CRIMES AGAINST HUMANITY

II. JURISPRUDENCE

ICCPR

- *Faurisson v. France* (550/1993), ICCPR, A/52/40 vol. II (8 November 1996) 84 (CCPR/C/58/D/550/1993) at paras. 2.1-2.5, 4.1, 4.2, 7.2, 7.7, 7.10, 8.8, 8.9, 9.5-9.7, 10, Individual Opinion by Nisuke Ando (concurring), 97, Individual Opinion by Elizabeth Evatt, David Kretzmer and Eckhart Klein (concurring), 97 at paras. 6, 9, 10, and Individual Opinion by Prafullachandra Bhagwati (concurring), 102.

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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...

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

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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.

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7.7 ...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 that 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.

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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.

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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.

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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.

...

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.

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10. The Human Rights Committee...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.

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Individual Opinion by Nisuke Ando

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 criminalizes 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.

Individual Opinion by Elizabeth Evatt, David Kretzmer and Eckart Klein

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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".

...

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 Nuremberg 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.

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Individual Opinion by Prafullachandra Bhagwati

...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 and 1946. 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...

Thus, according to the State party, the necessary consequence of denial of extermination of Jews by asphyxiation in the gas chamber was fueling 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...