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

GRAND CHAMBER

CASE OF LINDON, OTCHAKOVSKY-LAURENS AND JULY
v. FRANCE

(Applications nos. 21279/02 and 36448/02)

JUDGMENT

STRASBOURG

22 October 2007

In the case of Lindon, Otchakovsky-Laurens and July v. France,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Christos Rozakis, *President*,
Luzius Wildhaber,
Jean-Paul Costa,
Nicolas Bratza,
Boštjan M. Zupančič,
Peer Lorenzen,
Françoise Tulkens,
Loukis Loucaides,
Josep Casadevall,
Mindia Ugrekhelidze,
Elisabeth Steiner,
Lech Garlicki,
Khanlar Hajiyev,
Renate Jaeger,
Sverre Erik Jebens,
Davíd Thór Björgvinsson,
Ján Šikuta, *judges*,

and Michael O'Boyle, *Deputy Registrar*,

Having deliberated in private on 13 December 2006 and on 5 September 2007,

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

PROCEDURE

1. The case originated in two applications against the French Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by three French nationals ("the applicants"). The first application (no. 21279/02) was lodged on 23 May 2002 by Mr Mathieu Lindon ("the first applicant") and Mr Paul Otchakovsky-Laurens ("the second applicant"), and the second application (no. 36448/02) was lodged on 27 September 2002 by Mr Serge July ("the third applicant").

2. The first two applicants were represented by Mr H. Leclerc and Mr R. Rappaport, lawyers practising in Paris, and the third applicant was represented by Mr J.-P. Levy, a lawyer also practising in Paris. The French Government ("the Government") were represented by their Agent, Mrs E. Belliard, Director of Legal Affairs, Ministry of Foreign Affairs.

3. The applications were allocated to the Court's First Section (Rule 52 § 1 of the Rules of Court). On 1 June 2006 a Chamber of that Section composed of Christos Rozakis, President, Loukis Loucaides, Jean-Paul Costa, Françoise Tulkens, Elisabeth Steiner, Khanlar Hajiyev and Sverre Erik Jebens, judges, and Søren Nielsen, Section Registrar, relinquished jurisdiction in favour of the Grand Chamber, none of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

4. The composition of the Grand Chamber was determined in accordance with the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

5. The President of the Grand Chamber ordered that the proceedings in the two applications be conducted simultaneously (Rule 42 § 2). He further decided to maintain the application of Article 29 § 3 of the Convention before the Grand Chamber, which would accordingly examine the admissibility and merits of the applications at the same time.

6. The Government and the first two applicants filed observations on the admissibility and merits of the case

7. A hearing took place in public in the Human Rights Building, Strasbourg, on 13 December 2006 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Ms A.-F. TISSIER, Head of the Human Rights Section,
Department of Legal Affairs,
Ministry of Foreign Affairs — *Agent*,
Ms M. MONGIN, Ministry of Foreign Affairs, — *Counsel*,
Ms O. DIEGO, Ministry of Justice, — *Adviser*;

(b) *for the applicants*

Mr R. RAPPAPORT, lawyer,
Mr J.-P. LEVY, lawyer, — *Counsel*.

The Court heard addresses by Mr Rappaport, Mr Levy and Ms Tissier, and their replies to questions from judges.

8. On 19 January 2007 Luzius Wildhaber reached the end of his term of office as President of the Court. He was succeeded in that capacity by Jean-Paul Costa, and Christos Rozakis, Vice-President of the Court, assumed the presidency of the Grand Chamber in the present case.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The first applicant is a writer and the second is the chairman of the board of directors of the publishing company P.O.L.; the third was the publication director of the daily newspaper *Libération*. They were born in 1955, 1944 and 1949 respectively and live in Paris.

A. The conviction of Mr Lindon and Mr Otchakovsky-Laurens (application no. 21279/02)

1. The publication of the novel "Jean-Marie Le Pen on Trial"

10. The first applicant is the author of a book presented as a novel under the title *Le Procès de Jean-Marie Le Pen* ("Jean-Marie Le Pen on Trial"), published in August 1998 by P.O.L.

11. The novel recounts the trial of a Front National militant, Ronald Blistier, who, while putting up posters for his party with other militants, commits the cold-blooded murder of a young man of North African descent and admits that it was a racist crime. He is defended by a Jewish, left-wing and homosexual lawyer, Pierre Mine.

The novel is based on real events and in particular the murders, in 1995, of Brahim Bouaram, a young Moroccan who was thrown into the Seine by skinheads during a Front National march, and of Ibrahim Ali, a young Frenchman of Comorian origin who was killed in Marseilles by militants of the same party. Those militants were convicted in June 1998 after a trial in the Assize Court during which Front National leaders, Mr Le Pen included, declared that the case was no more than a provocation and a put-up job through which the party's enemies sought to harm it.

The author builds the plot around the lawyer, the main protagonist, who throughout the trial finds himself embroiled in a political debate. At the very beginning he raises the question of Mr Le Pen's responsibility: "Isn't the Chairman of the Front National responsible for the murder committed by one of his teenage militants inflamed by his rhetoric?" (page 7). The novel focuses on a number of figures who are characterised by their moral or political positions in relation to the ideology and political party of the far right. The work also seeks to highlight the difficulties and contradictions of certain "anti-racist" stances.

12. The text on the back cover of the book describes the novel as follows:

"How can Jean-Marie Le Pen be fought effectively? The youth Ronald Blistier, member of the Front National, has committed a cold-blooded racist murder, killing an Arab youth in the open street. The case has caused an outcry and it is generally agreed that Blistier's trial should really be that of his mentor.

Thirty-year-old Jewish lawyer Pierre Mine is defending the murderer. He has certain ideas about how best to fight Jean-Marie Le Pen.

– Set a trap for Le Pen? But it would backfire on all of us, warns his boyfriend Mahmoud Mammoudi.

Pierre Mine pursues his fight regardless. His strategy is unfathomable. Won't he become the punchbag of the anti-racists and the champion of those he seeks to defeat? Jean-Marie Le Pen pretends to show him some respect. He is beset with troubles on all sides – it's as if those who have no real success in their fight against the Front National are nevertheless suspicious of anyone trying a different approach."

13. By originating summonses of 20 and 27 November 1998, the Front National and Mr Le Pen brought proceedings against the first two applicants in the Paris Criminal Court for the offence of public defamation against a private individual, as a result of the novel's publication, under sections 29(1) and 32(1) of the Freedom of the Press Act of 29 July 1881. Six extracts from the novel were the subject of particular complaint: those (on pages 10, 86, 105-06 and 136) that were reproduced in a judgment delivered by the Paris Court of Appeal on 13 September 2000 (see paragraph 18 below), and the following two passages:

On page 28 the author attributes the following remarks to Mrs Blistier, Ronald's mother:

"It might have crossed his mind, but he was never much good at shooting – my husband didn't like Ronald using his rifle. But maybe the lad was humiliated because he'd never beaten anyone up, when all his mates from the Front National were bragging about their weekly clean-up rounds on the housing estates."

On page 118, concerning a Front National demonstration, the author writes:

"The crowd assembled on Place de la Bastille, now whipped up by their master ranter, mostly consists of youths. If you searched them you'd find handguns by their hundreds. They're ready for a fight – they're only too pleased if far-left organisations think it's a good strategy to confront them. The atmosphere is in some ways one of pre-insurrection, but as the journalists present have observed, the feeling on the side of the democrats is more one of disgust than of panic. A fascist *coup d'état* isn't yet on the cards, there is more a fear of gangrene setting in – a social disease that can occasionally be stopped from spreading or curbed temporarily."

2. The Paris Criminal Court's judgment of 11 October 1999

14. In a judgment of 11 October 1999, the Paris Criminal Court convicted the second applicant of defamation and the first applicant of complicity in that offence, taking account, however, of only four of the six

offending extracts, namely those on pages 10, 86, 105-06 and 136 of the book. They were each sentenced to pay a fine of 15,000 French francs (FRF) (equivalent to 2,286.74 euros (EUR)) and ordered jointly and severally to pay FRF 25,000 (EUR 3,811.23) in damages to each of the civil parties, together with the cost of publishing an announcement of the judgment.

In its judgment the court found as follows:

"Whether the publication was defamatory:

It should first be noted that, whilst the author chose to write a 'novel', as indicated on the front cover of the book, he portrays, along with a number of fictional characters, an actual and living political figure, namely Jean-Marie Le Pen, and his party, the Front National. In addition, the author announces the subject matter of his work in the title itself, 'Jean-Marie Le Pen on Trial'. On the back cover he asks the question 'How can Jean-Marie Le Pen be fought effectively?' and in the first few lines of the book he raises another question: 'Isn't the Chairman of the Front National responsible for the murder committed by one of his teenage militants inflamed by his rhetoric?' The reader thus immediately becomes aware that the fictional trial is a vector for direct criticism of Jean-Marie Le Pen, especially since the facts described are largely, and obviously, inspired by actual events which have had a great impact on public opinion.

Accordingly, although it is a novel, and although the offending remarks are only made by fictional characters, it can nevertheless be observed that the work seeks to impart clearly expressed ideas and to communicate a certain image of Jean-Marie Le Pen, his party and their behaviour. The classification of the charge cannot therefore be ruled out purely on the basis of the technique used to that end.

The text, regardless of its literary genre, is capable of harming the honour and reputation of the civil parties and it is appropriate to examine each of the offending extracts to establish their meaning and significance and to determine whether, for the charge of defamation to be made out, they are precise enough for the issue of proof to be addressed.

First passage, page 10: To allege that Jean-Marie Le Pen is the chief of a gang of killers – in other words, that he heads a group of murderers – constitutes, in the context of the book, an evidently defamatory allegation of sufficiently precise conduct, reference being made to the racist crime committed by the novel's protagonist, a young Front National member whose criminal act is said to have been inspired by the ideas advocated by Jean-Marie Le Pen.

It is of no consequence that the crime of 'Ronald Blistier' is not real, because the author's intention is not to write a satire about an impossible event but, on the contrary, to make the reader believe that, given Jean-Marie Le Pen's ideology, such a scenario is quite plausible and that he would be accountable for it. The story also evokes – inevitably, for the reader – the trial in June 1998 of the Front National billstickers accused of killing a Comorian youth, Ibrahim Ali, in Marseilles. Similarly, when the author, a few passages further on, recounts the killing of a black youth called 'Julien Thoris', who is thrown into the Seine during a demonstration at which the Front National is present, the reader is bound to recall the real murder of Brahim Bouaram, whose killers were taking part in a march held by that party.

The precision of the facts described in the offending extract is thus sufficient to constitute defamation against the civil parties, and the facts thus alluded to were susceptible of proof.

Second passage, page 28: The assertion that 'all his mates from the Front National were bragging about their weekly clean-up rounds on the housing estates' is not clarified by other remarks or illustrated by any given facts. It may stem from the boastfulness attributed to the character in the novel and is too vague to justify prosecution.

Third passage, page 86: The Front National is accused of using violence against those who leave the party. The author has one of his characters warn Ronald Blistier's lawyer against 'the Front National's common strategy' of 'battering' anyone who leaves it ('to beat you up ... ten against one, with metal bars, truncheons and steel-capped boots, one night as you're leaving the house').

This extract, which concerns facts that are precise and susceptible of proof, namely the attacking or even killing of anyone who dares to betray and leave the party, damages the honour of the Front National.

Fourth passage, pages 105-06: To accuse Jean-Marie Le Pen of making statements 'with racist overtones that are barely concealed at best' and to write that 'from behind each of his assertions looms the spectre of the worst abominations of the history of mankind' constitutes defamation against him in that he is accused of a form of racism that reminds the reader of the worst atrocities ever perpetrated. The author moreover explains a few lines further on that Jean-Marie Le Pen can put the idea of a racist murder into simple minds like that of Ronald Blistier, who 'would not have had a gun in his hand and a North African kid at the end of it if Jean-Marie Le Pen had not made it possible' (p. 106).

Fifth passage, page 118: This passage, which describes the young Front National militants firstly as being whipped up by their 'master ranter' and secondly as being armed by the hundreds and of creating an atmosphere of 'pre-insurrection', is certainly insulting to Jean-Marie Le Pen, but too imprecise to constitute defamation; the subsequent remarks do not concern the Front National but participants in that party's demonstrations and cannot therefore be taken into account.

Sixth passage, page 136: Jean-Marie Le Pen is accused of being a 'vampire' who thrives on 'the bitterness of his electorate' and 'the blood of his enemies', and of being a liar, defaming his opponents to protect himself from the accusations against him.

The author develops this image and the term 'vampire' by writing, just after the offending passage: '... Jean-Marie Le Pen used Ronald Blistier's life and is now using his death to stir up other Ronald Blistiers, to transform other lost youths into puppets who will have their lives and deaths manipulated by this ruthless puppeteer.'

These allegations about using the life and death of young militants, in driving them to murder and suicide, for personal political ends, are precise and damage the honour and reputation of Jean-Marie Le Pen.

As to the existence of good faith:

Defamatory allegations are, in law, deemed to have been made with the intention of causing harm, but they can be justified if the writer shows that he was acting in good faith.

The court observes in this connection that the author did not simply write a work of fiction. He portrayed to his readers Jean-Marie Le Pen, engaged in his usual activities as Chairman of the Front National, with the intention of criticising him and his party and of challenging their ideas. Mathieu Lindon indeed stated at the hearing that he had made much use of information in the news and, as a result, the reader may not be able to distinguish clearly between fact and fiction, so clear was the intention to associate the situations and remarks with recent events.

Although, in the sphere of political polemics and ideological debate, the greatest freedom of expression must be afforded to the author, that freedom is not unrestricted, and stops when it comes to personal attacks, whether they are made directly by the author or through the intermediary of fictional characters, and is discredited by the distortion of facts and by immoderate language.

Whereas the defence has asserted that this story reflects reality and does not twist it, the documents produced, which are mainly press articles, being devoid of evidentiary value, are insufficient to substantiate the defamatory allegations taken into account by the court concerning the criminal conduct imputed to the civil parties. No relevant judicial decision against them, which might have justified such assertions, was produced in the proceedings, and in the absence of documents the court can only find that Mathieu Lindon distorted the facts to reinforce the hostility of his readers towards Jean-Marie Le Pen and his party.

Furthermore, whilst authors and polemicists are afforded freedom to use a specific register, this does not authorise the particularly excessive remarks that appear in the text.

It cannot therefore be accepted that the defendants acted in good faith and the charge of defamation to the detriment of Jean-Marie Le Pen and the Front National is accordingly made out ..."

3. The Paris Court of Appeal's judgment of 13 September 2000

15. The first two applicants appealed against the above judgment in the Paris Court of Appeal. They challenged the finding that the offending extracts were defamatory in nature. They argued that it was simply a work of fiction portraying fictional characters, as the reader could see from the very first page. They also argued that the remarks merely amounted to value judgments about the claimants, reflecting a public debate, treated with distance and irony, about how best to combat the rise of the far right. In the alternative, pleading good faith, they submitted that the ideas of Mr Le Pen and the Front National had not been distorted by the book and its characters, and that the offending passages consisted exclusively of remarks made by the fictional characters without reflecting the ideas of the author, who, for

his part, had sought to criticise the strategy adopted by anti-racist associations and left-wing intellectuals in general, in their fight against the Front National.

The applicants relied on Article 10 of the Convention, claiming that this provision precluded any conviction because a work of fiction was entitled to reflect debate as to the moral responsibility borne by the Front National and its leader's ideas in the commission of racist crimes. They emphasised that the freedom to hold opinions would be infringed if the author of a value judgment were to be penalised on the pretext that he could not prove the pertinence of his opinion, and referred in this connection to the *Lingens v. Austria* judgment (8 July 1986, Series A no. 103). Lastly, they argued that equally aggressive and defamatory remarks against the civil parties had been made in the past by politicians or journalists, and that Mr Le Pen himself had been convicted several times of incitement to racial hatred.

16. In a judgment of 13 September 2000, the Paris Court of Appeal (Eleventh Division, consisting of Mr Charvet, President, Mr Blanc and Mr Deletang) upheld the judgment of 11 October 1999 as regards the defamatory nature of three out of the four passages taken into account by the Criminal Court, together with the fines imposed and the damages awarded by that court.

17. In its judgment the Court of Appeal considered, firstly, that the work in question was a "novel", "a 'creation of the imagination' as defined by the *Petit Robert* dictionary", whose story line was constructed around the dilemma facing the main character: "The author has developed a plot, based on that framework, running from the beginning of the proceedings against the young defendant until his suicide in prison before counsel's address and the prosecution speech, and has given expression to many characters who mainly appear as stereotypes characterised by their moral or political position in relation to the civil parties, who themselves are explicitly real people." It further observed that Mr Le Pen and the Front National, both appearing under their real and current identities, were constantly at the forefront not only of the debate conducted in open court but also of the exchanges between the various characters, "and even at the heart of the intimate contradictions facing the main protagonist". The court then noted that, on a number of occasions, words had been put into the mouth of Mr Le Pen, who "express[ed] views that [were] close or identical to those [that he took] in reality, but which [had not been] regarded by the civil parties as impugning his honour and reputation or those of the party of which he [was] the leader". It further considered that the subject of the book was the question set out on the back cover, "How can Jean-Marie Le Pen be fought effectively?", adding that "to ask that question, even in a novel, [was] not *per se* defamatory against him".

18. The court went on to point out that section 29 of the Act of 29 July 1881 defined defamation as "any statement or allegation of a fact that

impugns the honour or reputation of [a] person" and that the law made no distinction based on the nature of the writing in issue. On that basis, any writing, whether political, philosophical, novelistic or even poetical, was governed by the applicable rules in such matters, with regard both to public order and to the protection of individuals. However, the court added that "the application of the rules on defamation in respect of a press article or other text directly expressing the view of its author requires, if the text is a work of fiction, an examination of the question whether the civil parties are actually the individuals concerned by the offending remarks, and then of the meaning attributed by the author to the words of his characters in the light of the ideas that he expounds in reality in his work". As to the second point – the first being manifestly established – the court found as follows: "... a distinction has to be made between the offending passages on pages 10, 86, 105, and, lastly, 136, the only extracts now to be taken into account: some of them express the view of the narrator and coincide with the author's ideas as they emerge from the work as a whole, whilst others can be attributed only to the character making the remarks in question, in so far as the author genuinely distances himself from those remarks throughout the work, either through the narrator or by other means."

Using that method the court ruled as follows on the four passages in question:

> "1. Page 10: '... an effective way to fight Le Pen is to call for him to be put in the dock and show that he isn't the Chairman of a political party but the chief of a gang of killers – after all, people would have voted for Al Capone too' [this view is attributed by the author to anti-racist demonstrators who have gathered outside the law courts].
>
> This segment of text is preceded by another, which has not been mentioned by the civil parties: 'For them, it's not sufficient to call Ronald Blistier the murderer', following the narrator's description of the crowd of 'anti-racists' which assembles in front of the law courts during the trial of Ronald Blistier.
>
> To assert that Jean-Marie Le Pen is not the Chairman of a political party but the chief of a gang of killers, and then in addition to equate him with Al Capone, is clearly defamatory, as was quite rightly observed by the court below.
>
> There is nothing in the preceding or following sentences to suggest that any distance has been taken by the narrator – and therefore, in view of the book's literary construction, by the author himself – from this statement, which is attributed to the demonstrators gathered outside the law courts, and which, moreover, echoes the question presented on the back cover as the subject of the book: 'How can Jean-Marie Le Pen be fought effectively?'
>
> This extract accordingly constitutes defamation against the civil parties.
>
> 2. Page 86: 'He (Blistier [the accused]) wants to frighten you, Pierrot [the lawyer]. He wants to brand you as a member of his clan: that's a common Front National strategy, to make you look like a traitor if you later make the slightest criticism of Le Pen or his followers, and so they'll feel morally entitled to beat you up – to come

after you, ten against one, with metal bars, truncheons and steel-capped boots, one night as you're leaving the house, and give you a clear message that those who join the team stick together for life. Nobody leaves the Front National with impunity. Please don't try and be clever, Pierrot. I don't want them to kill you.'

These words are spoken by the boyfriend of the lawyer, Mr Mine, the main protagonist. The speaker is giving his own explanation about the defendant's attitude towards his counsel during the hearing, in response to a question from Mine.

This passage contains comments that are specific to the fictional character, albeit derogatory with regard to the civil parties, as observed by the court below.

Nevertheless, and contrary to the assessment of the lower court, they do not appear to be susceptible of proof within the meaning of the Act of 29 July 1881: being attributed to a fictional character, in a situation which is itself fictional, the text does not suggest that they may necessarily be regarded as corresponding to the author's opinion.

This passage is not found to be defamatory.

3. Pages 105-06: 'Read the papers, listen to the radio and television, every statement by Jean-Marie Le Pen is bedecked – or rather bespotted and bespattered – with racist overtones that are barely concealed at best. Each of his words is a veil for others and from behind each of his assertions looms the spectre of the worst abominations of the history of mankind. Everyone knows it, everyone says it. What Ronald Blistier did was precisely what Jean-Marie Le Pen advocates. Perhaps not explicitly – he tries to abide by the law, even though he does not always manage to do so. But when you consider the situations in which he speaks, the innuendos he makes and the figures he supports, there can be no doubt' [here the lawyer is addressing the court].

It is clearly defamatory to accuse Jean-Marie Le Pen of 'proffering words or assertions with racist overtones that are barely concealed at best and from behind which looms the spectre of the worst abominations of the history of mankind'.

Such an accusation is susceptible of debate as to whether or not it holds true in relation to the actual discourse of Jean-Marie Le Pen and the Front National.

The defendants cannot legitimately claim impunity for such remarks on the grounds that they derive from novelistic fiction and at the same time that they are covered by the statutory impunity concerning statements made during a judicial hearing.

The allegation by the character Mr Mine, the lawyer, that 'what Ronald Blistier did was precisely what Jean-Marie Le Pen advocates', following the narrator's comment – just before the paragraph containing the passage in question – that 'once again, everyone agrees that this trial should be that of Jean-Marie Le Pen rather than that of Ronald Blistier, otherwise it would never have had such an impact', shows that through the remarks attributed to his main protagonist it is in fact Mathieu Lindon who is expressing himself here with reference to the civil parties.

This extract constitutes defamation against the civil parties.

4. Page 136: After the defendant's suicide in prison, his lawyer gives the following statement on television: 'How can Jean-Marie Le Pen be allowed to play the victim after Ronald Blistier's suicide? Isn't the Front National Chairman a vampire who thrives on the bitterness of his electorate, but sometimes also on their blood, like the blood of his enemies? Why does Le Pen accuse democrats of the alleged murder of Ronald Blistier? Because he isn't afraid of lies – because engaging in defamation against his opponents always appears useful for him, of course, but it is also quite simply a means to deflect suspicion; he's the one who shouts the loudest in the hope that his ranting will drown out the accusations against himself.'

To describe Jean-Marie Le Pen, Chairman of the Front National, as 'a vampire who thrives on the bitterness of his electorate, but sometimes also on their blood, like the blood of his enemies', impugns the honour and reputation of the two civil parties.

This passage is part of a long television appearance by the main protagonist – the only one who, apart from his boyfriend, is portrayed in a positive light in the novel, as both characters convey, so to speak, the contradictions and values of the narrator – following the defendant's suicide in prison.

It is evident that this speech, which takes the form of an indictment, and which is presented as the only interview given to the media by the lawyer, who has previously turned down many other requests, constitutes both the synthesis and the final conclusion through which the author seeks to give his character an opportunity to express, with a certain solemnity in the context of this fiction, the author's own view as a militant writer.

Moreover, in the last two pages of the book, following the television statement, no distance whatsoever is introduced between the narrator and the remarks made.

This extract thus constitutes defamation against the civil parties."

19. The Court of Appeal further dismissed the argument that the applicants had acted in good faith, on the following grounds:

"Defamatory allegations are deemed to have been made in bad faith unless the defendant can show that they fulfil all of the following conditions: they must correspond to the pursuit of a legitimate aim; they must not reflect any personal animosity on his part towards the civil party; there must have been a serious preliminary investigation; and the language used must be dispassionate.

In the present case, the legitimacy of the aim pursued by the defendants through the novel, namely 'to fight against Jean-Marie Le Pen effectively', in other words to engage in a political combat, cannot be challenged in a democratic society.

With its claim to be a 'combative' work, the novel in question, and in particular the passages found to be defamatory, attest to patent animosity towards the civil parties. However, that animosity is explicitly related to the aversion felt by the defendants in reaction to the ideas and values presented for public debate by the civil party as Chairman of the Front National. That animosity, which is not directed against the civil party in person, cannot be regarded as reprehensible *per se*.

Since this is a work of fiction, the question of the seriousness of the investigation underpinning the work cannot be assessed as if it were a text intended to inform the

reader of real facts or comment on such facts. However, the principle adopted for the construction of the work in issue, as can be seen explicitly from a reading of the text and as the defendants have asserted before the court, is based on the juxtaposition within an imaginary plot of, on the one hand, various fictional characters, and on the other, the Chairman of the Front National, a real figure, who represents the focus in relation to which the imaginary characters take shape and around which they revolve throughout the novel.

Furthermore, the ideas, rhetoric, acts and gestures of Jean-Marie Le Pen are accurately described in the novel – as the defendants have claimed, producing cogent evidence to that effect – in relation to the reality of the various public manifestations of his political activity. Accordingly, it is appropriate to examine whether the use of the defamatory comments chosen by the author was preceded by an investigation sufficiently serious to justify the comments in question.

In this connection, whilst the rhetoric and ideas attributed to the civil parties, together with the ensuing debates, are unquestionably consonant with the actual representation of the ideas of the Front National in reports on French political life today, the defendants have failed to adduce any specific evidence to show that the use of the wording found to be defamatory was preceded by basic verification as to the reality supposed to be evoked by that wording.

Similarly, it cannot be said that the form of expression used in the three extracts found to be defamatory is sufficiently dispassionate: to liken Jean-Marie Le Pen to the 'chief of a gang of killers' (page 10), to assert that the murder committed by Blistier – a fictional character – was 'advocated' by Jean-Marie Le Pen – a real person – and to describe the Chairman of the Front National – a real person – as a 'vampire who thrives on the bitterness of his electorate, but sometimes also on their blood', clearly oversteps the permissible limits in such matters.

It cannot therefore be accepted that the defendants acted in good faith.

Lastly, the argument derived from the application of Article 10 of the European Convention on Human Rights and the *Lingens v. Austria* judgment of 8 July 1986, whereby 'a value-judgment made about a politician is by nature not susceptible of proof' is ineffective.

The allegations found in the present case to be defamatory, directed against a real politician, do not merely constitute value-judgments within the meaning of the judgment of the European Court of Human Rights cited above, in a case where a journalist had described the conduct of a politician as 'the basest opportunism', 'immoral' and 'undignified'. In Mr Lindon's case, he accuses the civil party of certain concrete practices (describing him as the 'chief of a gang of killers', 'advocating the perpetration of a murder' and 'a vampire who thrives on the bitterness and the blood of his voters')."

4. The Court of Cassation's judgment of 27 November 2001

20. In a judgment of 27 November 2001, the Court of Cassation dismissed an appeal on points of law lodged by the first two applicants. It rejected as follows the ground based on an alleged breach of Article 10 of the Convention:

"... In finding the defendants guilty of public defamation against a private individual, taking into account three extracts from the work, the judges, who made an accurate assessment of the meaning and significance of the offending writings, justified their decision without breaching the Convention provisions referred to in the ground of appeal.

Whilst Article 10 of the Convention ... recognises, in its first paragraph, that everyone has the right to freedom of expression, that provision states, in its second paragraph, that the exercise of this right, carrying with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society for the protection of the reputation of others. ..."

B. The conviction of Mr July (application no. 36448/02)

1. The article published in the daily newspaper Libération

21. In its edition of 16 November 1999, in a column entitled "*Rebonds*" ("reactions"), the daily newspaper *Libération* published an article signed by ninety-seven contemporary writers concerning the first two applicants' conviction, on charges of defamation and complicity in defamation, by the Paris Criminal Court in its judgment of 11 October 1999 (see paragraph 14 above). The article took the form of a petition and read as follows:

"**Petition. The passages from the book 'Jean-Marie Le Pen on Trial' for which Mathieu Lindon and his publisher were convicted are not defamatory. We are prepared to write them in a novel. We will write against Le Pen.**

Novels cannot be granted unlimited rights. But they have the right to exist and to evoke the real world in which the author and his peers live. Mathieu Lindon and his publisher Paul Otchakovsky-Laurens were convicted of defamation against Jean-Marie Le Pen on account of four passages in the novel 'Jean-Marie Le Pen on Trial'.

To write, in a novel, that demonstrators who pay tribute to the victim of a racist murder consider that: 'For them, it's not sufficient to call Ronald Blistier the murderer; an effective way to fight Le Pen is to call for him to be put in the dock and show that he isn't the Chairman of a political party but the chief of a gang of killers – after all, people would have voted for Al Capone too' is not defamatory in my view and I am prepared to write this in a novel.

To write, in a novel, that the boyfriend of a lawyer defending a murderer who belongs to the Front National gives the lawyer this warning: 'He wants to frighten you, Pierrot. He wants to brand you as a member of his clan: that's a common Front National strategy, to make you look like a traitor if you later make the slightest criticism of Le Pen or his followers, and so they'll feel morally entitled to beat you up – to come after you, ten against one, with metal bars, truncheons and steel-capped boots, one night as you're leaving the house, and give you a clear message that those who join the team stick together for life. Nobody leaves the Front National with impunity. Please don't try and be clever, Pierrot. I don't want them to kill you' is not defamatory in my view and I am prepared to write this in a novel.

To write, in a novel, that a lawyer, in defending his client who is accused of a racist crime puts the following arguments to the court: 'Read the papers, listen to the radio and television, every statement by Jean-Marie Le Pen is bedecked – or rather bespotted and bespattered – with racist overtones that are barely concealed at best. Each of his words is a veil for others and from behind each of his assertions looms the spectre of the worst abominations of the history of mankind. Everyone knows it, everyone says it. What Ronald Blistier did was precisely what Jean-Marie Le Pen advocates. Perhaps not explicitly – he tries to abide by the law, even though he does not always manage to do so. But when you consider the situations in which he speaks, the innuendos he makes and the figures he supports, there can be no doubt' is not defamatory in my view and I am prepared to write this in a novel.

To write, in a novel, that a lawyer who has poorly defended his client, a Front National member accused of a racist murder, makes the following analysis: 'How can Jean-Marie Le Pen be allowed to play the victim after Ronald Blistier's suicide? Isn't the Front National Chairman a vampire who thrives on the bitterness of his electorate, but sometimes also on their blood, like the blood of his enemies? Why does Le Pen accuse the democrats of the alleged murder of Ronald Blistier? Because he isn't afraid of lies – because engaging in defamation against his opponents always appears useful for him, of course, but it is also quite simply a means to deflect suspicion; he's the one who shouts the loudest in the hope that his ranting will drown out the accusations against himself' is not defamatory in my view and I am prepared to write this in a novel.

If these passages are to be considered defamatory in a novel, they are also defamatory in reality. I should be sued by Jean-Marie Le Pen and convicted by a court, if they are true to their own logic, for having reproduced those extracts here."

2. The Paris Criminal Court's judgment of 7 September 2000

22. It was on account of the above article that Mr Le Pen and his party summoned the third applicant to appear before the Paris Criminal Court in his capacity as publication director of *Libération*, alleging that he had committed the offence of public defamation against a private individual (under sections 29(1), 32(1) and 42 of the Freedom of the Press Act of 29 July 1881).

23. In a judgment of 7 September 2000, the court found the applicant guilty of the criminal offence of defamation and sentenced him to pay a fine of FRF 15,000 (EUR 2,286.74). It also awarded FRF 25,000 (EUR 3,811.23) in damages.

The court, after observing that *Libération* had reproduced *in extenso* passages from the work that it had characterised as defamatory in its judgment of 11 October 1999, found that "the defamatory nature of the remarks, which ha[d] already been found to have impugned the honour and reputation of another and ha[d] been repeated in the offending article, [was] ... not in doubt". As to the question of good faith, the court found that, whilst the newspaper *Libération* was entitled to comment on a judicial decision and to impart ideas and information on questions that formed the subject of public debate, it was nevertheless true that there was "a

distinction between the right of petition and the publicity given to a petition by the use of objectionable terms". In the court's view, the publication of the defamatory passages *in abstracto*, outside their literary context, strengthened the dishonouring force of the allegations, which were shifted to the terrain of reality and plausibility, without any debate of ideas, as the signatories of the article had emphasised in concluding: "If these extracts are to be considered defamatory in a novel, they are also defamatory in reality." The court added that other newspapers had reported on the debate triggered by the publication of "Jean-Marie Le Pen on Trial" and the petition following the conviction of its author but had not reproduced the offending comments *in extenso*. It inferred that the third applicant "could ... have reported on the offending petition and informed readers of the views of numerous writers and journalists, without, however, reiterating the offence of which Mr Lindon and his publisher had been convicted by reproducing the passages that had been found to be defamatory in the court's previous decision".

3. The Paris Court of Appeal's judgment of 21 March 2001

24. On 12 September 2000 the third applicant lodged an appeal against the judgment. He contended that the impugned article was part of a broader political debate concerning the Front National and its Chairman, and that the debate was intense because of events that had actually taken place. It was those events which had provided the inspiration for the novel by the first applicant, whose cause had been defended by the signatories of the petition, reacting in a democratic spirit and out of vigilance towards the far-right movement. The third applicant explained that the column "*Rebonds*" was specifically reserved for the opinions of commentators from outside the newspaper who expressed their views with the intention of triggering debate and provoking reactions among readers. He added that the column, in principle, was not supposed to be objective or impartial but to convey opinions and therefore entailed the freedom to hold those opinions. He argued that the free discussion of political matters should not be hindered by excessive requirements relating to the protection of the rights of others or the prevention of disorder.

25. In a judgment of 21 March 2001, the Eleventh Division of the Paris Court of Appeal (consisting of Mr Charvet, President, and Judges Deletang and Waechter) upheld all the provisions of the judgment under appeal.

The court pointed out that, in its judgment of 13 September 2000 (see paragraphs 16-19 above), it had upheld the conviction of the first two applicants on account of three out of the four offending passages in the novel. It reproduced those passages and, as regards the defamatory nature of the article, referred back to the grounds set out in the 13 September 2000 judgment, of which, it stated, the reasoning "remain[ed] applicable". It went on to dismiss the defence of good faith on the following grounds:

"The existence of controversy surrounding Mr Le Pen and the Front National has been patent for many years, and that controversy has taken on a polemical aspect at certain times.

As regards the work 'Jean-Marie Le Pen on Trial', the court found in its previous judgment that it was established that its very subject matter was the fight against the political ideas of the civil parties, which in this case had taken the form of a novel.

Such a medium does not preclude the application of the Act of 29 July 1881 where, firstly, the characters portrayed can be identified as real people, and, secondly, the defamatory allegations against them are a reflection not of the narrative process but of the author's own views.

On the basis of that analysis, the court considered that this situation obtained in respect of the novel itself. It is all the more true for the impugned article, which is presented as a shift from fiction in two ways, being published even though the passages in question had formed the basis of a conviction and by clearly indicating that shift: 'If these passages are to be considered defamatory in a novel, they are also defamatory in reality. We will write against Le Pen.'

The authors of the text in issue had no other aim than that of showing their support for Mathieu Lindon by repeating with approval, out of defiance, all the passages that had been found defamatory by the court, and without even really calling into question the defamatory nature of the remarks.

The polemical aim of a text cannot absolve it from all regulation of expression, especially when, far from being based merely on an academic debate, its line of argument is built around reference to precise facts. There was therefore an obligation to carry out a meaningful investigation before making particularly serious accusations such as incitement to commit murder, and to avoid offensive expressions such as those describing Mr Le Pen as the 'chief of a gang of killers' or as a vampire.

The defence of good faith cannot be admitted ..."

4. The Court of Cassation's judgment of 3 April 2002

26. On 23 March 2001 the third applicant appealed on points of law, claiming in particular that there had been a violation of Articles 10 and 6 of the Convention. In respect of Article 6 he contended that the Court of Appeal had already ruled on the defamatory nature of the book in question and that it had relied on that earlier judgment, so that the appeal had not been heard by an impartial tribunal but by a "court which openly regarded itself as clearly targeted by the offending article".

27. In a judgment of 3 April 2002, the Court of Cassation dismissed the appeal in the following terms:

"... It is apparent from the decision appealed against that Serge July, publication director, was summoned to appear before the Eleventh Division of the Court of Appeal on a charge of public defamation against a private individual, on account of having published an article. That article incorporated certain passages from a book for which the author had previously been found guilty under section 29 of the Act of

29 July 1881 by a bench of the Court of Appeal consisting of President Charvet and Judges Blanc and Deletang.

The appellant is not entitled to complain that Judges Charvet and Deletang sat on the bench of the appellate court before which he appeared, in so far as the participation in this case of a number of judges of the criminal division of the Court of Appeal in proceedings concerning charges brought, firstly, against the author of a defamatory text and, secondly, against the publication director who allowed certain passages from that text to be published, is not contrary to the requirement of impartiality enshrined in Article 6 § 1 of the Convention. In addition, contrary to what has been alleged, there is nothing in the judgment appealed against to suggest that the judges deemed themselves to be targeted by the offending text or that they expressed an opinion contrary to the requirement of impartiality.

... In finding Serge July guilty ... the Court of Appeal stated that the polemical aim of a text could not absolve it from all regulation of expression, when, far from being based merely on an academic debate, its line of argument was built around reference to precise facts. The court added that, in this case, the accusations that had been made without a meaningful prior investigation were particularly serious ones, the civil party having been described as the 'chief of a gang of killers' or as a vampire.

In these circumstances the Court of Appeal justified its decision without breaching Article 10 of the Convention ..."

II. RELEVANT DOMESTIC LAW AND PRACTICE

28. The relevant parts of the Freedom of the Press Act of 29 July 1881 provide as follows:

Section 29

"It shall be defamatory to make any statement or allegation of a fact that impugns the honour or reputation of the person or body of whom the fact is alleged. The direct publication or reproduction of such a statement or allegation shall be an offence, even if expressed in tentative terms or if made about a person or body not expressly named but identifiable by the terms of the disputed speeches, shouts, threats, written or printed matter, placards or posters.

It shall be an insult to use any abusive or contemptuous language or invective not containing an allegation of fact."

Section 32(1)

"Anyone who by any of the means set out in section 23 [including 'written' and 'printed' matter and 'any other written medium' 'sold or distributed, or offered for sale'] makes a statement that is defamatory of private individuals shall be liable on conviction to six months' imprisonment and a fine of 12,000 euros, or to one only of those sentences".

Section 42

"The following persons shall be liable, as principals, in the following order, to penalties for offences committed via the press:

1. Publication directors or publishers, irrespective of their occupation or title ..."

29. An individual may be defamed through the portrayal of characters in a novel or play, without it being necessary for the name of the imaginary person to correspond to that of the individual who claims to have been defamed, provided he or she is referred to in a clear manner such that the public cannot be mistaken (Paris Court of Appeal, 8 March 1897). On the other hand, the fact that the name of the imaginary person corresponds to that of a living person is not sufficient for the latter to allege defamation, even if there are certainly similarities of character and diffusion (Algiers Court of Appeal, 20 February 1897). Such situations mostly give rise to proceedings for civil liability and damages are awarded whenever there has been prejudice, that is to say when the public has unavoidably been led to associate the living person with the imaginary person and where an error of judgment can be attributed to the author (Paris Court of Appeal, 24 April 1936, and Paris Court of Appeal, 8 November 1950). (Source: *Juris-Classeur de droit pénal,* 1996, *Presse-Diffamation*, *fascicule* 90, "86 - *personnages littéraires*" (literary characters)).

THE LAW

I. JOINDER OF THE APPLICATIONS

30. In view of the connection between the applications as regards the facts and the substantive questions that they both raise, the Court considers it appropriate to join them in accordance with Rule 42 § 1 of the Rules of Court.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

31. The applicants complained that there had been a violation of their right to freedom of expression on account of their conviction for defamation or complicity in defamation. They relied on Article 10 of the Convention, which reads as follows:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not

prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. The parties' submissions

1. The applicants

32. The first two applicants complained that their conviction for defamation and complicity in defamation on account of the publication of *Le Procès de Jean-Marie Le Pen* ("Jean-Marie Le Pen on Trial") had constituted a "penalty" that was not "prescribed by law" within the meaning attributed to that notion by the Court's case-law. In their submission, notwithstanding the apparent precision of section 29(1) of the Act of 29 July 1881 upon which it had been based and the extensive case-law concerning defamation, their conviction had not been "foreseeable". Their main criticism of the Paris Court of Appeal was that it had sought to ascertain the author's thoughts from the words of fictional characters. This had, moreover, depended on whether or not a particular character was presented "positively". In examining the offending passages of the novel in such a way the court had used a process of deduction, which, they claimed, was a subjective and random approach that did not allow writers to predetermine the limits to authorised speech with which they were supposed to comply. As a result, and since that approach had not been applied with the same stringency to all the impugned passages, the judgment and reasoning of the Court of Appeal had in a number of respects been inconsistent and incoherent.

Secondly, the applicants considered that such a "penalty" had not been "necessary in a democratic society". They pointed out in particular that their conviction as author and publisher of a text which was purely fictional, and which was presented to readers as such, had not been justified by any "pressing social need". They laid emphasis on the novelist's freedom of expression and, referring in particular to *Lingens* (cited above), on the fact that the book in question concerned a politician. They added that the domestic courts had distorted the remarks in question and that the "penalty" inflicted, being criminal in nature, had been disproportionate.

33. The third applicant further complained that his conviction for defamation on account of the publication in the newspaper *Libération* of a

petition signed by ninety-seven writers, accompanied by certain passages from the novel "Jean-Marie Le Pen on Trial" that had been found to be defamatory by the Paris Criminal Court, had not been "necessary" within the meaning of Article 10 of the Convention. Referring in particular to the importance of the freedom of the press in a democratic society, and stressing that the impugned article had been published in the context of a political debate on a matter of general concern, he submitted that his conviction had been all the more disproportionate to the aim pursued, namely the protection of Mr Le Pen's reputation, as Mr Le Pen himself was inclined to be provocative and to use offensive language when expressing himself through the media.

2. The Government

34. The Government did not dispute the fact that the applicants' conviction constituted interference with the exercise of their right to freedom of expression but contended that it was "prescribed by law", pursued a "legitimate aim" and, having regard to the margin of appreciation afforded to States parties in such matters, was "necessary in a democratic society" to achieve that aim, in accordance with the second paragraph of Article 10.

35. On the first point, the Government pointed out that the applicants' conviction had been based on sections 29(1) and 32(1) of the Freedom of the Press Act of 29 July 1881.

The Government dismissed the argument of the first two applicants that the application of those provisions to their case had not been foreseeable, indicating in particular that there had been previous examples of proceedings for defamation committed through a literary work (they cited a judgment of the Paris Court of Appeal from 8 March 1897). Moreover, in the Government's submission, the second applicant had admitted during the appeal proceedings that he had been aware of the risk that, on publishing the book in question, Mr Le Pen might bring proceedings against him. As to the allegedly inconsistent criteria on which the domestic courts had based their decisions, that question did not relate to the foreseeability of the law but to whether the interference had been necessary.

36. As to the second point, the Government argued that the interference had sought to ensure the "protection of the reputation or rights of others" – those of Mr Le Pen and the Front National – this being one of the legitimate aims enumerated in the second paragraph of Article 10.

37. As to the necessity and proportionality of the interference in the case of the first two applicants, the Government considered that the tribunals of fact had coherently analysed the defamatory nature of the relevant passages from the book and had based their decisions on "relevant" and "sufficient" reasons. They further emphasised that the courts had not convicted the first two applicants on account of the aversion expressed in the impugned work

towards the ideas defended by the Front National and its Chairman, but only after weighing up the various interests at stake. Whilst the Government were aware that the limits of acceptable criticism were broader where politicians were concerned, the offending comments had clearly damaged the reputation of the civil parties. Moreover, in so far as they were not value judgments but allegations of fact susceptible of proof, the conviction of the applicants on the grounds, that they had not carried out a "basic verification" of the reality of the allegations before publishing them – when they had been able to do so – was compatible with Article 10 of the Convention. The Government added that the applicants had been given the opportunity to prove their good faith, that the penalties imposed on them and the amount of damages awarded against them were not disproportionate, and that the courts had ordered neither the seizure nor the destruction of the book.

The Government arrived at the same conclusion in the case of the third applicant. In their submission, the domestic courts had struck a fair balance between the various interests at stake (respect for free discussion of political ideas by the press, protection of the reputation of others), having regard to the fact that the reputation-damaging remarks were serious and had been published in a national newspaper with a large circulation. They added that the publication of the impugned petition had gone beyond the level of participation in a political controversy surrounding the far right and in fact consisted in the attribution to Mr Le Pen and his party of unproven offences. In actual fact, by publishing the extracts from the book for which the first two applicants had been convicted, the third applicant had sought to contest the defamatory nature of the impugned allegations and therefore to give credence to the offending remarks. In doing so he had failed to fulfil the obligation of care and moderation inherent in the "duties and responsibilities" of journalists. The Government added that the domestic courts had not punished the third applicant for criticising the conviction of the first two applicants, or for informing the public that the signatories of the impugned petition supported them, but for doing so in a way that constituted a reiteration of the offence.

38. The Government concluded that the applicants' complaints that there had been a violation of Article 10 of the Convention were manifestly ill-founded and therefore inadmissible.

B. The Court's assessment

1. Admissibility

39. The Court observes that this aspect of the applications is not manifestly ill-founded within the meaning of Article 35 § 3 of the

Convention. It moreover considers that no other ground for declaring it inadmissible has been established and therefore declares it admissible.

2. Merits

40. It is not in dispute between the parties that the applicants' conviction constituted "interference by public authority" with their right to freedom of expression. Such interference will breach the Convention if it fails to satisfy the criteria set out in the second paragraph of Article 10. The Court must therefore determine whether it was "prescribed by law", whether it pursued one or more of the legitimate aims listed in that paragraph and whether it was "necessary in a democratic society" in order to achieve that aim or aims.

(a) "Prescribed by law"

41. The Court reiterates that a norm cannot be regarded as a "law" within the meaning of Article 10 § 2 unless it is formulated with sufficient precision to enable the citizen to regulate his conduct; he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty. Whilst certainty is desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.

The Court further reiterates that the scope of the notion of foreseeability depends to a considerable degree on the content of the text in issue, the field it is designed to cover and the number and status of those to whom it is addressed. A law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. This is particularly true in relation to persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can on this account be expected to take special care in assessing the risks that such activity entails (see, for example, *Cantoni v. France*, 15 November 1996, § 35, *Reports of Judgments and Decisions* 1996-V, and *Chauvy and Others v. France*, no. 64915/01, §§ 43-45, ECHR 2004-VI).

42. In the present case, the legal basis for the applicants' conviction can be found in accessible and clear provisions, namely sections 29 and 32 of the Act of 29 July 1881. The first of these provisions states in particular that it is "defamatory to make any statement or allegation of a fact that impugns the honour or reputation of the person or body of whom the fact is alleged" and according to case-law this can be done through a work of fiction when

the individual who claims to have been defamed is referred to in a clear manner (see paragraphs 28-29 above).

Whilst the case-law on this specific point appears dated and rather scant – the Government confined themselves to citing a judgment of the Paris Court of Appeal from 8 March 1897 – the Court must take account of the fact that the first and second applicants are respectively an author and the chairman of the board of directors of a publishing company. Being professionals in the field of publishing it was incumbent on them to apprise themselves of the relevant legal provisions and case-law in such matters, even if it meant taking specialised legal advice. Accordingly, since the novel in issue specifically named Mr Le Pen and the Front National, they could not have been unaware that if they published it there was a risk that defamation proceedings might be brought against them by Mr Le Pen and his party on the above-mentioned legal basis.

As to the criteria applied by the Paris Court of Appeal in assessing whether or not the impugned passages of the novel were defamatory, this question in reality relates to the relevance and sufficiency of the grounds given by the domestic courts to justify the impugned interference with the right of the first two applicants to freedom of expression. The Court will therefore examine this question when it comes to assess whether the interference was "necessary".

43. In conclusion, the Court considers that the contention of the first two applicants that they were unable to foresee "to a reasonable degree" the consequences that the publication of the book was liable to have for them in the courts is untenable. It therefore finds that the interference in issue was "prescribed by law" within the meaning of the second paragraph of Article 10 of the Convention.

(b) Legitimate aim

44. The Court finds that the interference unquestionably pursued one of the legitimate aims set out in paragraph 2 of Article 10: the protection of "the reputation or rights of others", namely of Jean-Marie Le Pen and the Front National; moreover, this is not a matter of dispute between the parties.

(c) Necessary in a democratic society

(i) General principles

45. Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society". As

set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly.

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

The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" and whether it was "proportionate to the legitimate aim pursued". In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts (see, among many other authorities, *Hertel v. Switzerland*, 25 August 1998, § 46, *Reports* 1998-VI; *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, §§ 68-71, ECHR 2004-XI; *Steel and Morris v. the United Kingdom*, no. 68416/01, § 87, ECHR 2005-II; and *Mamère v. France*, no. 12697/03, § 19, ECHR 2006-XIII).

46. There is little scope under Article 10 § 2 of the Convention for restrictions on freedom of expression in the area of political speech or debate – where freedom of expression is of the utmost importance (see *Brasilier v. France*, no. 71343/01, § 41, 11 April 2006) – or in matters of public interest (see, among other authorities, *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 61, ECHR 1999-IV, and *Brasilier*, cited above).

Furthermore, the limits of acceptable criticism are wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance (see, for example, *Lingens*, cited above, § 42; *Vides Aizsardzības Klubs v. Latvia*, no. 57829/00, § 40, 27 May 2004; and *Brasilier*, cited above).

(ii) Application of the above principles

(α) The first two applicants

47. As observed by the Paris Court of Appeal in its judgment of 13 September 2000, the book whose publication resulted in the applicants' conviction for defamation and complicity in defamation is a "novel", a "creation of the imagination" (see paragraph 17 above). A novel is a form of artistic expression, which falls within the scope of Article 10 in that it affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds. Those who create or distribute a work, for example of a literary nature, contribute to the exchange of ideas and opinions which is essential for a democratic society. Hence the obligation on the State not to encroach unduly on their freedom of expression (see, among other authorities, *Karataş v. Turkey* [GC], no. 23168/94, § 49, ECHR 1999-IV, and *Alınak v. Turkey*, no. 40287/98, §§ 41-43, 29 March 2005).

Furthermore, in assessing whether the interference was "necessary" it should be borne in mind that a novel is a form of artistic expression that, although potentially maintaining its readership for a longer period, appeals generally to a relatively narrow public compared with the print media (in this respect see *Alınak*, cited above, § 41). Consequently, the number of persons who became aware of the remarks in issue in the present case and, accordingly, the extent of the potential damage to the rights and reputation of Mr Le Pen and his party, were likely to have been limited.

48. The impugned novel, which was inspired by real events but adds fictional elements, recounts the trial of a Front National militant, who, while putting up posters for his party with other militants, commits the cold-blooded murder of a young man of North African descent and admits that it was a racist crime. Published under the title *Le Procès de Jean-Marie Le Pen* ("Jean-Marie Le Pen on Trial"), it openly raises questions about the responsibility of the Front National and its Chairman in the growth of racism in France and about the difficulty of combating this scourge (see paragraphs 11-12 above). The work therefore unquestionably relates to a debate on a matter of general concern and constitutes political and militant expression, hence this is a case where a high level of protection of the right to freedom of expression is required under Article 10. The margin of appreciation enjoyed by the authorities in assessing the "necessity" of the penalty imposed on the applicants was thus particularly limited (see paragraph 46 above; see also *Steel and Morris*, §§ 88-89, cited above, and *Mamère*, cited above, § 20).

49. The Court notes at the outset that the examination of the applicants' case by the Paris Court of Appeal was duly carried out in this kind of perspective. In its judgment of 13 September 2000, the Court of Appeal found that to ask the question "How can Jean-Marie Le Pen be fought

effectively?" was, "even in a novel, ... not *per se* defamatory against him" and that "the legitimacy of the aim pursued by the defendants through the novel, namely 'to fight against Jean-Marie Le Pen effectively', in other words to engage in a political combat, [could not] be challenged in a democratic society". The court admittedly noted that "[w]ith its claim to be a 'combative' work, the novel in question, and in particular the passages found to be defamatory, attest[ed] to patent animosity towards the civil parties". It nevertheless found that this animosity, being "explicitly related to the aversion felt by the defendants in reaction to the ideas and values presented for public debate by the civil party as chairman of the Front National", was "not directed against the civil party in person" and "[could not] be regarded as reprehensible *per se*" (see paragraphs 17-19 above).

50. It thus appears that the penalty imposed on the applicants by the domestic court was not directed against the arguments expounded in the impugned novel but only against the content of certain passages that were found to be damaging to "the honour or reputation" of the Front National and its Chairman within the meaning of section 29 of the Act of 29 July 1881. Moreover, whilst the initial proceedings against the applicants in the criminal court concerned six passages from the novel (see paragraph 13 above), they were ultimately convicted on account of the following three passages alone:

> [page 10: a view attributed by the author to anti-racist demonstrators who have gathered outside the law courts] "... an effective way to fight Le Pen is to call for him to be put in the dock and show that he isn't the leader of a political party but the chief of a gang of killers – after all, people would have voted for Al Capone too."

> [pages 105-06: here the lawyer is addressing the court] "Read the papers, listen to the radio and television, every statement by Jean-Marie Le Pen is bedecked – or rather bespotted and bespattered – with racist overtones that are barely concealed at best. Each of his words is a veil for others and from behind each of his assertions looms the spectre of the worst abominations of the history of mankind. Everyone knows it, everyone says it. What Ronald Blistier did was precisely what Jean-Marie Le Pen advocates. Perhaps not explicitly – he tries to abide by the law, even though he does not always manage to do so. But when you consider the situations in which he speaks, the innuendos he makes and the figures he supports, there can be no doubt."

> [page 136: a statement by the defendant's lawyer on television after his client's suicide in prison] "How can Jean-Marie Le Pen be allowed to play the victim after Ronald Blistier's suicide? Isn't the Front National Chairman a vampire who thrives on the bitterness of his electorate, but sometimes also on their blood, like the blood of his enemies? Why does Le Pen accuse democrats of the alleged murder of Ronald Blistier? Because he isn't afraid of lies – because engaging in defamation against his opponents always appears useful for him, of course, but it is also quite simply a means to deflect suspicion; he's the one who shouts the loudest in the hope that his ranting will drown out the accusations against himself."

51. However, the applicants criticised the Court of Appeal for having, for the purposes of its examination of their case, sought to ascertain the

author's thoughts from the remarks of fictional characters in a fictional situation and for reaching its conclusions as to the defamatory nature of the passages in issue on the basis of whether the author had distanced himself from those remarks or not. In the applicants' submission, such an approach led to the imprisonment of literature in a set of rigid rules at odds with the freedom of artistic creation and expression.

The Court does not share that view. It considers, on the contrary, that the criteria applied by the Paris Court of Appeal in assessing whether or not the passages in issue were defamatory complied with Article 10 of the Convention.

In this connection the Court observes that, in its judgment of 13 September 2000, the Court of Appeal pointed out first of all that all writings, even novelistic, were capable of "impugn[ing] the honour or reputation of [a] person" within the meaning of section 29 of the Freedom of the Press Act of 29 July 1881 and therefore of resulting in a conviction for defamation. That approach is consistent with Article 10 of the Convention. Admittedly, as noted above (see paragraph 47), anyone who, for example, creates or distributes a literary work contributes to an exchange of ideas and opinions which is essential for a democratic society, hence the obligation on the State not to encroach unduly on their freedom of expression. This is especially the case where, like the novel in issue in the present case, the work constitutes political or militant expression (see paragraph 48 above). Nonetheless, novelists – like other creators – and those who promote their work are certainly not immune from the possibility of limitations as provided for in paragraph 2 of Article 10. Whoever exercises his freedom of expression undertakes, in accordance with the express terms of that paragraph, "duties and responsibilities".

52. The Court further observes that, in assessing whether or not the passages from the novel it was called upon to examine were defamatory, the Court of Appeal sought to determine whether they effectively "impugned the honour and reputation" of Mr Le Pen and the Front National. Inasmuch as the Court is entitled to judge (see, for example, *Mamère*, cited above, § 22), the domestic court's findings on this point cannot be criticised in view of the virulent content of the impugned passages and the fact that they specifically named the party and its chairman.

Lastly, it is apparent from the judgment of 13 September 2000 that, in reality, it was for the author's benefit that the Court of Appeal sought additionally to determine his thoughts. It considered that, where remarks "impugn[ing] the honour and reputation of [a] person" were made by a narrator or by characters in a "work of fiction", only those that reflected the thoughts of the author were punishable under the Act of 29 July 1881, and not those remarks from which the author really distanced himself in his work. As a result, the application of this criterion led the court to find that one of the four passages referred to it was not defamatory.

53. The Court of Appeal further verified whether the applicants were entitled to rely on good faith as a defence, which would be the case, under domestic law, if the allegations considered defamatory corresponded to the pursuit of a legitimate aim, if they did not reflect any personal animosity, if they followed a serious investigation, and if they were made using dispassionate language (see paragraph 19 above).

However, the court was unable to accept that defence as it found that, unlike the first two of these conditions, the last two were not satisfied.

54. As to the seriousness of the investigation preceding the publication of the novel, the Court of Appeal stated that "[s]ince this [was] a work of fiction, [that] question [could] not be assessed as if it were a text intended to inform the reader of real facts or comment on such facts". The court nevertheless considered this criterion relevant in the present case, since the novel juxtaposed reality and fiction – observing in this connection that, even though the plot was an imaginary one, the Chairman of the Front National, a real figure, represented the "focus" around which the imaginary characters revolved and in relation to which they took shape – and since the ideas, rhetoric, acts and gestures of Mr Le Pen had been very accurately described in the novel. Applying this test, the Court of Appeal found that "whilst the rhetoric and ideas attributed to [Mr Le Pen and his party], together with the ensuing debates, [were] unquestionably consonant with the actual representation of the ideas of the Front National in reports on French political life today, the defendants [had] failed to adduce any specific evidence to show that the use of the wording found to be defamatory had been preceded by basic verification as to the reality supposed to be evoked by such wording".

55. The Court considers that this reasoning is consistent with its own case-law.

It reiterates in this connection that in order to assess the justification of an impugned statement, a distinction needs to be made between statements of fact and value judgments. While the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10. The classification of a statement as a fact or as a value judgment is a matter which in the first place falls within the margin of appreciation of the national authorities, in particular the domestic courts. However, even where a statement amounts to a value judgment, there must exist a sufficient factual basis to support it, failing which it will be excessive (see, for example, *Pedersen and Baadsgaard*, cited above, § 76).

Generally speaking there is no need to make this distinction when dealing with extracts from a novel. It nevertheless becomes fully pertinent when, as in the present case, the impugned work is not one of pure fiction but introduces real characters or facts.

In the present case, firstly, it was all the more acceptable to require the applicants to show that the allegations contained in the passages from the novel that were found to be defamatory had a "sufficient factual basis" as they were not merely value judgments but also allegations of fact, as the Court of Appeal indicated. Secondly, the Court of Appeal adopted a measured approach, criticising the applicants not for failing to prove the reality of the allegations in question but for failing to make a "basic verification" in that connection.

56. Having regard to the content of the offending passages, the Court also considers that the Court of Appeal's finding that they were not sufficiently "dispassionate" is compatible with its case-law.

It is true that, whilst an individual taking part in a public debate on a matter of general concern – like the applicants in the present case – is required not to overstep certain limits as regards – in particular – respect for the reputation and rights of others, he or she is allowed to have recourse to a degree of exaggeration or even provocation, or in other words to make somewhat immoderate statements (see *Mamère*, cited above, § 25).

It is also true that the limits of acceptable criticism are wider as regards a politician – or a political party – such as Mr Le Pen and the Front National – as such, than as regards a private individual (see paragraph 46 above). This is particularly true in the present case as Mr Le Pen, a leading politician, is known for the virulence of his speech and his extremist views, on account of which he has been convicted a number of times on charges of incitement to racial hatred, trivialising crimes against humanity, making allowances for atrocities, apologia for war crimes, proffering insults against public figures and making offensive remarks. As a result, he has exposed himself to harsh criticism and must therefore display a particularly high degree of tolerance in this context (see, *mutatis mutandis*, *Oberschlick v. Austria (no. 2)*, 1 July 1997, §§ 31-33, *Reports* 1997-IV; *Lopes Gomes da Silva v. Portugal*, no. 37698/97, § 35, ECHR 2000-X; and *Wirtschafts-Trend Zeitschriften-Verlags GmbH v. Austria*, no. 58547/00, § 37, 27 October 2005).

57. The Court nevertheless considers that in the present case the Court of Appeal made a reasonable assessment of the facts in finding that to liken an individual, though he be a politician, to the "chief of a gang of killers", to assert that a murder, even one committed by a fictional character, was "advocated" by him, and to describe him as a "vampire who thrives on the bitterness of his electorate, but sometimes also on their blood", "oversteps the permissible limits in such matters".

The Court moreover considers that, regardless of the forcefulness of political struggles, it is legitimate to try to ensure that they abide by a minimum degree of moderation and propriety, especially as the reputation of a politician, even a controversial one, must benefit from the protection afforded by the Convention.

The Court will further have regard to the nature of the remarks made, in particular to the underlying intention to stigmatise the other side, and to the fact that their content is such as to stir up violence and hatred, thus going beyond what is tolerable in political debate, even in respect of a figure who occupies an extremist position in the political spectrum (see, *mutatis mutandis*, *Sürek (no. 1)*, cited above, §§ 62-63).

58. The Court accordingly arrives at the conclusion that the "penalty" imposed on the applicants was based on "relevant and sufficient" reasons.

59. As regards the "proportionality" of the penalty, the Court notes that the applicants were found guilty of an offence and ordered to pay a fine, so in that respect alone the measures imposed on them were already very serious. However, firstly, in view of the margin of appreciation left to Contracting States by Article 10 of the Convention, a criminal measure as a response to defamation cannot, as such, be considered disproportionate to the aim pursued (see *Radio France and Others v. France*, no. 53984/00, § 40, ECHR 2004-II). Secondly, the amount of the fine imposed on the applicants was moderate: EUR 2,286.74 (each); the same finding has to be made as regards the damages they were ordered jointly and severally to pay to each of the civil parties: EUR 3,811.23. The nature and severity of the penalty imposed are factors to be taken into account when assessing the proportionality of the interference (see *Sürek (no. 1)*, cited above, § 64).

In these circumstances, and having regard to the content of the impugned remarks, the Court finds that the measures taken against the applicants were not disproportionate to the legitimate aim pursued.

60. In conclusion, the domestic court could reasonably find that the interference with the exercise by the applicants of their right to freedom of expression was necessary in a democratic society, within the meaning of Article 10 of the Convention, in order to protect the reputation and rights of Mr Le Pen and the Front National.

(β) The third applicant

61. The third applicant was convicted of defamation in his capacity as publication director of *Libération*, on account of the publication in that newspaper's column "*Rebonds*" of a petition criticising the conviction of the first two applicants on charges of defamation and complicity in defamation by the Paris Criminal Court on 11 October 1999. The petition further reproduced the passages of the novel that had been found to be defamatory by that court and challenged that characterisation (see paragraph 21 above).

62. In publishing the petition the daily newspaper *Libération* reported on the conviction of the first two applicants by the Criminal Court for the publication of "Jean-Marie Le Pen on Trial", on the support given to them by the ninety-seven writers who signed the petition, and on the opinion of those writers that the impugned passages were not defamatory. There is therefore no doubt – as the Government have not in fact disputed – that the

article was published in a context of information and ideas imparted on a matter of public interest, namely the controversies surrounding a party of the far right and its Chairman – a subject of political debate – and the conviction of an author and a publisher for the publication of a book which was critical of that party and of its Chairman. Since freedom of the press is thus in issue, this is a case which attracts a particularly high level of protection of freedom of expression under Article 10.

In that connection the Court points out once again the essential role of a free press in ensuring the proper functioning of a democratic society. Although the press must not overstep certain bounds, regarding in particular the protection of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest, including those relating to the administration of justice. Not only does the press have the task of imparting such information and ideas; the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog". Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see, for example, *Pedersen and Baadsgaard*, cited above, § 71).

63. In its judgment of 21 March 2001 in the case concerning the third applicant, the Paris Court of Appeal pointed out that in its judgment of 13 September 2000 it had upheld the conviction of the first two applicants on account of three out of the four offending passages in the novel. It reproduced those passages and, as regards the defamatory nature of the article into which those passages had been incorporated, referred back to the grounds set out in the 13 September 2000 judgment, the reasoning behind which, it stated, "remain[ed] applicable" (see paragraph 25 above).

In view of its own findings on this matter (see paragraph 50 above), the Court considers those grounds "relevant and sufficient".

64. The Court of Appeal then dismissed the defence of good faith. In this connection it found that the impugned petition, even more than the novel in issue, reflected the "direct thoughts" of its authors since they had presented it as a shift from fiction in two ways: firstly by publishing it even though the passages in question had formed the basis of a conviction; and secondly by indicating: "If these passages are to be considered defamatory in a novel, they are also defamatory in reality. We will write against Le Pen". The court found that, in doing so, the authors of this text had had no other aim than that of showing their support for the first applicant "by repeating with approval, out of defiance, all the passages that had been found defamatory by the court, and without even really calling into question the defamatory nature of the remarks". The Court of Appeal went on to explain: "The polemical aim of a text cannot absolve it from all regulation of expression, especially when, far from being based merely on an academic debate, its line of argument is built around reference to precise facts. There

was therefore an obligation to carry out a meaningful investigation before making particularly serious accusations such as incitement to commit murder, and to avoid offensive expressions such as those describing Mr Le Pen as the 'chief of a gang of killers' or as 'a vampire'".

65. It thus appears that the third applicant was not punished for reporting on the conviction of the first two applicants for the publication of "Jean-Marie Le Pen on Trial", on the support given to them by the ninety-seven writers who signed the petition, or on the opinion of those writers that the impugned passages were not defamatory. Nor was he convicted on the ground that *Libération* had failed to distance itself from the content of the petition (see, for example, *Radio France and Others* and *Pedersen and Baadsgaard*, both cited above, § 37 and § 77 respectively) or for reproducing or criticising a judicial decision – a conviction which would have been difficult to reconcile with Article 10 of the Convention. He was actually convicted because *Libération* had thus published a petition which reproduced extracts from the novel containing "particularly serious allegations" and offensive remarks, and whose signatories, repeating those allegations and remarks with approval, denied that the extracts were defamatory in spite of a finding to that effect against the first two applicants.

66. The Court considers that, within the limits indicated above, the reasoning of the Court of Appeal is consonant with its own findings that the impugned writings were not merely value judgments but also allegations of fact (see paragraph 54 above) and that the Court of Appeal had made an acceptable assessment of the facts in reaching its conclusion that the writings were not sufficiently dispassionate (see paragraphs 56-57 above). On this latter point in particular, having regard to the content of the impugned passages of "Jean-Marie Le Pen on Trial", to the potential impact on the public of the remarks found to be defamatory on account of their publication by a national daily newspaper with a large circulation and to the fact that it was not necessary to reproduce them in order to give a complete account of the conviction of the first two applicants and the resulting criticism, it does not appear unreasonable to consider that the third applicant overstepped the limits of permissible "provocation" by reproducing those passages.

67. Furthermore, this reasoning is consistent with the boundaries that the press must not overstep, in particular as regards the protection of the reputation and rights of others. The Court reiterates in this connection that protection of the right of journalists to impart information on issues of general interest requires that they should act in good faith and on an accurate factual basis and provide "reliable and precise" information in accordance with the ethics of journalism. Under the terms of paragraph 2 of Article 10 of the Convention, freedom of expression carries with it "duties and responsibilities", which also apply to the media even with respect to matters of serious public concern. Moreover, these "duties and

responsibilities" are liable to assume significance when there is a question of attacking the reputation of a named individual and infringing the "rights of others". Thus, special grounds are required before the media can be dispensed from their ordinary obligation to verify factual statements that are defamatory of private individuals. Whether such grounds exist depends in particular on the nature and degree of the defamation in question and the extent to which the media can reasonably regard their sources as reliable with respect to the allegations (see, for example, *Pedersen and Baadsgaard*, cited above, § 78).

68. Lastly, having regard to the moderate nature of the fine and the damages that the third applicant was ordered to pay (a fine of EUR 2,286.74 and an award of EUR 3,811.23 to each of the two civil parties), to the content of the impugned writings and to the potential impact on the public of the remarks found to be defamatory on account of their publication by a national daily newspaper with a large circulation, the Court finds that the impugned interference was proportionate to the aim pursued.

69. In view of the foregoing, the Court considers that the domestic court could reasonably find that the interference with the exercise by the applicant of his right to freedom of expression was necessary in a democratic society, within the meaning of Article 10 of the Convention, in order to protect the reputation and rights of Mr Le Pen and the Front National.

(d) Conclusion

70. In conclusion, there has been no violation of Article 10 of the Convention either in respect of the first two applicants or in respect of the third applicant.

III. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

71. The third applicant contended that he had not been heard by an "impartial" tribunal within the meaning of Article 6 § 1 of the Convention, which provides as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law."

A. Arguments of the parties

72. The third applicant pointed out that the article of 16 November 1999, on account of which he had been convicted of defamation, had reproduced in full a petition openly criticising the conviction of the first two applicants for defamation and complicity in defamation by the Paris Criminal Court in a judgment upheld by the Paris Court of Appeal on 13 September 2000. He

complained that two out of the three judges on the bench of the Paris Court of Appeal which ruled on his case had also sat on the bench which previously convicted the first two applicants. He emphasised that, according to the judgment given in his case by that court on 21 March 2001, the court had simply referred to its first decision to justify the second, at least as regards the characterisation of the impugned remarks as defamatory.

In his submission, under those circumstances the two judges concerned had necessarily had a preconceived idea and thus he had not been heard by an impartial tribunal. This was all the more true as the judgment given in his case by the Paris Court of Appeal had criticised the authors of the petition for "repeating with approval, out of defiance, all the passages that had been found defamatory by the court, and without even really calling into question the defamatory nature of the remarks", thus indicating, in the applicant's view, that the judges had felt overtly and personally targeted by the impugned article.

73. The Government rejected that argument.

In their submission, the indication by the Court of Appeal that the authors of the petition had "repeat[ed] with approval, out of defiance, all the passages that had been found defamatory by the court" could not mean that the judges had felt overtly and personally targeted by the impugned article. The attribution of this passage to the two judges in question moreover amounted to speculation: it was in reality an objective conclusion arrived at on reading the petition. The Government further argued that the applicant had not adduced any evidence of bias on the part of those judges.

The Government went on to observe that the third applicant's case not only post-dated that of the first two applicants but was also a separate case. The parties were not the same and the case was not the same because it did not concern the same offending acts. In their submission, there was no overlap between the legal questions raised in each case either: one raised the question of the role of fiction in the determination of the offence of defamation, whilst the other concerned the applicant's duty of verification and moderation in his capacity as head of the editorial staff of the newspaper *Libération*.

The Government added that, in the third applicant's case, the judges of the Court of Appeal had not simply referred to the decision taken in the case of the first two applicants, but had taken other factors into account, in particular the fact that the article had been published outside any literary context and without any debate of ideas. They pointed out that, according to the Court's case-law, the simple fact that a judge had already ruled on similar but separate offences could not in itself call the impartiality of that judge into question.

B. The Court's assessment

1. Admissibility

74. The Court observes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It moreover considers that no other ground for declaring it inadmissible has been established and therefore declares it admissible.

2. Merits

75. The Court reiterates that impartiality, within the meaning of Article 6 § 1 of the Convention, normally denotes absence of prejudice or bias. There are two tests for assessing whether a tribunal is impartial: the first consists in seeking to determine a particular judge's personal conviction or interest in a given case and the second in ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (see, for example, *Gautrin and Others v. France*, 20 May 1998, § 58, *Reports* 1998-III, and *Kyprianou v. Cyprus* [GC], no. 73797/01, § 118, ECHR 2005-XIII).

76. In applying the first test, the personal impartiality of a judge must be presumed until there is proof to the contrary (see, among other authorities, *Padovani v. Italy*, 26 February 1993, § 26, Series A no. 257-B, and *Kyprianou*, cited above, § 119). The third applicant argued in this connection that the reasoning in the judgment of the Paris Court of Appeal of 21 March 2001 to the effect that "[t]he authors of the [petition] had [had] no other aim than that of showing their support for Mathieu Lindon by repeating with approval, out of defiance, all the passages that had been found defamatory by the court, and without even really calling into question the defamatory nature of the remarks" had shown that the two judges in question had felt overtly and personally targeted by the offending article.

The Court does not share that view. In its opinion, this was simply one of the factors that the Court of Appeal took into account in assessing whether the applicant had acted in good faith, without in fact drawing any conclusion from it. In reality, the third applicant was not convicted because he had published a text that challenged the first two applicants' conviction for defamation, or because he had thus shown support for the petitioners' "defiance", or because he had criticised the judges in question, but because he had, without a proper preliminary investigation, disseminated a text containing "particularly serious allegations" and offensive remarks. Moreover, the Court is unable to find, in the grounds of the judgment of 21 March 2001, the slightest indication that those judges might have felt personally targeted by the offending article.

There is thus no evidence to suggest that the two judges in question were influenced by personal prejudice when they passed judgment.

77. As to the second test, when applied to a body sitting as a bench, it means determining whether, quite apart from the personal conduct of any of the members of that body, there are ascertainable facts which may raise doubts as to its impartiality. In this respect even appearances may be of some importance. It follows that when it is being decided whether in a given case there is a legitimate reason to fear that a particular body lacks impartiality, the standpoint of those claiming that it is not impartial is important but not decisive. What is decisive is whether the fear can be held to be objectively justified (see, for example, *Gautrin and Others* and *Kyprianou*, both cited above, § 58 and § 118 respectively).

In the present case, the fear of a lack of impartiality stemmed from the fact – moreover a proven one – that two out of the three judges on the bench of the Paris Court of Appeal which upheld the third applicant's conviction for defamation on account of the publication of the impugned petition had previously, in the case of the first two applicants, ruled on the defamatory nature of three of the offending passages from the novel which were cited in the petition.

The Court understands that this situation may have aroused doubts in the third applicant's mind as to the impartiality of the "tribunal" which heard his case, but considers that such doubts are not objectively justified.

78. The Court notes that, even though they were connected, the facts in the two cases differed and the "accused" was not the same: in the first case the question was whether the publisher and author, by publishing certain passages from "Jean-Marie Le Pen on Trial", had been guilty of the offence of defamation and of complicity in that offence; in the second, the court had to decide whether, in a journalistic context, the publication director of *Libération* had committed the same offence by publishing the text of a petition which reproduced those same passages, and whose signatories, repeating them with approval, denied that they were defamatory in spite of the finding to that effect against the publisher and author (see, *a fortiori*, *Craxi v. Italy* (dec.), no. 63226/00, 14 June 2001). It is moreover clear that the judgments delivered in the case of the first two applicants did not contain any presupposition as to the guilt of the third applicant (ibid.).

79. Admittedly, in the judgment given on 21 March 2001 in the third applicant's case, the Paris Court of Appeal referred back, in respect of the defamatory nature of the impugned passages, to the judgment that it had given on 13 September 2000 in the case of the first two applicants. However, in the Court's view this does not objectively justify the third applicant's fears as to a lack of impartiality on the part of the judges. The first judgment of the Court of Appeal, dated 13 September 2000, had found to be defamatory certain passages of the book written by the first applicant and published by the second. On this point that judgment had become *res judicata*. The second judgment of the Court of Appeal, dated 21 March 2001, was bound to apply that authority to this aspect of the dispute, whilst

the question of the good or bad faith of the third applicant, who was responsible for the publication of a petition approving that book and criticising the conviction of the first two applicants, remained open and had not been prejudiced by the first judgment. It would therefore be excessive to consider that two judges who sat on the bench which successively delivered the two judgments in question could taint the court's objective impartiality. In reality, as regards the characterisation of the text as defamation, any other judge would have been bound by the *res judicata* principle, which means that their participation had no influence on the respective part of the second judgment. And as regards the issue of good faith, which was a totally different issue in the two cases even though they were connected, there is no evidence to suggest that the judges were in any way bound by their assessment in the first case (see, *mutatis mutandis*, *Thomann v. Switzerland*, 10 June 1996, § 35, *Reports* 1996-III).

80. Lastly, the present case is manifestly not comparable to that of *San Leonard Band Club v. Malta* (no. 77562/01, § 63, ECHR 2004-IX), where the trial judges had been called upon to decide whether or not they themselves had committed an error of legal interpretation or application in their previous decision, that is to say, to judge themselves and their own ability to apply the law.

81. Consequently, any doubts the third applicant may have had as regards the impartiality of the Court of Appeal when it ruled in the second case cannot be regarded as objectively justified.

82. In conclusion, there has been no violation of Article 6 § 1 of the Convention.

FOR THESE REASONS, THE COURT

1. *Decides* unanimously to join the applications;

2. *Declares* the applications admissible unanimously;

3. *Holds* by thirteen votes to four that there has been no violation of Article 10 of the Convention;

4. *Holds* unanimously that there has been no violation of Article 6 § 1 of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 22 October 2007.

Michael O'Boyle	Christos Rozakis
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Judge Loucaides;

(b) joint dissenting opinion of Judges Rozakis, Bratza, Tulkens and Šikuta.

C.L.R.
M.O'B.

CONCURRING OPINION OF JUDGE LOUCAIDES

I agree with the findings of the Court in this case but I would like to express certain views regarding freedom of expression and the right to protection of one's reputation.

One cannot disagree with the importance of freedom of speech, especially that of the media, as an essential element of a democratic society. However, the question is whether the protection accorded to such a freedom may, under any circumstances, be so excessive as to deprive the victims of false defamatory statements of the necessary effective remedy.

For many years the jurisprudence of the Court has developed on the premise that, while freedom of speech is a right expressly guaranteed by the Convention, the protection of reputation is simply a ground of permissible restriction on the right in question which may be regarded as justified interference with expression only if it is "necessary in a democratic society", in other words if it corresponds to "a pressing social need" and is "proportionate to the aim pursued" and if "the reasons given were relevant and sufficient". Moreover, as a restriction on a right under the Convention it has to be (like any other restriction on such rights) strictly and narrowly interpreted. The State bears the burden of adducing reasons for interfering with expression and has to demonstrate the existence of "relevant and sufficient" grounds for doing so.

As a consequence of this approach, the case-law on the subject of freedom of speech has on occasion shown excessive sensitivity and granted over-protection in respect of interference with freedom of expression, as compared with interference with the right to reputation. Freedom of speech has been upheld as a value of primary importance which in many cases could deprive deserving plaintiffs of an appropriate remedy for the protection of their dignity.

This approach cannot be in line with the correct interpretation of the Convention. The right to reputation should always have been considered as safeguarded by Article 8 of the Convention, as part and parcel of the right to respect for one's private life.

It would have been inexplicable not to provide for direct protection of the reputation and dignity of the individual in a human rights convention drafted in the aftermath of the Second World War and intended to enhance the protection of the individual as a person after the abhorrent experiences of Nazism. The Convention expressly protects rights of lesser importance, such as the right to respect for one's correspondence. It is therefore difficult to accept that the basic human value of a person's dignity[1] was deprived of

1. In this respect the following well-known words of Shakespeare come to mind: "Good name in man and woman, dear my lord, Is the immediate jewel of their souls: Who steals my purse steals trash …; But he that filches from me my good name … makes me poor indeed." (*Othello*, Act III, scene 3)

direct protection by the Convention and instead simply recognised, under certain conditions, as a possible restriction on freedom of expression. A person's dignity requires more extensive and direct protection against false defamatory accusations which may destroy individuals and we have plenty of examples of such tragic results. In this respect I reiterate the following statement from my dissenting opinion in the report of the Commission concerning the case of *Bladet Tromsø A/S and Stensaas v. Norway* (9 July 1998, unreported):

> "The press is, in our days, an important and powerful means of influencing public opinion. The impressions that may be created through a publication in the press are usually more decisive than the reality because until the reality is found out the impressions prevail. And the reality may never be discovered or when it is disclosed it may be too late to remedy the damage done by the original impressions. The press is in effect exercising a significant power and should be subject to the same restraints applicable to any exercise of power, namely it should avoid abuse of its power, it should act in a fair way and respect the rights of others."

Accepting that respect for reputation is an autonomous human right, which derives its source from the Convention itself, leads inevitably to a more effective protection of the reputation of individuals *vis-à-vis* freedom of expression.

In recent years the Court has expressly recognised that protection of reputation is a right which is covered by the scope of the right to respect for one's private life under Article 8 § 1 of the Convention (see *Chauvy and Others v. France*, no. 64915/01, ECHR 2004-VI; *Abeberry v. France* (dec.), no. 58729/00, 21 September 2004; and *White v. Sweden*, no. 42435/02, 19 September 2006), even though the relevant jurisprudence has not expanded on this novel approach, nor has it been relied on in other cases involving freedom of speech and defamation. In the light of this jurisprudence, protection of reputation entails an obligation for the State to enforce a corresponding right guaranteed by the Convention with the same status as freedom of expression. Any defamatory statement amounts to interference with the right guaranteed by the Convention and can only be justified if it satisfies the requirements of permissible restrictions on the exercise of such right, that is to say, it must be prescribed by law and necessary in a democratic society, corresponding to a pressing social need, proportionate to the aim pursued, etc. Therefore it will be more difficult to defend a defamatory statement for purposes of Convention protection when it is examined as interference with a right recognised under the Convention, rather than as a necessary restriction on freedom of expression.

When there is a conflict between two rights under the Convention, neither of them can neutralise the other through the adoption of any absolute approach. Both must be implemented and survive in harmony through the necessary compromises, depending on the facts of each particular case.

The principle established by the jurisprudence that there is more latitude in the exercise of freedom of expression in the area of political speech or debate, or in matters of public interest, or in cases of criticism of politicians, as in the present case, should not be interpreted as allowing the publication of any unverified defamatory statements. To my mind this principle means simply that in those areas mentioned above, and in respect of politicians, certain exaggeration in allegations of fact or even some offending effect should be tolerated and should not be sanctioned. But the principle does not mean that the reputation of politicians is at the mercy of the mass media or other persons dealing with politics, or that such reputation is not entitled to the same legal protection as that of any other individual. Reputation is a sacred value for every person including politicians and is safeguarded as a human right under the Convention for the benefit of every individual without exception. And that is how I approached the facts of the present case.

I wish to take this opportunity to point out some adverse consequences resulting from over-protection of freedom of expression at the expense of the right to reputation. The main argument in favour of protecting freedom of expression, even in cases of inaccurate defamatory statements, is the encouragement of uninhibited debate on public issues. But the opposite argument is equally strong: the suppression of untrue defamatory statements, apart from protecting the dignity of individuals, discourages false speech and improves the overall quality of public debate through a chilling effect on irresponsible journalism. Moreover, such debates may be suppressed if the potential participants know that they will have no remedy in the event that false defamatory accusations are made against them. The prohibition of defamatory speech also eliminates misinformation in the mass media and effectively protects the right of the public to truthful information. Furthermore, false accusations concerning public officials, including candidates for public office, may drive capable persons away from government service, thus frustrating rather than furthering the political process.

The right to reputation, having the same legal status as freedom of speech, as explained above, is entitled to effective protection so that under any circumstances any false defamatory statement, whether or not it is malicious and whether or not it may be inevitable for an uninhibited debate on public issues or for the essential function of the press, should not be allowed to remain unchecked.

One should not lose sight of the fact that the mass media are nowadays commercial enterprises with uncontrolled and virtually unlimited strength, interested more in profitable, flashy news than in disseminating proper information to the public, in controlling government abuse or in fulfilling other idealistic objectives. And although they may be achieving such objectives incidentally, accidentally or occasionally, even deliberately, they

should be subject to certain restraint out of respect for the truth and for the dignity of individuals. Such restraint should include the duty to investigate defamatory allegations before rushing into print and the obligation to give an opportunity to the persons affected by their defamatory stories to react and give their own version. Furthermore they should remain legally accountable to the persons concerned for any false defamatory allegations. Like any power, the mass media cannot be accountable only to themselves. A contrary position would lead to arbitrariness and impunity, which undermine democracy itself.

JOINT PARTLY DISSENTING OPINION OF JUDGES ROZAKIS, BRATZA, TULKENS AND ŠIKUTA

(Translation)

We are unable to agree with the finding of the majority that there has been no violation of Article 10 of the Convention in the present case. In the first place, it is noteworthy in our view that in the course of the judicial proceedings there was a gradual reduction in the number of passages regarded as defamatory: the direct summons served by the civil parties designated six passages; the Paris Criminal Court, in its judgment of 11 October 1999, found four of them to be defamatory; the judgment of the Paris Court of Appeal of 13 September 2000 limited the number to three; lastly, the Court, for its part, has identified two defamatory passages, representing three lines in all from a novel of 138 pages.

I

In terms of the *general principles*, it should be emphasised that freedom of expression is one of the foundations of a democratic society, of which the hallmarks are pluralism, tolerance and broadmindedness (see *Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24). On numerous occasions the Court has referred to the key importance of freedom of expression as one of the preconditions for a functioning democracy (see Özgür Gündem *v. Turkey*, no. 23144/93, § 43, ECHR 2000-III). This assertion of the social function of freedom of expression constitutes the basic philosophy of the Court's Article 10 case-law. It follows that the right to freedom of expression is not only a safeguard against State interference (an individual right), it is also a general fundamental principle of life in a democracy. Moreover, freedom of expression is not an end in itself but a means by which a democratic society is established. In this context we will first examine the situation of the first two applicants then that of the third applicant.

II

1. With regard to the first two applicants, we attach considerable weight to the nature of the work in question and, as explained later, we consider that the Court has not sufficiently taken this into account. It is undeniable – and not in fact disputed – that the book containing the two passages finally regarded as defamatory is not a news report but a *novel*, written by an author who is recognised as such. We are not saying that artistic and literary creation should be immune from all criticism and unbridled, but we

nevertheless believe that this aspect should be given due consideration.

In this connection, we are not prepared to espouse the view of the domestic courts that no distinction was to be made based on the form of expression used or, at the very least, that this was not an essential factor. The 11 October 1999 judgment of the Paris Criminal Court, for example, rules out or neutralises such a consideration: "although it is a novel, and although the offending remarks are only made by fictional characters ...", the text was to be assessed "regardless of its literary genre". The Court of Appeal, in its judgment of 13 September 2000, also pointed out that it would not take account of the fact that the work was a novel and therefore a fictional device: "... On that basis, any writing, whether political, philosophical, novelistic or even poetical, was governed by the applicable rules in such matters, with regard both to public order and to the protection of individuals". In addition, by seeking to ascertain the author's thoughts from the remarks of fictional characters in a fictional situation, the Court of Appeal imprisoned literature in a set of rigid rules at odds with the freedom of artistic creation and expression.

2. In our view such a radical position represents a clear departure from our case-law, which has laid emphasis on the role of artistic creation in political debate.

In *Müller and Others v. Switzerland* (24 May 1988, Series A no. 133) the Court already had occasion to point out that Article 10 covered freedom of artistic expression – notably within freedom to receive and impart ideas – adding that it afforded the opportunity to take part in the exchange of cultural, political and social information and ideas (§ 27) and it concluded that this imposed on the State a particular obligation not to encroach on the freedom of expression of creative artists (§ 33).

In the area of literary creation – as in the present case – the Court applied Article 10 of the Convention to the medium of poetry in *Karataş v. Turkey* ([GC], no. 23168/94, ECHR 1999-IV): "The work in issue contained poems which, through the frequent use of pathos and metaphors, called for self-sacrifice for 'Kurdistan' and included some particularly aggressive passages directed at the Turkish authorities. Taken literally, the poems might be construed as inciting readers to hatred, revolt and the use of violence. In deciding whether they in fact did so, it must nevertheless be borne in mind that the medium used by the applicant was poetry, a form of artistic expression that appeals to only a minority of readers" (§ 49). Moreover, in the context of Article 10, the Court added: "Those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society. Hence the obligation on the State not to encroach unduly on their freedom of expression" (ibid.). Lastly, it declared as follows: "As to the tone of the poems in the present case – which the Court should not be taken to approve – it must be

remembered that Article 10 protects not only the substance of the ideas and information expressed but also the form in which they are conveyed" (ibid.).

The case of *Alınak v. Turkey* (no. 40287/98, 29 March 2005) concerned a novel about the torture of villagers that was based on real events. The Court observed as follows: "... the book contains passages in which graphic details are given of fictional ill-treatment and atrocities committed against villagers, which no doubt creates in the mind of the reader a powerful hostility towards the injustice to which the villagers were subjected in the tale. Taken literally, certain passages might be construed as inciting readers to hatred, revolt and the use of violence. In deciding whether they in fact did so, it must nevertheless be borne in mind that the medium used by the applicant was a novel, a form of artistic expression that appeals to a relatively narrow public compared to, for example, the mass media" (§ 41). After reiterating, in paragraphs 42 and 43 of its judgment, all the general principles that we have mentioned above, the Court pointed out that "the impugned book [was] a novel classified as fiction, albeit purportedly based on real events". It further observed as follows: "... even though some of the passages from the book seem very hostile in tone, the Court considers that their artistic nature and limited impact reduced them to an expression of deep distress in the face of tragic events, rather than a call to violence" (§ 45). In the present case the Government have not indicated the number of copies of Mathieu Lindon's novel that were sold and distributed.

Even though it does not directly concern a novel or work of fiction, the case of *Klein v. Slovakia* (no. 72208/01, 31 October 2006) is nevertheless significant. In that case the Court expressly took account of the applicant's explanation that the article he had published in a weekly journal aimed at intellectually-oriented readers was in fact meant as a joke which he had not expected to be understood and appreciated by everyone. The journal moreover had a limited circulation of approximately 8,000 copies (§ 48).

Lastly, in its judgment in *Vereinigung Bildender Künstler v. Austria* (no. 68354/01, 25 January 2007) concerning an injunction against the exhibition of pictures considered to be indecent, the Court based its findings on the same principles as those that govern its case-law on artistic creation, observing that "[a]rtists and those who promote their work are certainly not immune from the possibility of limitations as provided for in paragraph 2 of Article 10" (§ 26). However, the following assessment was given in paragraph 33 of that judgment: "The Court finds that such portrayal amounted to a caricature of the persons concerned using satirical elements. It notes that satire is a form of artistic expression and social commentary and, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate. Accordingly, any interference with an artist's right to such expression must be examined with particular care".

3. When the Court is confronted, as in the present case, with a situation of conflict between freedom of expression (Article 10 of the Convention)

and the right to protection of one's reputation (Article 8), its method is to weigh the various interests against each other in order to ascertain whether a fair balance has been struck between the competing rights and interests. By contrast, neither the Paris Criminal Court nor the Court of Appeal engaged in such an analysis.

Moreover, by endorsing — or even paraphrasing — the reasoning given by the domestic courts, adhering to the logic they themselves adopted, the Court in its judgment has quite simply refrained from carrying out its own review. The result is that European supervision is lacking, or is at best considerably limited, and this represents a significant departure from our case-law in matters of criticism of politicians.

By espousing the method of analysis both of the Paris Criminal Court judgment of 7 September 2000 and of the Court of Appeal judgment of 21 March 2001, making an artificial distinction within the impugned novel between what is fiction and what represents the author's intention, the majority have created areas of uncertainty. In particular, the question whether words or expressions attributed to fictional characters are to be regarded as defamatory is made to depend on whether the author is to be seen as having sufficiently distanced himself in the novel from the words spoken. This seems to us to be a very fragile foundation on which to conclude that an author is guilty of defamation. By way of example, why is it that the words attributed to the lawyer's boyfriend – "so they'll feel morally entitled to beat you up – to come after you, ten against one, with metal bars, truncheons and steel-capped boots ... Nobody leaves the Front National with impunity." (p. 86) – are *not* regarded as defamatory whereas the words attributed to the anti-racist demonstrators in front of the law courts – "... an effective way to fight Le Pen is to call for him to be put in the dock and show that he isn't the Chairman of a political party but the chief of a gang of killers ..." (p. 10) – are clearly found to be defamatory?

4. To ensure the stringent application of the Court's case-law to this type of situation, the relative importance of various factors should have been assessed. In the first place, the fact that it was a novel, in other words an artistic work, is capable of justifying a higher level of protection. In this connection we find it difficult to place on the same plane, as the majority do (see paragraph 45 *in fine* of the judgment), situations concerning freedom of expression in literary works and situations where this right is relied upon in relation to police investigations (see *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, ECHR 2004-XI), to the dangers of using a microwave oven (see *Hertel v. Switzerland*, 25 August 1998, *Reports of Judgments and Decisions* 1998-VI) or to advertising (see *Steel and Morris v. the United Kingdom*, no. 68416/01, ECHR 2005-II).

Furthermore, the status of the injured party is also a factor which comes into play in the determination of the admissible limits to the rights and freedoms protected. In this connection, public figures and politicians, on

account of the responsibilities they bear, are exposed to criticism as a matter of course and are therefore required to show greater tolerance towards polemical discourse or even insults directed against them. The founding judgment concerning the criticism of politicians is clearly that of *Lingens v. Austria* (8 July 1986, § 42, Series A no. 103) and since then there has been a high degree of consistency in the Court's case-law with regard to the application of this fundamental principle[1]. The recent declaration of the Committee of Ministers on freedom of political debate in the media fundamentally adheres to the Court's case-law and explains its *raison d'être*: "Political figures have decided to appeal to the confidence of the public and accepted to subject themselves to public political debate and are therefore subject to close public scrutiny and potentially robust and strong public criticism through the media over the way in which they have carried out or carry out their functions."[2] The Court has applied these principles in cases where the factual circumstances were similar to those of the present case. For instance, in *Lopes Gomes da Silva v. Portugal* (no. 37698/97, ECHR 2000-X) the applicant had been convicted for describing a person reported to be standing in the Lisbon City Council elections as "grotesque and ... buffoonish ... such an incredible mixture of crude reactionaryism ..., fascist bigotry and coarse anti-Semitism" (§ 10) and the Court found that there had been a violation of Article 10 of the Convention. *Mutatis mutandis*, in *Karman v. Russia* (no. 29372/02, 14 December 2006) the Court found that the conviction of a journalist who had described a politician as a "local neofascist" had entailed a violation of Article 10 of the Convention. In *Dąbrowski v. Poland* (no. 18235/02, 19 December 2006) the Court also found that there had been a violation of Article 10 of the Convention in respect of an article that had led to a journalist's conviction for describing a deputy mayor as a "mayor-burglar".

As regards Mr Jean-Marie Le Pen, it may reasonably be argued that he should accept an even higher degree of tolerance precisely because he is a politician who is known for the virulence of his discourse and for his extremist views. On this point we refer in particular to the case of *Oberschlick v. Austria (no. 2)* (1 July 1997, *Reports* 1997-IV) where the Court considered that "calling a politician a Trottel in public may offend him" but that, in the instant case, "the word [did] not seem disproportionate to the indignation knowingly aroused by Mr Haider" (§ 34). Similarly, in *Wirtschafts-Trend Zeitschriften-Verlags GmbH v. Austria* (no. 58547/00, 27 October 2005) the Court considered that Mr Haider was a leading politician who had been known for years for his ambiguous statements

1. M. Oetheimer, *L'Harmonisation de la liberté d'expression en Europe. Contribution à l'étude de l'article 10 de la Convention européenne des droits de l'homme et de son application en Autriche et au Royaume-Uni*, Paris, Pédone, 2001, p. 112.
2. *Declaration on freedom of political debate in the media* (adopted by the Committee of Ministers on 12 February 2004 at the 872nd meeting of the Ministers' Deputies), point III.

about the National Socialist regime and had thus exposed himself to fierce criticism inside Austria but also at the European level. He therefore had to display a particularly high degree of tolerance in this context (§ 37). Of course, such an observation should be kept in the context of the present case and of those cases that have given rise to the judgments of the Court cited above, and we do not suggest that it be applied generally. In other situations it may be difficult to determine the extreme nature of political ideas or distinguish them from other categories of ideas.

5. In examining insulting, offensive, libellous and defamatory discourse, the Court has observed that it is necessary to make a distinction depending on whether the offending remarks are statements of fact or value judgments. However, value judgments must be supported by a sufficient factual basis. As a general rule, the Court considers that the necessity of a link between a value judgment and its supporting facts may vary from case to case according to the specific circumstances (see *De Haes and Gijsels v. Belgium*, 24 February 1997, § 47, *Reports* 1997-I; *Feldek v. Slovakia*, no. 29032/95, § 86, ECHR 2001-VIII; and *Wirtschafts-Trend Zeitschriften-Verlags GmbH*, cited above, § 35). The Court has also found that the requirement to adduce the facts on which a value judgment is based is less stringent when they are already known to the general public (see *Feldek*, cited above, § 86). In this context we consider it appropriate to make two observations.

First of all, it is generally accepted – and the majority acknowledge this – that "there is no need to make this distinction when dealing with extracts from a novel" (see paragraph 55). However, the Court considers that it does become fully pertinent where, as in the present case "the impugned work is not one of pure fiction but introduces real characters or facts" (ibid.). In our view that assertion is quite simply incorrect. A reality novel largely remains a novel, just as docufiction remains, for the most part, fiction. Strictly speaking, the Court should simply have said that the rule becomes partly pertinent when the novel and the reality coincide.

Furthermore, the criticism levelled against the applicants by the Court of Appeal for not having carried out a "basic verification" appears to us to be at odds with the facts and the reality. It is clear in our view that a sufficient factual basis could easily be derived from Jean-Marie Le Pen's various convictions throughout his political career, particularly for the following offences: "trivialisation of crimes against humanity, making allowances for atrocities" (Versailles Court of Appeal, 18 March 1991, and Nanterre *tribunal de grande instance*, 26 December 1997); "apologia for war crimes" (Court of Cassation, 14 January 1971); "anti-Semitism, incitement to racial hatred" (court of Aubervilliers, 11 March 1986); "incitement to hatred or racial violence" (Paris Court of Appeal, 29 March 1989, and Lyons Court of Appeal, 23 March 1991); "proffering insults against public figures and offensive remarks" (Paris Court of Appeal, 3 June 1993, and court of

Strasbourg, 6 January 1997); and "physical violence" (Paris *tribunal de grande instance*, 16 January 1969, and Court of Cassation, 2 April 1998). Similarly, Mr Jean-Marie Le Pen has lost a number of cases, particularly suits against the accusation of "incitement to racism, anti-Semitism and Nazism" (Amiens Court of Appeal, 28 October 1985; Lyons Court of Appeal, 27 March 1986; and Toulon Criminal Court, 20 June 1990, judgment upheld by Aix-en-Provence Court of Appeal on 25 February 1991) and against the accusation that he engaged in torture (Paris Court of Appeal, 22 June 1984). In addition, it may reasonably be argued that Mr Jean-Marie Le Pen's speeches and opinions inciting and provoking hatred and violence, for which he has been convicted, may have encouraged, and indeed prompted, militants to commit acts of violence.

6. According to the Court's case-law, the limits to freedom of expression are overstepped where there is incitement to violence or hatred. By contrast, in *Dağtekin v. Turkey* (no. 36215/97, 13 January 2005) – which also concerned a novel – the Court found that there had been a violation of the Convention, observing that whilst certain particularly caustic passages of the book painted an extremely negative picture of the history of the Turkish State and the tone was thus hostile, they nevertheless did not amount to incitement to engage in violence, armed resistance or rebellion, nor did they constitute hate speech (§ 26). The Court reached the same conclusion in *Yalçın Küçük v. Turkey* (no. 28493/95, 5 December 2002), which concerned an interview book rather than a novel, but the Court nevertheless considered that the book had to be placed in the general context and that it was written in a literary and metaphorical style.

In the present judgment, the Court reiterates that it has had regard to the nature of the remarks made, in particular to the underlying intention to stigmatise the other side, and to the fact that their content is such as to stir up violence and hatred, thus going beyond what is tolerable in political debate, even in respect of a figure who occupies an extremist position in the political spectrum (see paragraph 57). *Mutatis mutandis*, the Court refers to its judgment in *Sürek v. Turkey (no. 1)* ([GC], no. 26682/95, ECHR 1999-IV). We find that it is incorrect to draw a parallel between the facts of the present case and those of the *Sürek* case, which concerned the publication of a particularly virulent text – describing the Turkish army as fascist and the Republic as a "murder gang", calling the Kurdish population to fight against the State, inciting hatred and violence, and being placed in the specific and sensitive context of the Kurdish question. It was a sort of appeal to rise up against the State itself, not criticism of a politician who does not represent the State.

In addition, and more fundamentally, we believe that it is excessive and inaccurate to claim that the novel in question constitutes an appeal to violence or hatred. The work criticises a politician who is himself inclined to make comments of such a nature, as shown by the convictions

pronounced against him. In the present case, the expressions "the chief of a gang of killers" (p. 10) and "a vampire who thrives on the bitterness of his electorate, but sometimes also on their blood" (p. 136) cannot be taken literally; their intention is to convey the message that this politician, through his discourse, encourages his followers to engage in acts of extreme violence, especially against minorities, as the Bouaram case itself showed. In this sense, these expressions are also value judgments which have an established factual basis.

7. Lastly, the sentence handed down in the present case was certainly not symbolic and there has been no review of the proportionality of the sanction (compare, for example, *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, §§ 111 et seq., ECHR 2004-XI). Moreover, it may also be questioned whether it is still justified, in the twenty-first century, for damage to reputation through the press, media or other forms of communication to entail punishment in the criminal courts. In its Recommendation 1589(2003), the Parliamentary Assembly of the Council of Europe made the following observation: "The media legislation in some [west European] countries is outdated (for instance the French press law dates back to 1881) and although restrictive provisions are no longer applied in practice, they provide a suitable excuse for new democracies not willing to democratise their own media legislation."

III

1. As regards the third applicant, the publication director of *Libération*, admittedly it was perhaps not advisable to allow ninety-seven writers to use a newspaper column to express such views. However, as the Court has found in the present judgment, since freedom of the press is in issue "this is a case which attracts a particularly high level of protection of freedom of expression under Article 10" (see paragraph 62). It is not in dispute that the article was published in the context of information and ideas on questions of public interest.

In its judgment in *Jersild v. Denmark* (23 September 1994, Series A no. 298) the Court – which warned that if duties and responsibilities were applied too extensively there was a risk of undermining the protection of freedom of expression – declared that the journalist's increased responsibility could not, however, justify scrutiny of the techniques used to convey information. In the present case, the director of the newspaper *Libération* used a column entitled "*Rebonds*" and it is not for us to comment on that. In its judgment in Bladet Tromsø *and Stensaas v. Norway* ([GC], no. 21980/93, ECHR 1999-III) the Court also considered that it was not its role, any more than that of the domestic courts, to substitute itself for the press and dictate the reporting technique that journalists should adopt.

2. Apart from the argument that he had reproduced passages previously judged to be defamatory, the judicial authorities justified the third applicant's conviction by the fact that the polemical aim of a text could not absolve it from all regulation of expression, when, far from being based merely on an academic debate, its line of argument was built around reference to precise facts, and that the applicant had therefore been under an obligation to carry out a meaningful investigation before making particularly serious accusations, namely that Mr Le Pen could be regarded as the "chief of a gang of killers" or as a "vampire". In other words, for the applicant to have acted in good faith he should have adduced evidence to substantiate his offending allegations.

3. Such an obligation, in our view, seems to run counter to the Court's case-law concerning the duties and responsibilities of the press. For example, in its judgment in *Thoma v. Luxembourg* (no. 38432/97, ECHR 2001-III) the Court had occasion to define the responsibility borne by journalists in the publication of information supplied to them by third parties, and it restated the principle whereby "punishment of a journalist for assisting in the dissemination of statements made by another person ... would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so" (§ 62). The third applicant could not seriously be criticised for informing the public about the protest movement that had emerged following the judgment against Mathieu Lindon's work, but nor could he be criticised for failing to correct, by comments of his own, the allegations regarded as defamatory. In its judgment in *Radio France and Others v. France* (no. 53984/00, ECHR 2004-II) the Court considered that "... a general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation was not reconcilable with the press's role of providing information on current events, opinions and ideas" (§ 27). It cannot therefore be argued that, by simply reporting in the column "*Rebonds*" on the support of ninety-seven writers for Mathieu Lindon and by publishing their opinion that the impugned passages were not defamatory, the third applicant had failed in his duty to act in good faith.