Genocide Denials and the Law

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LUDOVIC HENNEBEL ✵ THOMAS HOCHMANN

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Contributors

Lawrence Douglas: James J. Grossfeld Professor of Law, Jurisprudence and Social Thought at Amherst College. He is the author of four books including, *The Memory of Judgment* (Yale University Press, 2001).

David Fraser: Professor of Law and Social Theory at the University of Nottingham. He is the author of *Law After Auschwitz: Towards A Jurisprudence of the Holocaust* (Carolina Academic Press, 2005) and *The Fragility of Law: Constitutional Patriotism and the Jews of Belgium 1940–45* (Routledge, 2009), as well as several articles on Nazi law and legality and works on Holocaust Denial.

Emanuela Fronza: Professor of International Criminal Law, Researcher in Criminal Law, University of Trento (Italy), Faculty of Law. She is a Fellow of the Alexander von Humboldt Foundation at the University of Berlin, Faculty of Law. She is the author of several publications in the field of International Criminal Law, Criminal Law and Comparative Criminal Law, including: (Amati et al.) "Introduction to International Criminal Law" (Giuffré, Milan, 2005; II. edition 2010); she also co-authored (Delmas Marty et al.) the book, Le crime contre l´humanité" (Puf, Paris, 2009).

Ludovic Hennebel: Fellow at the National Fund for Scientific Research (Belgium); Member of the Perelman Center for Legal Philosophy at the Law School of the Université Libre de Bruxelles; Global Fellow at New York University (Law School, Center for Human Rights and Global Justice, B.A.E.F. Fellow 2007–2008); Faculty Director of the Magna Carta Institute. He is the author of a number of publications on international human rights law and global justice including a monograph on the American Convention on Human Rights (Bruylant, 2007) and a monograph on the International Covenant on Civil and Political Rights (Bruylant, 2007), published in French with Bruylant Publishers.

Thomas Hochmann: Research Fellow at the University of Paris Panthéon-Sorbonne where he taught public law. He won several awards for his PhD research (supervised by Professor O. Pfersmann) on Holocaust denial and freedom of speech, including a scholarship from the Fondation pour la Mémoire de la Shoah (2006) and the prize of the City of Paris for researches on anti-Semitism and xenophobia (2010). He is the author of a number of publications on human rights, freedom of speech, and comparative constitutional law in peer-reviewed journals and edited volumes.

Martin Imbleau: Lawyer (Quebec Bar, Canada). He is an independent researcher, mainly on the interplay between massive human rights violations and the establishment of historical truth. He is the author of a number of publications on human rights law and freedom of speech, notably La négation du génocide nazi, Liberté d'expression ou crime raciste? (Holocaust Denial: free speech or racist crime?, L'Harmattan, 2003) and articles in The Encyclopedia of Genocide and Crimes Against Humanity (Macmillan, 2004).

Robert A. Kahn: Associate Professor of Law at the University of Saint Thomas (Minnesota). He is the author of *Holocaust Denial and the Law: A Comparative Study* (Palgrave-MacMillan, 2004).

Kenneth Lasson: Professor of Law at the University of Baltimore. He has written and lectured widely on freedom of expression and religion, as well as Holocaust denial. He is the author of ten books (most recently *Trembling in the Ivory Tower: Excesses in the Pursuit of Truth and Tenure* [2003]) and numerous law review articles concerning civil liberties and international human rights.

Laurent Pech: *Jean Monnet* Lecturer in EU Public Law at the School of Law, National University of Ireland (Galway). He is the author of *Freedom of Expression and its Limitation. Lessons from the United States with regard to European case-law* (in French, L.G.D.J., 2003). He recently published *Fondement du droit de la presse et des médias* in B. Beignier et al. (eds), *Traité de droit de la presse et des medias* (Paris: LexisNexis, 2009), p. 69 and *Liberté d'expression: Aperçus de droit comparé* in *Juris-Classeur Communication* (Paris: LexisNexis, 2010), no. 1250.

Preface

"IRVING: CONSIGNED TO HISTORY as a racist liar," read the headline in *The Guardian* on April 12, 2000, after the famous decision by Justice Charles Gray in the libel suit against Deborah Lipstadt was released. I can still recall the excitement that morning, when I first saw it on a newsstand at the Vienna airport. The headline was provocative, almost as if *The Guardian* was inviting Irving to file another claim in court, against it this time, but I don't believe he ever did. The idea that he was "consigned to history" is rich in significance. The suggestion, finally, is that "history" triumphed over falsehood. In this case, at any rate, the marketplace of ideas seems to have worked.

My own views on this complex issue have evolved over the years. They may change in the future, too. Sometimes, I find myself sharing the opinion of the last persuasive person with whom I have spoken, my perspective tilting in one direction or another. I find myself torn between the militant antiracism of punishing denial and a latent libertarianism that bristles at any attempt to muzzle expression. I think that at various times in my life, I have argued for both extremes on these issues. Now, I find myself somewhere in the middle. My preferable compass, international human rights law, seems to have two needles that point in opposite directions.

Nearly two decades ago, when I was teaching in Canada, the *Zundel* and *Keegstra* trials were on the docket of the Supreme Court. At about the same time, *Faurisson* was adjudicated by the United Nations Human Rights Committee. Both the Supreme Court of Canada and the Human Rights Committee seemed divided. There was a visible rupture in *Keegstra*, with four justices opting for what might be called the "European" approach to hate speech, while the minority of three judges preferred the "American" approach. In *Zundel*, the Court shifted ever so slightly the other way. It was a quintessentially Canadian standoff.

At the Human Rights Committee, the disagreement may have been more subtle. Thomas Buergenthal recused himself on the basis of his

own personal involvement in the fact of Auschwitz, where he had been imprisoned as a boy. I never found this explanation for recusal to be very convincing. I would have thought a survivor would be a particularly appropriate person to assess the behavior of Faurisson. I've since wondered whether Judge Buergenthal might also have been of two minds, pulled between his inevitable hatred of anti-Semitism and the strong commitment to free speech that he would have absorbed as one of America's greatest human rights experts. I would love to read the decision that he never wrote. There was also a nuanced individual opinion signed, amongst others, by another Jewish member of the Committee, David Kretzmer. One can imagine the surprise of Faurisson himself, whose perverse world view probably made him fear a Jewish conspiracy. As it turned out, the Jewish members of the Committee were probably among those most uncomfortable with the French anti-denial legislation.

The legacy of the prosecutions of *Zundel*, *Keegstra*, and *Faurisson* seems shrouded in ambiguity, whereas it is the Irving trial, launched by the famous revisionist himself, which seems to have cleared the air. Since then, one has the impression that the storm of Holocaust denial may have passed or at least subsided. The big exception is Ahmadinejad's famous conference in Tehran. Iran's demagogic president muddles the distinction between anti-Semitism and harsh criticism of Israel. His opponents seize on the point and suggest that anti-Semitism is somehow linked to the important struggle for the rights of the Palestinians. Thus, the memory of one of history's greatest atrocities, the attempted extinction of European Jews, gets reduced to a debating ploy by both Ahmadinejad and his detractors.

But if denial was once a vehicle for anti-Semites, the concept has spread to other historical issues. The other two great genocides of the twentieth century, of the Armenians in the Ottoman Empire in 1915 and of the Rwandan Tutsi in 1994, have their own deniers. The Armenian diaspora has campaigned for legislation and declarations acknowledging the Armenian genocide, in some places with considerable success, in others with failure. Debates about historical events of nearly a century ago feature on parliamentary agendas in Brussels, Washington, and elsewhere. Increasingly, legal regulations seem to frame our view of history. Truth has become a matter for legislators, a strange situation given the reputation of many politicians.

Often, there is confusion between the factual underpinning and its legal qualification. The term "genocide" has become such a loaded label that those who may disagree on its application to specific facts find themselves called

"deniers," even if there is little or no disagreement about the reality of the events themselves. Thus, some who speak of crimes against humanity in Bosnia or Darfur or Cambodia but who resist the term "genocide" may find themselves described as "deniers." And what of disputing whether the Ukrainian famine of the 1930s, whose cause may have been a combination of the natural and artificial, should be branded as genocide? Or the argument as to whether the bombing of Hiroshima and Nagasaki was "genocide" or a lawful act of war?

There is a lot of abuse of language, and it is not just the racists who are responsible. Well-meaning activists for groups of victims sometimes indulge in their own forms of hyperbole. This can poison both historical and legal debate. At what point does legitimate discussion about the appropriate terminology to describe historic atrocities start to merge with vulgar racism? Law doesn't have to provide absolute clarity, but it should aspire to a norm with some degree of predictability, so that sincere academic discussion can be clearly demarcated from hate propaganda.

The European Parliament made a stab at this in its recent Framework Directive. It requires Member States to enact legislation addressed at punishment of "publicly condoning, denying or grossly trivializing crimes of genocide, crimes against humanity and war crimes . . . carried out in a manner likely to incite to violence or hatred" against groups defined by race, color, religion, descent, or national or ethnic origin. Thus, denial is linked to incitement, which becomes the real test. It is presented as a form of incitement, although an inchoate one in the sense that the law can intervene before the result.

The "likely to incite" phrase seems calculated to make this context specific. For example, it would appear unlikely that an Irish historian or legal academic who disputed elements of the great famine who be "likely to incite" violence or hatred, although this remark might well have been less unequivocal a few decades ago, at the height of the "troubles" and if the denial were made in one of the conflict zones of Northern Ireland.

The objective approach by which denial is "likely to incite" seems preferable to the subjectivity of other legislative models, such as the Additional Protocol on the Convention on Cybercrime. The latter makes the test whether denial "is committed with the intent to incite hatred, discrimination or violence." The focus is on the individual intent, rather than on the environment and the probability of consequences. We may make more progress in dealing with racism by focusing on the potential for results. The more obvious the danger of violence and persecution, the more such

encroachments on freedom of expression can find some justification. Where these threats are absent or very remote, it is much harder to allow the law to intervene, even in situations where the intent is an ugly one.

In the final words of their introduction, Ludovic Hennebel and Thomas Hochmann invite the readers to "decide for themselves." There will be some, however, including myself, who are buffeted by conflicting values and who find they are unable to draw a clear line. Maybe that's because there isn't one.

Professor William Schabas OC MRIA
Galway, January 25, 2010

Introduction
Questioning the Criminalization of Denials

-Ludovic Hennebel & Thomas Hochmann

FOR HISTORIANS, DENIAL OF GENOCIDE (or of any other crime against humanity) does not raise any serious issue. Indeed, they can demonstrate easily the absurdity of the deniers' arguments. Furthermore, historians can take denial as a subject of inquiry.[1] They can wonder whether it is preferable to expose the denier for what he is in a debate, or rather to avoid such direct confrontation, given the fact that deniers understand better than anybody else Schopenhauer's *Art of Controversy* and its leitmotiv that the "discovery of objective truth must be separated from the art of winning acceptance for propositions; for objective truth is an entirely different matter."[2] It seems fair to say that one of Schopenhauer's stratagems to win this acceptance seems to have been written for deniers:

> This is chiefly practicable in a dispute between scholars in the presence of the unlearned. If you have no argument *ad rem*, and none either *ad hominem*, you can make one *ad auditores*; that is to say, you can start some invalid objection, which, however, only an expert sees to be invalid. . . . To show that your objection is an idle one, would require a long explanation on the part of your opponent, and a reference to the principles of the branch of knowledge in question, or to the elements of the matter which you are discussing; and people are not disposed to listen to it.[3]

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1. See, for instance, DEBORAH LIPSTADT, DENYING THE HOLOCAUST: THE GROWING ASSAULT ON TRUTH AND MEMORY (New York: Free Press, 1993); FLORENT BRAYARD, COMMENT L'IDÉE VINT À M. RASSINIER, NAISSANCE DU RÉVISIONNISME (Paris: Fayard, 1996); VALÉRIE IGOUNET, HISTOIRE DU NÉGATIONNISME EN FRANCE (Paris: Seuil, 2000).

2. ARTHUR SCHOPENHAUER, THE ART OF CONTROVERSY (London: Swan Sonnenschein & Co., 1990), 7 (Die Kunst, Recht zu behalten, 1831.)

3. *Id.* at 42.

Furthermore, because the deniers' contributions are void to the historical inquiry, most historians have concluded that although demonstrating the deniers' falsehood is a task worth undertaking, it is preferable not to honor the deniers with a debate; or to put it in a widely quoted formula: "there can be no question of any discussion with [the negationists]."[4]

Denial is much more problematic for the legal scholar since denial prohibition currently may be the most controversial issue related to the freedom of expression in Europe, especially since the 2008 adoption of the European Union Framework Decision on combating racism and xenophobia. The present book aims at offering a legal analysis of such a limit on free speech along with some legal-political reflections on its legitimacy.

In this general introduction to the book, some clarification must be made concerning the title. Although it refers to "Genocide Denials," the present volume includes the study of denial of other crimes against humanity. Most of the existing statutes only target the denial of the Holocaust and other crimes against humanity committed by the Nazis and their accomplices. For a long time, only Switzerland and Spain had adopted a broader approach; the former for every crime against humanity and the latter for every genocide.[5] Things may change however, due to the European Union's Framework Decision, which includes the denial of any genocide, crime against humanity, or war crime. One should nevertheless be aware that the Framework Decision contains other stipulations restricting its scope; indeed, it seems only to require the Member States to target "aggravated denial."[6]

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4. Pierre Vidal-Naquet, *Qui sont les assassins de la mémoire?* (1981), *in* PIERRE VIDAL-NAQUET, LES ASSASSINS DE LA MÉMOIRE 206 (Paris: La découverte, 2005)

5. The Spanish statute was found to be unconstitutional by the Tribunal Constitucional in 2007. See in this volume the contributions of Emmanuela Fronza and Laurent Pech.

6. According to Article 1, the denial must be "directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin." (The English and the French versions of the Decision do not allow understanding whether this requirement applies to the expression of denial or to the denied crime, but the German and Italian versions do not leave any doubt.) The denial must also be "likely to incite to violence or hatred against such a group or a member of such a group." Furthermore, Article 1, paragraph 2 allows limiting the punishment of denial to the cases where it is "threatening, abusive or insulting."

"Denial,"[7] indeed, describes many types of expression.[8] Under its purest form, denial is an expression contesting the existence of a crime or a characteristic feature of a crime.[9] Examples include statements such as "the Holocaust did not happen," and "no gas chambers were used to kill anybody under the Third Reich." The German legal scholarship[10] called this kind of denial *einfache Auschwitzleugnung*, which can be translated as "bare denial." But there exists also a kind of expression called *qualifizierte Auschwitzleugnung* or "aggravated denial." In this case, a group of individuals is targeted explicitly. An example is the "usual" claim that "Jews invented the myth of the Holocaust to exploit Germany financially." Furthermore, some expressions are closely related to denial. More often than not, the statutes forbidding the denial of a crime against humanity also target its approval, justification, and minimization.[11]

It seems that these various expressions can be located on a continuum stretching from "hate speech" to "bare denial." Aggravated denial is indeed a kind of hate speech, a hostile expression targeting a group of individuals for some reasons such as origin, nationality, color, or "race." Justification, approval, or qualitative minimization of a crime against humanity, while not necessarily targeting anyone explicitly, can be linked quite easily to the expression of hate and possibly also to the infliction of harm toward victims of crimes alleged to have been legitimate. Bare denial and quantitative minimization—considered literally—do not appear to target anybody; rather, they seem to act only as general statements about a historical event without drawing any conclusions.

Of these kinds of speech, the most striking issue arises with bare denial and quantitative minimization. The well-examined path of "hate speech"

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7. The French word for Denial is *Négationnisme*. In German, Holocaust Denial is referred to as *Auschwitzleugnung*, although a number of authors keep on resorting to the confusing term of *Auschwitzlüge* (Auschwitz Lie).

8. *See* Gérard Cohen-Jonathan, *Négationnisme et droits de l'homme -Droit international et européen (la sentence du Comité des droits de l'homme, Faurisson c. France)*, 32 REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 571 (1997).

9. CAROLE VIVANT, L'HISTORIEN SAISI PAR LE DROIT. CONTRIBUTION À L'ÉTUDE DES DROITS DE L'HISTOIRE 417 (Paris: Dalloz, 2007).

10. See, for instance, the major German study on the topic: THOMAS WANDRES, DIE STRAFBARKEIT DES AUSCHWITZ-LEUGNENS 96–9 (Berlin: Duncker & Humblot, 2000).

11. For an overview of the statutes, please refer in this volume to the contribution of Martin Imbleau.

is certainly relevant to any study of genocide denial,[12] but one must acknowledge that "bare denial" confronts the regulation of freedom of expression with some new questions and casts a new light on some more classical "hate speech regulation" problems. Some of these questions are merely legal, while others pertain more broadly to the political or philosophical reflection about the limitation of expression. This introduction (1) presents the main legal issues raised by the prohibition of denial, (2) offers some deeper analysis of the relationship between freedom of speech and denial in international law, and (3) inquires about the existence of an international obligation to criminalize denial under international human rights law. Last, (4) it confronts the main political and moral arguments *pro* or *contra* the prohibition of denials.

1. Prohibiting Denials: Legal Issues

The first question that arises whenever one studies the constitutionality of a norm forbidding a type of behavior is whether the behavior is covered by the Constitution, i.e., whether it belongs to the domain of protection (*Schutzbereich*) of some of the guarantee of the right. In some legal systems, denial is precluded from any protection at this very first step. The European Court of Human Rights considers Holocaust denial to "run counter to the fundamental values of the Convention, as expressed in its Preamble, namely justice and peace"[13] and thus is excluded from any protection by the Convention, in accordance to Article 17. In Austria, the *Verbotsgesetz* (Prohibition Act), a norm with constitutional rank, forbids any expression favorable to the Nazi ideology, including the denial of crimes committed in its name.[14] One can also wonder whether some treaties are arguing for genocide denial as an internationally uncovered expression.

More tangentially, the German Constitutional Court ruled that as a false statement of fact dealing with a notorious historical event, "bare" Holocaust

12. See the recently published and excellent collection of essays gathered in EXTREME SPEECH AND DEMOCRACY, (Ivan Hare & James Weinstein eds., New York: Oxford University Press, 2009). On the relationship between "bare" denial and hate speech, see the contribution of Robert Kahn in this volume.

13. Garaudy v. France (dec.), no. 65831/01, 2003. See *infra*.

14. See Felix Müller, DAS VERBOTSGESETZ IM SPANNUNGSVERHÄLTNIS ZUR MEINUNGSFREIHEIT (Vienna: Verlag Österreich, 2005).

denial, did not belong to the domain of protection of the freedom of expression.[15] One could wonder whether the almost proverbial sentence of the Supreme Court of the United States in *Gertz v. Robert Welch, Inc.*, stating that "there is no constitutional value in false statements of fact,"[16] could be understood as denial as an expression uncovered by the First Amendment. However, one should not forget the subsequent observation that the "First Amendment requires that we protect some falsehood in order to protect speech that matters."[17] The First Amendment does cover false statements of facts: they can be suppressed only in some circumstances, such as defamation, and even then only under certain conditions, such as proving the speaker's "actual malice" or at least negligence.[18]

To say that an expression is covered by the protection of free speech does not lead to any conclusion regarding its effective protection. Indeed, in most legal systems, the norm that guarantees the freedom of expression entails some possibilities to restrict it under certain conditions, such as for the protection of individual rights or collective interests.

There are two main ways to forbid an expression, both of which can apply to denial. First, a lawmaker can target an expression that has some consequences and provokes some harm. These harmful effects may pertain to individuals (for instance, seeing denial as harming victims and survivors of the denied crime and/or their descendants). A lawmaker may also wish to counter a more general and indirect consequence, like the threat to democracy perceived in a whitewashing of National Socialism. The organ applying these kinds of norms will have to establish whether the targeted consequence did occur.

In Germany for instance, Holocaust deniers can be convicted with the offenses of insult or defamation, since the courts consider this expression to be an attack on the "personality," that is, the "self-conception" (*Selbstverständnis*) of Jews living today in the country.[19] In the United States,

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15. BVerfGE 90, 241, 249. See in this volume the contribution of Laurent Pech.

16. 418 U.S. 323 (1974), 340.

17. *Id.*, 341.

18. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964), 279; Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), 347.

19. This reasoning of a 1979 decision of the civil chamber of the Federal Court of Justice was afterwards adopted by both criminal and constitutional jurisprudence. In 1985, a statute was voted that suppressed the requirement of a request to prosecute for a lawsuit based on insult if the person targeted was persecuted as a member of a group under the National

given the unconstitutionality of group libel regulation after *New York Times v. Sullivan*[20] and *R.A.V. v. City of St. Paul*,[21] Holocaust denial cannot be prosecuted as a defamation of "the Jews." Nevertheless, it is fair to say that the case—which seems insignificant for practical purposes—of an aggravated denial targeting a specific individual can be punished in the United States: "X is a liar because the Holocaust did not happen" may give rise to liability.[22]

The European Union Framework Decision requiring the prohibition of denial allows the Member States to include such a "consequential requirement" in their statutes. One should wait and see how this international instrument will be implemented, but it is possible to already observe that most of the statutes specifically targeting denial did not choose this path. Germany seems to link the prohibition of denial with some consequences since its statute requires that the speech be able to "disturb the public peace." But the definition of "public peace" shows how toothless this requirement is. It is generally understood by German scholars and judges to be "the condition of general security as well as general trust in the further existence of safe conditions and the sense of security within the population."[23] One must thus agree that such a "public peace" is automatically "disturbed" whenever a criminal act is committed.[24]

Socialist or another authoritarian regime and if the insult is connected to this persecution. A very widespread extrapolation and mistake in the English and French speaking scholarship persists in arguing that this statute forbade Holocaust denial. The article usually cited to support this claim did not make it. *See* Eric Stein, *History against Free Speech: The New German Law against the "Auschwitz"—and Other—Lies"*, 85 MICH. L. REV. 277 (1986). It seems that the French Parliament was also persuaded that Germany forbade Holocaust denial in 1985 and intended to follow this example while voting the Gayssot Act in 1990. See Jean Stengers, *Quelques libres propos sur « Faurisson, Roques et Cie »*, CAHIERS-BIJDRAGEN, Centre de recherches et d'études historiques de la seconde guerre mondiale, no. 29, May 12, 1989. No earlier than 1994 did Germany pass a law forbidding Holocaust denial.

20. 376 U.S. 254 (1964).

21. 505 U.S. 377 (1992).

22. The Supreme Court ruled explicitly that "X is a liar" can be a defamatory statement. Milkovich v. Lorain Journal, 497 U.S. 1 (1990), 19.

23. See Tatjana Hörnle, *Offensive Behavior and German Penal Law*, 5 BUFF. CRIM. L. REV. 255 (2001), 256.

24. See Andreas Stegbauer, *Anmerkung*, JURISTISCHE RUNDSCHAU (2003), 75. It seems therefore that the "public peace" clause is nothing but a way to comply with the constitutional requirement that a statute limiting expression be "general," i.e., that it does not target an opinion as such but aims at protecting some interest. However, the Constitutional Court seemed recently to adopt a more demanding conception of the public peace, defining its

Therefore, the German statute corresponds much more to the second manner of forbidding an expression and is similar to most of the other European statutes forbidding denial that target a meaning without requiring the judge to verify that it has caused some harmful consequences. The prohibition of denial seems therefore to be very "un-American" because one of the most characteristic features of the First Amendment is precisely that "[w]henever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; [and] whether the danger, if any, was imminent."[25] The legislative estimation is "merely a rebuttable presumption that these conditions have been satisfied."[26] In Europe and Canada, the rational legislative estimation that racist speech or genocide denial is likely to have some harmful consequences is sufficient to justify speech regulation, and thus a mere meaning can be prohibited without requiring that its empirical consequences be verified in each case. American judges, to the contrary, "are compelled to examine for [themselves] the statements in issue and the circumstances under which they were made to see whether or not they do carry a threat of clear and present danger."[27] In the words of one contributor to this volume: "While Americans, post-Brandenburg, debate about the impact of the words on an audience, Europeans debate the meaning of the words themselves."[28] European statutes forbidding genocide denial generally do not require the judge applying it to establish that the speech caused any harm to anybody or threatened anything. As a result, since the mens rea of an offense is linked with its actus reus, these statutes, lacking a specific provision, also do not require evidence that the denier intended to inflict any harm.[29]

Of course, the fact that the lawmaker did not make harmful effects of denial a part of the offense does not mean that it did not want to avoid such consequences. From a legal point of view, the judge controlling the

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threat as the danger of the commission of an illegal act. See BVerfG (2009), *Wunsiedel*, 1 BvR 2150/08, par. 77–78.

25. Whitney v. California, 274 U.S. 357 (1927), 378–79 (Brandeis, conc.)

26. *Id.*, 379.

27. Pennekamp v. Florida, 328 U.S. 331 (1946), 335. See especially Brandenburg v. Ohio, 395 U.S. 444 (1969), 447.

28. See in this volume the contribution of Robert Kahn.

29. See in this volume the contribution of Thomas Hochmann.

conformity of the statute with a superior norm will be competent to identify which possibility to limit the freedom of expression the statute concretizes, a task that in some cases can amount to identifying which consequences one can attribute to denial.

The International Human Rights Law regime regarding freedom of expression helps to understand the dialectic between denial and free speech. The posture of international human rights law regarding genocide denials can be analyzed through two main questions. First, the criminalization of genocide denial questions the compatibility of such limitations to freedom of speech with human rights standards. It questions whether and under what conditions States may or may not, under international human rights law, criminalize genocide denials. Second, international human rights law may impose some positive obligations born by the States to criminalize some behaviors that affect the full enjoyment of the rights and liberties protected at the international level. It is therefore critical to solve the question of whether or not the States have a positive obligation under international human rights law to criminalize denials.

❋ 2. Denial as Speech

Deniers claim the protection of their freedom of expression. That is why the chapters of this book refer extensively to the moral foundations and the legal arrangements related to free speech. This freedom is one of the key human rights protected in all the major human rights treaties as well as in most of the world's domestic constitutions. At the international and regional levels, the protection of freedom of expression is provided by the 1948 Universal Declaration of Human Rights (UDHR),[30] the 1966 International Covenant on Civil and Political Rights (ICCPR),[31] the 1950 European Convention for the

30. Universal Declaration of Human Rights, G.A. Res. 217 (III), U.N. Doc. A/810, at 71 (1948), Art. 19: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

31. International Covenant on Civil and Political Rights, opened for signature Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976), art. 19 § 2: "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

Protection of Human Rights and Fundamental Freedoms (ECHR),[32] the 1969 American Convention on Human Rights (ACHR),[33] the 1981 Banjul Charter of Human and Peoples' Rights (ACHP),[34] and the 1966 International Convention on the Elimination of All Forms of Racial Discrimination (CERD).[35]

Freedom of expression is a pillar of democratic societies, based on pluralism of ideas and thoughts. Even the ideas and thoughts that offend, shock, or disturb the State or part of the population are deemed to have the full protection of the freedom of speech. As the European Court of Human Rights stated in the 1976 landmark case *Handyside*:

> The Court's supervisory functions oblige it to pay the utmost attention to the principles characterising a "democratic society." Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. 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 the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society." This means, amongst other things,

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32. European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953), art. 10 § 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."

33. American Convention on Human Rights, opened for signature Nov. 22, 1969, 1144 U.N.T.S. 143 (entered into force July 18, 1978), art. 13 § 1: "Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice."

34. Banjul Charter of Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 58 (1982), art. 9 § 2: "Every individual shall have the right to express and disseminate his opinions within the law."

35. International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Mar. 12, 1969), art. 5 (d) (viii): "In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: (viii) the right to freedom of opinion and expression."

that every "formality," "condition," "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued.[36]

In international human rights law, freedom of expression is therefore based on the principle expressed by the Handyside paradigm according to which a democracy must not only accept but also protect ideas that are not shared by the majority. Freedom of speech is so fundamental in a democratic society that the States should avoid interference.[37] A vast range of discourses or ideas are protected by the freedom of expression. More than scrutinizing and assessing what is being said, the international bodies tend to analyze the *general aim pursued by the use of freedom of speech* that is defined in a very wide manner.[38] This liberal and pluralist approach is adopted by such other international organs as the Inter-American Court of Human Rights[39] and the United Nations Human Rights Committee.[40]

The freedom of expression is fundamental for democratic societies—there is no doubt on this assertion—and international human rights law confirms it. However, that freedom is not absolute and may be limited by the States under certain conditions. The limitation aims at balancing the freedom of expression and the rights and liberties of others. The limitation rule is expressly provided by Article 10 § 2 of the European Convention,[41]

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36. Handyside v. UK, no. 5493/72, 1976, §49.

37. This significant role played by the freedom of speech in a democratic society is underlinded by all international organs. For the HRC's position, see for example Mukong v. Cameroun, n°458/1991 (1991), par. 9.7.

38. The European case law dealing with defamation, for example, shows that before deciding whether the domestic condemnation of a journalist for defamation is justified or not, the European Court controls the content of the discourse and the issue it deals with (corruption, justice, public administration, use of public funds, public affairs, health, environmental issues, nuclear policy, historical debate, etc. . .) as well as the person targeted by the discourse (public or private person). See Eur. Court of H. R., judgment of October 8, 2009, Porubova v. Russia; Fedchenko v. Russia and Fedchenko (n°2) v. Russia, no. 33333/04 and 48195/06;, Antica & Company "R" v. Romania, no. 26732/03, 2010. *See also Lehideux and Isorni v. France*, no. 24662/94, 1998; Orban & others v. *France*, no. 20985/05, 2009; Karsai v. Hungry, no. 5380/07, 2009.

39. See for instance Claude Reyes v. Chile, 2006 Inter-Am. Ct. H.R. (ser. c) No. 151 (Sept. 19, 2006).

40. See for an illustration HRC's various decisions concerning the Republic of Korea and Article 19 of the ICCPR: for instance, Kim v. Republic of Korea, n°574/1994, (1999).

41. Article 10 § 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

Article 19 § 3 of the International Covenant on Civil and Political Rights,[42] and Article 13 § 2 of the American Convention on Human Rights.[43]

To be valid, according to the international human rights standards, the restrictions must meet three cumulative criterion: legality,[44] legitimacy,[45] and democratic necessity.[46] When confronted by a restriction to the freedom of expression, the international bodies will apply that three-pronged test.[47] Indeed, to evaluate the compatibility of a limitation to the freedom of the

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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 the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

42. Article 19 § 3: The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
    (a) For respect of the rights or reputations of others;
    (b) For the protection of national security or of public order (ordre public), or of public health or morals.

43. Article 13 § 2: The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:a. respect for the rights or reputations of others; orb. the protection of national security, public order, or public health or morals.

44. Legality requires that the restriction be provided by law. The language may vary from one treaty to another. For instance, the International Covenant on Civil and Political Rights refers to the wording "provided by law," the American Convention requires that the restrictions be "expressly established by law," and the European Convention requires that such restriction be "prescribed by law." Despite these language differences, the idea of all these human rights treaties is similar: a government may not arbitrarily restrict freedom of expression; it may only do so where a law exists allowing it to. The relevant domestic law must be formulated with sufficient precision to enable one to reasonably foresee the consequences that a given action may entail.

45. The legitimacy standard requires that the restriction meet one of the goals of the limitations expressly enumerated in the international human rights treaty. These goals may slightly vary from one instrument to another, but the idea in most of the treaties is to ensure the protection of the interests of national security, territorial integrity, public safety or order, public health or morals, and the protection of the reputation or the rights of others. Some treaties, such as the American Convention on Human Rights or the International Covenant on Civil and Political Rights explicitly allow or oblige restrictions of freedom of expression when such expression consists of advocating national, racial or religious hatred that constitutes incitement to discrimination, hostility, violence, or any similar action against any person or group of persons on any grounds.

46. The proportionality standard entails that the interference must be a suitable and the most lenient means to achieve the goal.

47. Based on these standards, the European Court considers that the limitation must correspond to an "imperative social need." For a description of the European Court's control of a State's limitation to the freedom of speech, see Handyside v. UK, §§48–49.

speech with the international human rights law standards, international bodies take into account the context of the speech and its "weight" in a democracy. Various factors influence the balancing exercise scrutinizing the whole context and depending on various elements such as the speaker, the speech, the target, and the other rights that may be affected by the speech.

As far as the speaker is concerned, the agents of democracy and "watchdogs"—first of all, the journalists, and by extension the editors, writers, artists, historians, scholars, political leaders,[48] and elected representatives of the people[49]—enjoy extensive protection. Therefore, the margin of appreciation of the States to limit their expression is narrower than when limiting the speech of a private person. The journalists and other similar categories of speakers enjoy a greater protection because they contribute to the democratic debates and to the information of the public regarding public matters and concerns.[50] Inevitably, the international bodies assess the method, the context, the content, and the purpose of the expression and of the work of, for instance, the journalist. In one word, "good journalism"—the "serious" kind, based on objective and critical analysis, aiming at informing "in good faith" the general public regarding public matter—enjoys a quasi-absolute protection under international human rights law.[51] On the other

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48. Mamère v. France, no. 12697/03, 2006, §20.

49. As stated in Castells v. Spain, no. 11798/85, 1992, at §42: "While freedom of expression is important for everybody, it is especially so for an elected representative of the people. He represents his electorate, draws attention to their preoccupations, and defends their interests. Accordingly, interferences with the freedom of expression of an opposition member of parliament, like the applicant, call for the closest scrutiny on the part of the Court."

50. The Court recalled its position on the matter in the 2009 Aleksandr Krutov v. Russia case. In that case, a journalist had been found liable by the domestic courts for defamation for having written an article describing how the regional prosecutor received "gifts" from the town hall in exchange for support he had provided to some of its members including by shielding them from criminal prosecution. The Court determined that Russia violated Article 10 of the European Convention. Aleksandr Krutov v. Russia, no. 15469/04, 2009.

51. However, even the journalists' protection is not unconditional. They bear duties and responsibilities. The European Court of Human Rights scrutinizes the role played by journalists and evaluates the quality of their work in the context of a democratic society. In the 1994 Jersild v. Denmark case, the Court assessed the journalist's editorial responsibility when editing and broadcasting a television interview featuring a group of racist young people expressing abusive and derogatory remarks about immigrants and ethnic groups. Fundamentally, the Court appraises the quality of the work done in distinguishing, at least implicitly, between informative journalism and sensationalist journalism. In the *Jersild* case, the State argued that the journalist edited the documentary "in a sensationalist rather than informative manner and that its news or information value was minimal" (§ 29).

hand, "bad journalism"—the sensationalist type that does not contribute to the general debate[52] or that aims at using the free speech protection that "when considered as a whole, appeared from an objective point of view to have had as its purpose the propagation of racist views and ideas"[53]—may be limited by the States with a greater margin of appreciation to protecting other rights, such as privacy or the reputation of others.

As far as the person targeted by the speech is concerned, the general principles drawn by the international jurisprudence are that when he or she is a "public" figure, he or she must accept criticisms from journalists or other protected peoples: the consequence is that the State has a narrower margin of appreciation to limit speeches concerning a political leader, for example, than the speeches targeting a private person. The same is true when the person targeted by the discourses is a judge exercising political functions or a civil servant[54] and even more true when the subject of the criticisms is the government itself.[55] However, civil servants acting in an official capacity must be ensured a more extensive protection than politicians, subject to the broader limits of acceptable criticism, and "it cannot be said that civil servants knowingly lay themselves open to close scrutiny of their every word

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The Court didn't share that point of view. Its assessment was quite extensive and based on the method, the context, the content and the purpose of the contentious show. The main question to solve by the Court was "whether the item in question, when considered as a whole, appeared from an objective point of view to have had as its purpose the propagation of racist views and ideas" (§ 31). Therefore, accordingly the scope of the protection depends of the type of journalism and the type of content. Jersild v. Denmark, no 15890/89, 1994, §§ 29–31.

52. The Court does not credit sensationalist journalism with the same level of protection as it was illustrated in the *Caroline Von Hannover* case. In the latter case, the Court ruled that Germany should have protected a public figure against the publication of photographs related exclusively to a private life, taking into account the fact that the the princess did not exercise any official functions. In its case law, the Court "considers that the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest." Von Hannover v. Germany, no. 59320/00, 2004, § 76.

53. Jersild v. Denmark, § 31.

54. Mamère v. France, §27. *See also*, more recently, Taffin and Contribuables Associés v. France, no. 42396/04, 2010 (condemnation of a person who criticized a civil servant from the tax department; nonviolation of freedom of speech committed by France).

55. *Sürek and Özdemir v. Turkey*, nos. 23927/94, 24277/94, 1999, § 60: "the limits of permissible criticism are wider with regard to the government than in relation to a private citizen or even a politician. In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion." *See also* Oberschlick v. Austria *(No. 2)*, no. 20834/92, 1997, § 29.

and deed to the extent to which politicians do and should therefore be treated on an equal footing with the latter when it comes to the criticism of their actions." Moreover, "civil servants must enjoy public confidence in conditions free of undue perturbation if they are to be successful in performing their tasks and it may therefore prove necessary to protect them from offensive and abusive verbal attacks when on duty."[56]

As far as the speech is concerned, freedom of speech in a democratic society "covers possible recourse to a degree of exaggeration or even provocation."[57] Any kind of speech or expression is protected under international human rights law, including cartoons[58] and ideas imparted in the form of art.[59] As far as the content of speech is concerned, speech that deals with "public concerns" enjoys a quasi-absolute protection under international human rights law.[60] The European Court decides on a case-by-case basis what "public concern" covers.[61] However, even when the speech pretends to be

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56. Janowski v. Poland, no. 25716/94, 1999, § 33.

57. As stated in the 1995 Prager & Oberschlick v. Austria judgment dealing with journalists condemned for defamation for having published an article containing criticisms of the judges sitting in the Austrian criminal courts. Prager and Oberschlick v. Austria, no. 15974/90, 1995, § 38. *See also* Kulis & Rózycki v. Poland, no. 27209/03, 2009, § 30.

58. *See* Kulis & Rózycki v. Poland and Alves da Silva v. Portugal, no. 41665/07, 2009, §§ 27–28.

59. Human Rights Committee, Hak-Chul Shin v. Republic of Korea, no. 926/2000, § 7.2, 2004.

60. Regarding political debates, the Court summarized its position in the 1992 Castells v. Spain judgment at § 46: "The limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion. Furthermore, the dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media. Nevertheless it remains open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal law nature, intended to react appropriately and without excess to defamatory accusations devoid of foundation or formulated in bad faith."

61. On the contrary, freedom of speech is less protected and must be reconciled with other rights as explained further above, when it does not deal with public concerns or interests, as shown by the *Caroline von Hannover* case at § 63: The Court considers that a fundamental distinction needs to be made between reporting facts—even controversial ones—capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions." While in the former case, the press exercises its vital role of "watchdog" in a democracy by contributing to "impart[ing] information and ideas on matters of public interest . . ., it does not do so in the latter case."

addressing a "public concern," heinous and violent speech is not protected under international human rights law. Article 20 of the International Covenant on Civil and Political Rights[62] and Article 13 §5 of the American Convention on Human Rights[63] provide that such a discourse should be specifically prohibited. The European Court of Human Rights adopts a similar position, although its recent jurisprudence may soon be the object of serious criticism. In the 2009 Féret v. France judgment, the court found no violation of the freedom of expression for the criminal condemnation of a political leader of an extreme-Right political party–who was member of the Parliament—based on distribution of leaflets presenting immigrant communities "as criminally-minded and keen to exploit the benefits they derived from living in Belgium." For the court, such discourse could be considered an advocation of racial discrimination and therefore was not protected by freedom of expression.[64] Political speech may be considered as the basic pillar of a democratic society promoted by the ideals of the Council of Europe. However, dignity and tolerance are two other fundamental pillars of a democratic and pluralist society, and in these circumstances, the political speech can be limited and restricted.[65] Hate speech and racism are obviously not protected by the European Convention. However, the recent jurisprudence of the court shows that such posture, requested to protect the rights of others and the democracy, may jeopardize free speech, especially political discourses and debates, as well as democratic values.[66] Such danger is clearly exposed in another 2008 case, *Leroy v. France*. A cartoonist was

62. This article states that: "1. Any propaganda for war shall be prohibited by law. 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

63. Article 13 § 5: "Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law."

64. *See* Féret v. Belgium, no. 15315/07, 2009, §§ 6364.

65. *Id.*, § 64 (to date, the judgment has only been published in French): "Il en résulte qu'en principe on peut juger nécessaire, dans les sociétés démocratiques, de sanctionner voire de prévenir toutes les formes d'expression qui propagent, incitent à, promeuvent ou justifient la haine fondée sur l'intolérance (y compris l'intolérance religieuse), si l'on veille à ce que les « formalités », « conditions », « restrictions » ou « sanctions » imposées soient proportionnées au but légitime poursuivi."

66. The *Féret* judgment was adopted by 4 votes to 3. The three dissending judges feared the consequences of this excessive jurisprudence regarding political discourse over the freedom of expression regime.

criminally charged and convicted for the publication (on September 13, 2001) of a drawing representing the attack on the twin towers of the World Trade Center, with a caption that parodied the advertising slogan of a famous brand: "We have all dreamt of it... Hamas did it."[67] The court found no violation of the freedom of expression of the cartoonist taking into account the context of global chaos after the events of 9/11. This ruling shows the danger of the censorship of the expression of ideas and political arguments that may shock or disturb and that are not in conformity with the opinions of the established government. It underlines the challenges of the balancing exercise between freedom of expression and the rights and liberties of others.

It is not surprising in the light of the global regime regarding freedom of expression in international law that the restrictions imposed by the States over denial speech were not deemed a violation of the human rights treaties considered. There is, however, a difference in the posture adopted at the United Nations level and at the Council of Europe level. The Human Rights Committee of the United Nations had to deal with the issue of denial in the 1996 case, *Robert Faurisson v. France*.[68] *In casu*, Robert Faurisson was convicted by a criminal tribunal under the Gayssot Act following the publication of an interview in a newspaper in which he contested the existence of homicidal gas chambers for the extermination of Jews in Nazi concentration camps. Before the Committee, he claimed, *inter alia*, for the protection of his freedom of expression and his academic freedom. After considering the claim admissible, the Committee found no violation of his freedom of expression. The Committee was prudent regarding the Gayssot Act per se. Since the act makes a criminal offence of merely challenging the conclusions and the verdict of the International Military Tribunal at Nuremberg, it may lead, in certain cases, according to the Committee, to decisions or measures incompatible with the International Covenant on Civil and Political Rights.[69]

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67. Leroy v. France, no. 36109/03, 2008 (in French only—press release available in English).

68. Human Rights Committee, Robert Faurisson v. France, no. 550/1993, 1996.

69. *Id.* at § 9.3. Regarding that issue, Ando Nisuke, member of the Human Rights Committee expressed his skepticism: "As I understand it, the Act criminalises the negation ("contestation" in French), by one of the means enumerated in article 23 of the Law on the Freedom of the Press of 1881, of one or several of the crimes against humanity in the sense of article 6 of the Statute of the International Military Tribunal of Nuremberg (see para. 4.2). In my view the term 'negation' ('contestation'), if loosely interpreted, could comprise various forms of expression of opinions and thus has a possibility of threatening or encroaching the right to freedom of expression, which constitutes an indispensable prerequisite for the proper functioning of a democratic society. In order to eliminate this

The Committee applied the three-pronged test evaluating whether the conditions of the restrictions on the freedom of expression compatible with the International Covenant on Civil and Political Rights were met. The restriction was provided by law: the Gayssot Act. Faurisson was convicted for having violated the rights and reputation of others. The purpose of the restriction was to protect the interests of other persons or to those of the community as a whole. The Committee considered that "[S]ince the statements made by the author, read in their full context, were of a nature as to raise or strengthen anti-semitic feelings, the restriction served the respect of the Jewish community to live free from fear of an atmosphere of anti-semitism."[70] Finally, it considered that the restriction was necessary and noted that the Gayssot Act was intended to serve the struggle against racism and anti-Semitism. The Committee recalled the statement made by a member of the French Government, the then-minister of justice, characterizing the denial of the existence of the Holocaust as the principal vehicle for anti-semitism.[71] The reasoning of the Committee regarding the proportionality test is quite short and does not help to understand the standards that the Committee may apply when appreciating the concrete application of anti-denial laws. Some members of the Committee have expressed their doubts. In their individual opinion, they considered:

> The Gayssot Act is phrased in the widest language and would seem to prohibit publication of *bona fide* research connected with matters decided by the Nuremburg Tribunal. Even if the purpose of this prohibition is to protect the right to be free from incitement to anti-semitism, the restrictions imposed do not meet the proportionality test. They do not link liability to the intent of the author, nor to the tendency of the publication to incite to anti-semitism. Furthermore, the legitimate object of the law could certainly have been achieved by a less drastic provision that would not imply that the State party had attempted to turn historical truths and

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possibility it would probably be better to replace the Act with a specific legislation prohibiting well-defined acts of anti-semitism or with a provision of the criminal code protecting the rights or reputations of others in general."

70. *Id.* at § 9.5.

71. *Id.* at § 9.7.

> experiences into legislative dogma that may not be challenged, no matter what the object behind that challenge, nor its likely consequences.[72]

For those members, the "good faith" standard is crucial:

> While there is every reason to maintain protection of *bona fide* historical research against restriction, even when it challenges accepted historical truths and by so doing offends people, anti-semitic allegations of the sort made by the author, which violate the rights of others in the way described, do not have the same claim to protection against restriction. The restrictions placed on the author did not curb the core of his right to freedom of expression, nor did they in any way affect his freedom of research; they were intimately linked to the value they were meant to protect—the right to be free from incitement to racism or anti-semitism; protecting that value could not have been achieved in the circumstances by less drastic means.[73]

The European human rights law dealing with the matter dismisses the freedom of expression argument pleaded by deniers as well. However, contrary to the Human Rights Committee, before the European Court, the merits are even not considered by the court since the individual petitions lodged by deniers have been, so far, considered as inadmissible. In the 1996 case, Marais v. France,[74] the European Commission founded the admissibility on the ground of Article 17 of the European Convention that prevents a person from deriving from the Convention a right to engage in activities aimed at the destruction of any of the rights and freedom set forth in the Convention.[75] The article published in that case, pretending to be a scientific

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72. Individual opinion by Elizabeth Evatt and David Kretzmer, cosigned by Eckart Klein (concurring), § 9.

73. *Id.* at § 10. On the issue of intent, see in this volume the contribution of Thomas Hochmann.

74. Marais v. France, no. 31195/96, Commission decision of June 24, 1996.

75. That does not mean, however, that the authors of hate speech or denials are not protected by the Convention for instance when their reputations are infringed by other speakers. Eur. Court of HR (GC), judgment of October 22, 2007, Lindon, Otchakovsky-Laurens and July v. France [GC], nos. 21279/02, 36448/02, 2007, § 56. Some cases tend nevertheless to indicate that the Court will be more reluctant to limit freedom of speech when the defamed individual is a right-wing extremist. *See* Oberschlick v. Austria *(n°2)*, at § 34; Lopes Gomes da Silva v. Portugal, no. 37698/97, 2000, § 35; Wirtschafts-Trend

demonstration, aimed at denying that gas chambers existed or had been used to commit genocide. The Commission ruled that such speech "runs counter to basic ideas of the Convention, as expressed in its preamble, namely justice and peace." The real goal of the use of freedom of expression revealed in that case is considered by the European Commission as "contrary to the text and spirit of the Convention."[76] In the 1998 Lehideux v. France case, dealing with the conviction for "public defence of war crimes or the crimes of collaboration" based on the publication in a national daily newspaper of an advertisement presenting in a positive light certain acts of Philippe Pétain, the court distinguished between this type of ongoing debate—protected by the Convention—and "the category of clearly established historical facts—such as the Holocaust—whose negation or revision would be removed from the protection of Article 10 by Article 17."[77] The court confirmed that position in the 2003 Garaudy v. France case,[78] considering the application in casu inadmissible under Article 17 of the Convention. Garaudy, a philosopher and writer, was charged and convicted for denying crimes against humanity. The charges and convictions followed the publication of the book entitled The Founding Myths of Israeli Politics in which the applicant questioned various historical events relating to the Second World War, such as the Holocaust. For the Court:

> far from confining himself to political or ideological criticism of Zionism and the State of Israel's actions, or even undertaking an objective study of revisionist theories and merely calling for 'a public and academic debate' on the historical event of the gas chambers, as he alleges, the applicant does actually subscribe to those theories and in fact systematically denies the crimes against humanity perpetrated by the Nazis against the Jewish community.

Zeitschriften-Verlags GmbH v. Austria, no. 58547/00, 2005, § 37. One author characterized this case law as the "horizontal effect" of Article 17. Sébastien Van Droogheenbroeck, *L'article 17 de la Convention européenne des droits de l'homme est-il indispensable ?*, REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 541, 560 (2001).

76. See similar decisions: Remer v. Germany, no. 25096/94, Commission decision September 6, 1995; N.D.P. Bezirkserband München-Oberbayern v. Germany, no. 24398/94, Commission decision November 29, 1995.

77. Lehideux and Isorni v. France, at § 47.

78. Garaudy v. France (dec.).

> There can be no doubt that denying the reality of clearly established historical facts, such as the Holocaust, as the applicant does in his book, does not constitute historical research akin to a quest for the truth. The aim and the result of that approach are completely different, the real purpose being to rehabilitate the National-Socialist regime and, as a consequence, accuse the victims themselves of falsifying history. Denying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order. Such acts are incompatible with democracy and human rights because they infringe upon the rights of others. Their proponents indisputably have designs that fall into the category of aims prohibited by Article 17 of the Convention.
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> The Court considers that the main content and general tenor of the applicant's book, and thus its aim, are markedly revisionist and therefore run counter to the fundamental values of the Convention, as expressed in its Preamble, namely justice and peace. It considers that the applicant attempts to deflect Article 10 of the Convention from its real purpose by using his right to freedom of expression for ends which are contrary to the text and spirit of the Convention. Such ends, if admitted, would contribute to the destruction of the rights and freedoms guaranteed by the Convention.

The posture of international human rights law regarding denials turns down the free speech protection to deniers. While the Committee considers that the deniers' petition may be considered admissible, the European Court judges that such claims are in contradiction with human rights standards. The European position corresponds to a clear political goal of the Council of Europe that intends to combat the resurgence of the Nazi ideology and thus refuses to give any room to deniers that may contribute to such resurgence.[79]

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79. Parliamentary Assembly, Council of Europe, Resolution 1495(2006), April 12, 2006, Combatting the resurgence of the Nazi Ideology, § 8: "Modern Europe has been conceived on the basis of a total rejection of the Nazi ideas and principles, to ensure that such horrendous crimes as those committed by the Nazi regime in the name of 'racial superiority' will never be repeated. The Council of Europe, as the oldest European political organisation aimed at protecting and furthering democracy, human rights and the rule of law, has a special responsibility in preventing the resurgence of the Nazi ideology."

❋ 3. Denial as a Crime

Among the means and tools used by States to conciliate freedoms, the key question that arises is whether it implies the use of criminal law to regulate the exercise of the freedom of expression. The law offers various avenues, including torts litigation and criminal prosecution, which can be used against the deniers in order to protect the reputation, honor, or memory of the victims. Education may be the best tool to beat racism, racial discrimination, xenophobia, and related intolerance. However, criminal law often remains the classic mode of regulation used to ease relations between individuals in pluralist and so-called multicultural societies. Criminal law as an expression of the State's constraint power on citizens is equipped with a "*capital symbolique et d'une charge émotive énormes*"[80]: "*sa grande visibilité, l'immédiateté de ses effets, la grossièreté de ses catégories manichéennes qui aplatissent toutes les complexités et les remplacent par un simple code binaire « innocent-coupable », lui garantissent une carrière florissante*,"[81] according to a philosopher who stresses that Western societies are today experiencing an inflation of criminal law. According to him, "*cette inflation est stimulée par le recours irréfléchi à une philosophie pénale solidariste. . . selon laquelle un procès pénal sert à ressouder la communauté autour de ses principes originaires si bien qu'une seule et unique interprétation du passé a droit de cité.*"[82]

The relationship between criminal law and human rights is quite complex.[83] Human rights treaties not only oblige States to refrain from violating human rights but also to protect them.[84] Following the positive obligations doctrine, the case law of the European and Inter-American Courts and the Human Rights Committee of the United Nations underlines the significant role played by State organs to ensure the respect of human rights by individuals and private persons. To ensure and protect rights and liberties,

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80. Ioannis Papadopoulos, "Pénalisation du discours de haine et premier amendement," www.ihej.org (2003).

81. *Id.*

82. *Id.*

83. Stefan Trechsel, *Comparative Observations on Human Rights and Criminal Law*, 2000 *St.* Louis-Warsaw Transatlantic L.J. 1 (2000).

84. The Human Rights Committee has admitted the same definition and interpretation of a general obligation of protection relying on States. For its scope and content, *see* its General Comment No. 31, *Nature of the General Legal Obligation Imposed on States Parties to the Covenant:. 26/05/2004. CCPR/C/21/Rev.1/Add.13.*

States may have to use criminalization.[85] In its case law concerning Article 3 of the Convention (inhuman or degrading treatments), the Court has stressed the "element of humiliation" inherent in any criminal sentence.[86] Some scholars currently criticize the "abuse" of proceduralization and the danger raised by the intensive referral to the criminal law. Accordingly, intensive criminal prosecution can violate human rights, namely arbitrary detention, unfair trial, illegal deprivation of liberty, ill treatment in prison or more broadly during the deprivation of liberty, and in the worst situations, imposition of capital punishment. In cases of freedom of speech, the European Court often points out that the use of criminal sanction toward journalists, for instance, keeps them from enjoying their liberty freely. The consequences of the use of criminal prosecution are deterrent. But in the relevant international case law, the use of criminal law is perceived as a tool for a better implementation of human rights, including in private relations. However, while the criminal procedure and a fair and effective punishment of individuals responsible for grave violations of human rights may be considered as one of the best ways to improve respect for human rights and freedoms, criminalization can infringe upon human rights as well. Penal law is ambivalent since it is both a tool to protect and a means to violate individuals' rights.[87]

Regarding the criminalization of certain speech, the international jurisdictions control, with the utmost scrutiny, penal condemnations of journalists, for instance, who allegedly have misused their freedom of speech. This approach, systematically reiterated by the Strasbourg Tribunal, is well described in the 1999 *Surek & Ozdemir v. Turkey* judgment:

> . . . The dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings,

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85. Synthesis work of the internal legislations of the European Commission against Racism and Intolerance (ECRI—body of the Council of Europe) shows that in the European legal systems, a large majority of the States of the Council of Europe use criminal law to fight this kind of speech.

86. *See* Tyrer v. the United Kingdom, no. 5856/72, 1978, § 30; *Ülke v. Turkey*, no. 39437/98, 2006, § 59. *See also* Ivo Appel, VERFASSUNG UND STRAFE 283 (Berlin: Duncker & Humblot, 1998).

87. To illustrate the debate concerning the use of criminal law in the field of the freedom of speech, the dissent opinion of three European Judges under the Féret v. Belgium case (only in French), pointed out the danger of the criminalization of political discourse. For the minority, the use of criminal law in this field is contrary to the freedom of expression, even if it aims at protecting the "spirit" of the European Convention. See also Lindon v. France (dissenting opinion by Tulkens and others), § 7.

> particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries. Nevertheless, it certainly remains open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal-law nature, intended to react appropriately and without excess to such remarks . . .[88]

In international human rights law, criminal law may be used to limit specific discourses. Explicit obligations to criminalize hate speech can be found in various international texts. The starting point is, without doubt, the text of the Charter of the United Nations of 1945, to which the Preamble proclaims the faith of the people of the United Nations "in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women," and the first article states, among the goals of this new organization that aims at breaking away from the model of the League of Nations, "[t]o achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." This postwar ideal was translated, a few years later, in the first article of the Universal Declaration of Human Rights of December 10, 1948, according to which "all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." Article 2 of the Universal Declaration reaffirms the principle of nondiscrimination as a corollary of the principle of equality which had just been announced. In a Recommendation adopted in June 2007, the parliamentary Assembly of the Council of Europe reaffirmed "that the speech of hatred towards people, for religious or different reasons, must be set as a penal offence by the law. . .. Speech of hatred, in this way, includes remarks necessarily directed against a person or a particular group of people. The national legislations must be set up as a penal offense of the declarations that call for hatred, discrimination, or violence against a person or a group of people with as a reason their religion.[89]

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88. Sürek & Özdemir v. Turkey, at § 60; Incal v. Turkey, no. 22678/93, 1998, § 54. Before the Human Rights Committee, see for instance *Coleman v. Australia*, no. 1157/2003, § 7.3, 2006.

89. This resolution refers to the international obligation to incriminate the speech of hatred and especially, when this hatred originates from a racial or religious reason. States and

Article 4 of the 1965 UN Convention on Racial Discrimination[90] provides an explicit obligation to incriminate the heinous remarks, since the States:

> a. Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof; b. Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law; . . . .

The European Court of Human Rights, in various judgments, recently referred to the 1965 Convention to recall to the responding States their obligation to fight against racial discrimination in general, and hate speech in particular, even within interindividuals' relationships. In the *Balsytė-Lideikiene v. Lithuania* decision concerning the prohibition and confiscation of a calendar containing racist and discriminatory elements, the court, relying on International Law and especially Article 20, §2 of the ICCPR, the CERD, and the European Framework Convention on national minorities (1995), recalls the international obligation to take measures necessary to protect peoples against discriminatory behaviors and the necessity to *forbid hatred speeches*.[91] As mentioned above, the 1966 International Covenant on Civil and Political Rights required that States prohibit by law calls "to national, racial or religious hatred which constitutes an incentive to discrimination, hostility or violence" (Article 20). It is up to the States to use criminal law to ensure the effectiveness of such a prohibition. The 1969 American Convention of Human Rights required the States to consider as offenses punishable by

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the international organizations concentrated on this form of hatred and for the time being forsakes the speech of hatred which would be motivated by the gender of the person or their sexual preferences, even if in internal law, the homophobic arguments are sometimes set up as a penal offence. The international obligation to incriminate the speech of racial or religious hatred is manifest; it is more difficult to state the same for the other motives of hatred.

90. One hundred seventy-three States have ratified that Convention.

91. Balsyté-Lideikiene v. Lithuania, no. 72596/01, 2008, § 78. In other judgments as the Féret v. Belgium case, at §§ 72–73, the Strasburg Court does not cite expressly the CERD but other international or domestic sources.

law any "advocacy of national, racial, or religious hatred that" constitutes incitement "to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin" (Article 13, §5).

The rejection of hate speech is so radical in international law that it constitutes an element of the genocide as understood by the Convention of 1948 mentioned above. In this case, and taking into account the development, also since 1945, of international criminal law, this means that the obligation to incriminate and repress does not have only an internal dimension but acquires an international dimension. In Article 4 of the Statute of the International Criminal Tribunal for the Former-Yugoslavia (ICTY) and in Article 2 of the Statute of the International Criminal Tribunal for Rwanda (ICTR) can be found this constitutive component of genocide ("the direct and public incentive to commit genocide") and recently, the ICTR applied it in a judgment of December 3, 2003, in a case known as "*business of the media*" in which the international criminal judge analyzed "the genocide-rhetoric" in the written press as well as through the radio and television, such as the famous radio broadcasts of the Thousand-Hills.[92] The speech of hatred in its absolute form - in which its end is to perpetrate a genocide—is therefore not only an internal infringement but becomes a crime of repressed international law in certain circumstances by international jurisdictions. However, in the definition of genocide in Article 6 of the Statute of the International Criminal Court (ICC), this element is abandoned, which may be regrettable taking into account the dramatic consequences that speeches of hatred have had and continue to have in Rwanda but also today in the Democratic Republic of Congo or in Sudan.

If international law unquestionably requires that States repress the heinous behaviors *lato sensu*, it is more difficult to find an obligation to incriminate the negation of crimes against humanity or genocide. Of course, denials may be assimilated to hate speech.[93] However, specific obligations to criminalize denials are not so explicit in international law. For instance, a draft resolution adopted by States within the General Assembly in January 2007 concerning the "Denial of the Holocaust," only requires "all the Member

92. ICTR, judgment December 3, 2003, *Proc. c. Nahimana, Barayagwiza, Ngeze*, 99-52-T (see H. Ascensio and R. Maison, *L'activité des juridictions pénales internationales* (2003–2004), AFDI 2004, p. 462). See also in this volume the contribution of Martin Imbleau.

93. See in this volume the contribution of Robert Kahn.