of public order (ordre public) or of public health or morals. It would be difficult to bring the restriction under paragraph 3 (b) because it cannot be said to be necessary for any of the purposes set out in paragraph 3 (b). The only question to which it is necessary to address oneself is whether the restriction can be said to be necessary for respect of the rights and reputations of others so as to be justifiable under paragraph 3 (a).

Now if a law were merely to prohibit any criticism of the functioning of the International Military Tribunal at Nuremberg or any denial of a historical event simpliciter, on pain of penalty, such law would not be justifiable under paragraph 3 (a) of article 19 and it would clearly be inconsistent under article 19, paragraph 2. But, it is clear from the submissions made by the

State party and particularly, the submission made on 3 July 1996 that the object and purpose of imposing restriction under the Gayssot Act on freedom of expression was to prohibit or prevent insidious expression of anti-semitism. According to the State party:

> "the denial of the Holocaust by authors who qualify themselves as revisionists could only be qualified as an expression of racism and the principal vehicle of anti-semitism."
>
> "the denial of the genocide of the Jews during World War Two fuels debates of a profoundly anti-semitic character, since it accuses the Jews of having fabricated themselves the myth of their extermination."

Thus, according to the State party, the necessary consequence of denial of extermination of Jews by asphyxiation in the gas chamber was fuelling of anti-semitic sentiment by the clearest suggestion that the myth of the gas chamber was a dishonest fabrication by the Jews and it was in fact so articulated by the author in his offending statement.

It is therefore clear that the restriction on freedom of expression imposed by the Gayssot Act was intended to protect the Jewish community against hostility, antagonism and ill-will which would be generated against them by statements imputing dishonest fabrication of the myth of gas chamber and extermination of Jews by asphyxiation in the gas chamber. It may be noted, as observed by the Committee in its General Comment 10, that the rights for the protection of which restrictions on the freedom of expression are permitted by article 19, paragraph 3 (a), may relate to the interests of other persons or to those of the community as a whole. Since the statement made by the author, read in the context of its necessary consequence, was calculated or was at least of such a nature as to raise or strengthen anti-semitic feelings and create or promote hatred, hostility or contempt against the Jewish community as dishonest fabricators of lies, the restriction imposed on such statement by the Gayssot Act was intended to serve the purpose of respect for the right and interest of the Jewish community to live free from fear of an atmosphere of anti-semitism, hostility or contempt. The second element required for the applicability of article 19, paragraph 3, was therefore satisfied.

That takes me to a consideration of the question whether the third element could be said to have been satisfied in the present case. Was the restriction on the author's freedom of expression imposed under the Gayssot Act necessary for respect of the rights and interests of the Jewish community? The answer must obviously be in the affirmative. If the restriction on freedom of expression in the manner provided under the Gayssot Act had not been imposed and statements denying the Holocaust and the extermination of Jews by asphyxiation in the gas chamber had not been made penal, the author and other revisionists like him could have gone on making statements similar to the one which invited the conviction of the author and the necessary consequence and fall-out of such statements would have been, in the context of the situation prevailing in Europe, promotion and strengthening of

anti-semitic feelings, as emphatically pointed out by the State party in its submissions. Therefore, the imposition of restriction by the Gayssot Act was necessary for securing respect for the rights and interests of the Jewish community to live in society with full human dignity and free from an atmosphere of anti-semitism.

It is therefore clear that the restriction on freedom of expression imposed by the Gayssot Act satisfied all the three elements required for the applicability of article 19, paragraph 3, and was not inconsistent with article 19, paragraph 2, and consequently, the conviction of the author under the Gayssot Act was not violative of his freedom of expression guaranteed under article 19, paragraph 2. I have reached this conclusion under the greatest reluctance because I firmly believe that in a free democratic society, freedom of speech and expression is one of the most prized freedoms which must be defended and upheld at any cost and this should be particularly so in the land of Voltaire. It is indeed unfortunate that in the world of today, when science and technology have advanced the frontiers of knowledge and mankind is beginning to realize that human happiness can be realized only through inter-dependence and cooperation, the threshold of tolerance should be going down. It is high time man should realize his spiritual dimension and replace bitterness and hatred by love and compassion, tolerance and forgiveness.

I have written this separate opinion because, though I agree with the majority conclusion of no violation, the process of reasoning through which I have reached this conclusion is a little different from the one which has found favour with the majority.

Prafullachandra Bhagwati [signed]
[Original: English]

Notes

1/ Cases Nos. 8348/78 and 8406/78 (Glimmerveen and Hagenbeek v. The Netherlands), declared inadmissible on 11 October 1979.

2/ Communication No. 104/1981 (J.R.T. and the W.G. Party v. Canada), declared inadmissible 6 April 1983, para. 8 (b).

3/ No. 84-181 D.C. of 10 and 11 October 1984, Rec. p. 78.

4/ Case No. 9235/81 (X. v. Federal Republic of Germany), declared inadmissible 16 July 1982.

5/ Cf. Seventeenth Criminal Chamber, Tribunal Correctionnel de Paris , 18 April 1991.
