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Denial of Genocide and Crimes against Humanity in the Jurisprudence of Human Rights Monitoring Bodies

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In 2008, the EU Council after long disagreement adopted a Framework Decision (FD) on combating certain forms and expressions of racism and xenophobia by means of criminal law. The principal aim of the decision was to institutionalise at the EU level a framework to halt the growing instances of Holocaust denial. However, proposals from central and eastern European member states led that concept of denial to be applied to other historical issues. The EU example has inspired debates about 'memory laws' *also in countries outside the EU and stimulated discussions on widening the existing limitations on freedom of expression in some of the member states. This has led to alarm among historians that increasingly legal regulation will construct views of historical events. This article traces the evolution and comparative assessment of* 'memory laws' *in the jurisprudence of the two human rights monitoring bodies: the Human Rights Committee (HRC) and the European Court of Human Rights (ECtHR). It analyses the arguments in favour of limitation of free speech in the jurisprudence of both bodies and gives a critical appraisal of their jurisprudence in the light of the new claims for expanding* 'memory laws'.

Keywords: Freedom of Expression; Genocide Denial; Human Rights Committee; European Court of Human Rights

Introduction

> Among the ways in which freedom is being chipped away in Europe, one of the less obvious is the legislation of memory. More and more countries have laws saying you must remember and describe this or that historical event in a certain way, sometimes on pain of criminal prosecution if you give the wrong answer. What the wrong answer is depends on where you are. In Switzerland, you get prosecuted for saying that the terrible

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> thing that happened to the Armenians in the last years of the Ottoman Empire was not genocide. In Turkey, you get prosecuted for saying it was. (Garton Ash 2008)

In 2008, the EU Council after long disagreements adopted a Framework Decision (hereinafter FD) on combating certain forms and expressions of racism and xenophobia by means of criminal law.[1] This decision, inter alia, obliges member states to declare an offence speech which publicly condones, denies or grossly trivialises crimes defined by the Nuremberg Tribunal.[2] The FD builds on specific laws against Holocaust denial in countries like Germany and France, which were adopted in the 1990s as a reaction to growing anti-Semitism (Schmidt and Vojtovic 2000, 133–158). At the same time, it also intensified the trend to protect historical facts by means of law in other countries.

For instance, most of the central and eastern European States expressed criticism that FD does not include within its scope the denial or trivialisation of crimes committed by communist regimes,[3] which led to deportations, hunger and death of thousands of people in this part of Europe.[4] In order to respond at least partially to the requests of these states the Council agreed to annex a declaration that deplores crimes committed by all totalitarian regimes.[5] A number of central and eastern European States also used the possibility provided by the FD to apply it in a broader manner and have enacted legislation which would make it an offence to deny or trivialise genocide and crimes against humanity perpetrated by any totalitarian regime.[6] Other countries, like France have tried to widen the existing 'memory laws' and enacted legislation prohibiting denial of Armenian genocide (Cajani 2011, 22). Similar initiatives were taken by countries outside the EU. For example, the Ukrainian Parliament prior to the final text of the FD adopted a law which made it illegal to deny the Ukrainian artificial famine (Holodomor).[7] Some states went even further than adopting legal bans in relation to denial of crimes. For instance, the deputies of the leading party of the Russian Parliament in May 2009 proposed amendments to the Penal Code:

> that would outlaw any misrepresentation of the decisions of the Nuremberg Tribunal with the intention of rehabilitating Nazism, as well as any attempt to designate as criminal the actions of the countries of the anti-Hitler alliance, including the Soviet Union. (Koposov 2011)

This paper asks whether the so-called memory laws are about protecting historical truth or serve other interests, like the prohibition of incitement to racial discrimination? If so, how to draw the line between the latter and other values which such laws aim to protect? Furthermore, is it an appropriate and reasonable measure to demand that all EU member states apply a 'one size fits all solution' to these issues, or should one take particular historical realities and social context of states into account?

Since the case law of EU member states on this issue differs widely (Salvador-Coderch and Rubi-Puig 2008), I will analyse these questions on the basis of the

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implementation of two human rights treaties ratified by all EU member states: the International Covenant on Civil and Political Rights (1966) (hereinafter ICCPR) and the European Convention on Human Rights (1950) (hereinafter ECHR). I will first identify the values and interests which serve as a basis for restricting such expressions in the jurisprudence of the monitoring bodies of these two human rights treaties: the Human Rights Committee (HRC) and the European Court of Human Rights (hereinafter ECtHR). While the ECHR and ECtHR's jurisprudence serves as a benchmark for the scope of acceptable restrictions on the exercise of the right to the freedom of expression, the ICCPR obliges the state to prohibit certain forms or racist expressions.[8] Therefore, one might question whether the obligation established by the FD to enact legislation criminalising the denial of speech which publicly condones, denies or grossly trivialises crimes defined by the Nuremberg Tribunal is not already encompassed by the provisions of the ICCPR, and justified by well-established case law of the ECtHR (Tulkens 2007). This paper also analyses the methods the court and the committee use in restricting free speech: is there a balancing of different interests or an absolute ban? How consistent is the case law of both monitoring bodies and how extensive, if any, is the scope for states' margin of appreciation in this process? Lastly, this paper also asks whether the time factor and distance from the challenged historical events should be the criteria in assessing the need for restrictions.

The Approach of the HRC towards Proscription of Historical Events

Article 19(2) of the ICCPR declares the protection of the right to freedom of expression in its various forms. It states:

> 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.[9]

The monitoring of the implementation of the Covenant at the domestic level is entrusted to the HRC, the body of 18 independent experts. It examines state reports and considers individual complaints, and on the basis of its findings communicates its recommendations to states parties to ensure compliance with their obligations under the ICCPR (Joseph, Schultz, and Castan 2004, 16–18). The Committee has constantly emphasised the importance of the right to freedom of expression in a democratic society despite the fact that there is no reference to democracy in the text of Article 19.

However, the right to freedom of expression is not an absolute right and may be subject to restrictions. While restrictions are allowed, they may be imposed only in strict accordance with the conditions provided in the Covenant and may not put in jeopardy the essence of the right itself.[10] The Committee has stressed that:

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> Any restriction of the freedom of expression must cumulatively meet the following conditions: it must be provided for by law, it must address one of the aims enumerated in paragraphs 3(a) and (b) of Article 19, and must be necessary to achieve the legitimate purpose.[11]

In addition, the limitations must be construed narrowly, with a presumption in favour of the freedom of expression.[12]

In addition to Article 19, the ICCPR contains a separate provision which obliges states to restrict certain forms of 'hate speech'. Article 20(2) of ICCPR states: 'Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'.[13] The text of this article has raised the issue: are any 'hate speech' expressions a priori outside the scope of the right to the freedom of expression and what is the interlink between the permitted restrictions on free speech under Article 19(3) and state obligations to restrict certain types of 'hate speech' under Article 20? The *travaux preparatoires*[14] and scholarly works demonstrate that Article 20(2) was drafted as a response 'to the Nazi racial hatred campaigns, which ultimately led to the murder of millions of human beings on the basis of racial, religious and national criteria' (Nowak 2005, 475). Already during the initial debates in the Commission on Human Rights on the draft text of the Covenant, a number of western industrialised states raised objections against the need to include the article prohibiting 'any advocacy of national, racial and religious hostility' (Bossuyt 1987, 404, 406–407). Those states were concerned that such a prohibition would prejudice the right to freedom of expression. Furthermore, it was argued that giving free play to all views (Bossuyt 1987, 394) and not legislative prohibition is the most effective means to deal with the evil of hate speech, and that the restriction on free speech was already dealt with under Article 19(3) (Bossuyt 1987, 404, 406). States favouring the restrictive clause emphasised that the 'strong influence of modern propaganda on the minds of men rendered legislative intervention necessary', and that Article 19(3) did not impose the obligation to prohibit the advocacy of national, racial or religious hostility (Bossuyt 1987, 404, 406).

The scope of Article 20(2) was also the subject of discussion among the drafters of the treaty. A number of states argued that contrary to 'incitement to violence', which is a legally valid and objective concept, 'incitement to discrimination' or 'incitement to hostility' is not. This illustrates an ongoing debate between the US approach which is to attack only those hate expressions which present 'clear and present danger', and the more restrictive approach towards free speech favoured in Europe which would limit also those expressions which affront human dignity or incite discrimination against particular group of persons (Bleich 2011, 919–927). However, the prevailing opinion among states during the drafting of treaty was that any propaganda which might incite discrimination and hostility would likely incite violence (Bossuyt 1987, 408). This argument is often behind the justification of 'holocaust denial' or other laws on denial of genocide and crimes against humanity. It is argued that the denial of atrocities is part of a broader agenda and the first step towards the revival of violence against the threatened group (Timmermann 2005). Therefore, Article 20(2)

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of ICCPR is primarily conceived of as a special state duty to take preventive measures to enforce the rights to life and equality in order to combat the roots of the main causes for their systematic violation by acting on the formation of public opinion (Timmermann 2005). There are, however, many opponents against establishing a relationship between hate speech and genocide or other crimes against humanity (Sottiaux 2011, 55). According to those representing such views, 'the historical correlation of "hate" propaganda and atrocities such as genocide would be insufficient to establish causation: "hate speech" could simply have been a symptom of already entrenched beliefs or attitudes' (Baker 2009, 146). In light of this double nature of attacking 'hate speech' and the need to maintain safeguards on limitations that Manfred Nowak (2005) clarifies in his extensive commentary on ICCPR, an assessment of the necessity of restrictions is required.

Nowak argues that Article 20(2) does not authorise a priori limitations on the freedom of expression.[15] The initial jurisprudence of HRC has not always followed this model of interpretation of Article 20.[16] However, starting from the Committee's views in the case of *Faurisson v. France*,[17] which up to now is the principal one decided by the HRC as far as proscriptions of historical interpretations are concerned, the Committee departed from its practice to declare some types of expressions outside the protection of Article 19 and explicitly rejected the broad interpretation of the scope of Article 20. Contrary to the suggestion of the French Government to declare the case inadmissible, HRC declared the communication admissible and assessed the need for limitations in the light of requirements laid down in Article 19 (3). The individual opinions attached to the decision illustrate that obligations laid down in Article 20(2) of ICCPR were an essential factor in assessing whether restrictions on the freedom of expression are justified.[18] However, the decision clarifies that HRC will not assess the permissibility of restrictions just on a basis of Article 20 alone.[19] In this case, the HRC gave also very comprehensive assessment on the legality of 'holocaust denial laws'.

The disputed expressions concerned Mr Faurisson, an academic, who has publicly questioned the existence of gas extermination chambers in Nazi concentration camps. In an interview to the French monthly magazine *Le Choc du Mois* he made inter alia the following statements:

> No one will have me admit that two plus two makes five, that the earth is flat, or that the Nuremberg Tribunal was infallible. I have excellent reasons not to believe in this policy of extermination of Jews or in the magic gas chamber [and] I would wish to see that 100 per cent of all French citizens realise that the myth of the gas chambers is a dishonest fabrication (*gredinerie*), endorsed by the victorious powers of Nuremberg in 1945-46 and officialized on 14 July 1990 by the current French Government, with the approval of the "court historians."[20]

Following a private criminal action brought by resistance fighters and concentration camp deportees, Mr Faurisson was convicted for these statements under a French law (Gayssot Act) which criminalised contesting the existence of the category of crimes

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against humanity defined in the London Charter of 1945, on the basis of which the International Military Tribunal at Nuremberg convicted Nazi leaders. Mr Faurisson subsequently petitioned the HRC, challenging both the law itself and his conviction under the Gayssot Act, claiming that his freedom of expression rights under ICCPR, Article 19(2) had been violated.

At the outset the HRC made clear that it can only decide on the violation of the petitioner's rights under ICCPR in a case in front of it and cannot criticise in abstract laws enacted by states parties. However, it referred to discussions in France and in other European countries about the effect of similar legislations—Holocaust denial laws exist, for example, also in Germany and Austria—and emphasised that:

> The application of the terms of the Gayssot Act, which, in their effect, make it a criminal offence to challenge the conclusions and the verdict of the International Military Tribunal at Nuremberg, may lead, under different conditions than the facts of the instant case, to decisions or measures incompatible with the Covenant.[21]

This observation of the HRC suggests that it is not in accordance with Article 19 of the ICCPR to rule out criticism of court decisions, including ones by the Nuremberg Tribunal.

Furthermore, the Committee points out that it opposes national laws which lay down general content-based restrictions on the freedom of expression, leaving no room for exceptions and individual assessment of expressions. Yet, in the case before it, the Committee found the restriction provided by law because it was 'satisfied that the Gayssot Act, as read, interpreted and applied to the author's case by the French courts, is in compliance with the provisions of the Covenant'.[22]

The Committee also agreed with the French Government that the restriction of the author's expressions were based on a legitimate aim provided for by the Covenant. HRC declared that:

> Since the statements made by the author, read in their full context, were of a nature as to raise or strengthen anti-Semitic feelings, the restriction served the respect of the Jewish community to live free from fear of an atmosphere of anti-Semitism.[23]

However, regarding an assessment of the necessity of restrictions on Faurisson's expression of his views, the decision of the HRC lacks a rigorous review. The principal and sole argument advanced by the Committee to support the necessity of restriction was linked to the claims put forward by the French Government, namely, that the introduction of the Gayssot Act was intended to serve the struggle against racism and anti-Semitism, since the holocaust denial is one of the principle contemporary vehicles for anti-Semitism.[24] The HRC states that:

> In the absence in the material before it of any argument undermining the validity of the State party's position as to the necessity of the restriction, the Committee is satisfied that the restriction of Mr Faurisson's freedom of expression was necessary.[25]

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However, the Committee did not refute or at least discuss in their decision wider scholarly criticism of the Gayssot Act which was also applicable in this case (for instance, that the law does not require any proof of racist intent of the author or malice and that no evidence of a causal link between one's expressions and incitement to hatred is required, Pech 2009). The need to prove the causal link between expressions and the threats they impose on protected values, is emphasised by the HRC itself in its latest commentary on Article 19.[26] The HRC also did not address the arguments stated by the Faurisson himself explicitly: 'that the State party has failed to provide the slightest element of proof that his own writings constitute a "subtle form of contemporary anti-semitism" or incite the public to anti-semitic behaviour'.[27]

By resting its decision on the government's claims, the HRC missed the opportunity to 'set forward a clear doctrinal basis for adjudicating on the compliance of Holocaust denial laws with freedom of expression guarantees'(Cooper and Williams 1999, 606). Yet this deficiency in the decision is to some extent mitigated by sophisticated arguments in a number of individual opinions attached to this decision, which illustrate different motives among the members of the Committee in favour of acknowledging that the restriction is necessary. These opinions reveal that apart from the content of expressions the members of the Committee took into account the wider context[28] in which Faurisson's statements were made, the way they have been assessed by French courts[29] the alleged purpose of author and social effects of these expressions on peaceful coexistence of different groups of French society.[30]

Though, the members of the Committee were united in finding violation, many stressed the potential threat to the freedom of expression hidden in the wording of the Gayssot Act. For instance, Elizabeth Evatt and David Kretzmer emphasises that the state had to use less drastic provisions to achieve the legitimate object of the law that 'would not imply that the State party had attempted to turn historical truths and experiences into legislative dogma that may not be challenged, no matter what the object behind that challenge, nor its likely consequences'.[31] The reluctance of the Committee to accept carte blanche restrictions on the freedom of expression is evident in the latest General Comment on Article 19, where the Committee states:

> Laws that penalize the expression of opinions about historical facts are incompatible with the obligations that the Covenant imposes on States parties in relation to the respect for freedom of opinion and expression. The Covenant does not permit general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events.[32]

To summarise, evolving practice of the HRC illustrates that it is reluctant to restrict any speech just on the basis of its content, and will assess the necessity for restrictions on the freedom of expression taking into account the wider context in which the challenged expressions were made. The renewed General Comment of HRC on the freedom of expression reaffirms the speech-protective position of the HRC by including a strong criticism of HRC against 'memory laws'. The next chapter of this

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article illustrates the more restrictive approach of ECtHR to expressions denying historical events and provides a critical assessment of the ECtHR case law.

Jurisprudence of the ECtHR on Proscription of Historical Events

The European Court on Human Rights has constantly declared that the freedom of expression is 'one of the basic conditions for the progress of democratic societies and for the development of each individual'.[33] This statement by the Court includes two theoretical bases for protecting expression—the essential part that it plays, first, in the operation of the democratic political process, and, second, in the self-realisation of the individual (Harris, O'Boyle, and Warbrick 1995, 373). Yet, as in Article 19 of ICCPR this fundamental right is not absolute. As the former vice-president of the Court Francoise Tulkens emphasised: 'the freedom of expression is not an end in itself but a means for the establishment of a democratic society' (Tulkens 2007, 53). Indeed, legitimate reasons might exist to limit the freedom of expression when it applies to 'hate speech' including 'incitement to hatred or to racial discrimination by revisionist writings' (Tulkens 2007, 54). This is evidenced both by the case law of the Court and the 'duties and responsibilities' embodied in the text of Article 10 of ECHR, which declares that everyone has the right to freedom of expression, but exercise of that right may be subject to certain limitations.[34]

The ECHR does not contain a specific clause, similar to Article 20 of the ICCPR, imposing on states an obligation to prohibit certain forms of 'hate speech'. Therefore, one might expect that the ECtHR would provide more far-reaching scope for the freedom of expression than one can find in the case law of the HRC. However, that is far from being the case in ECtHR's jurisprudence, which has 'exercised its supervisory jurisdiction in a highly deferent manner with respect to national convictions for Holocaust denial' (Pech 2009). The Court has allowed states to apply pure content-based restrictions on such expressions by adopting the German Courts' inspired notion of holocaust as 'clearly established fact'. Therefore, it is no coincidence that in the *Faurisson* case heard before the HRC, the French Government relied strongly on the case law of the ECtHR to justify the restrictions imposed on Faurisson's expressions.[35]

With respect to 'holocaust denial' laws and limitations on interpretations of other historical events the Court and previously the Commission has adopted two avenues to assess the legitimacy of interference with the freedom of expression. First, they have applied the traditional approach of assessment of legitimacy of interference with the right to the freedom of expression according to requirements established in the second part of Article 10: is the restriction provided by law, does it serve a legitimate aim, and is it necessary in a democratic society? Alternatively, and especially in recent cases, the Court has employed a broader approach to restrictions by excluding, for instance, expressions denying Holocaust entirely from the protection of Article 10. The Court argues that such expressions are against underlying values of the ECHR and constitute abuse of the Convention rights prohibited in Article 17. This approach

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of the Court, which in fact leaves broad discretion for the states to assess the necessity of restrictions, has been severely criticised as threatening the freedom of expression and the underlying values of the Convention Article 17 was designed to protect (Cannie and Voorhoof 2011). However, to illustrate the evolution of the court's case law the next subsection will commence with assessment of cases under Article 10(2), which has been applied by the European Commission of Human Rights in almost all earlier cases. Up to 1998, when Protocol 11 of the ECHR entered into force, the Commission served as an intermediary between the Court and individuals. It decided on the admissibility of applications, and only if it found the case to be well founded did it go for consideration by the Court.

Assessment of Restrictions under Article 10 of the Convention

Cases concerning denial or trivialisation of crimes against humanity have not been frequently adjudicated by the Court and Commission. In the earlier years, after the adoption of the ECHR, only Holocaust denial or trivialisation cases came in front of the assessment of the Convention's supervisory bodies. While on some occasions the Commission was faced with restrictions on the freedom of association by state actions forbidding the establishment of a Communist party,[36] the denial of communist crimes has never been an issue confronted by the Commission. The Commission has continuously assessed the imposed restrictions on the freedom of expression under the criteria prescribed by the second part of Article 10 instead of opting for the over-broad approach of excluding these expressions from protection of Convention on the basis of Article 17. It used such an approach despite the fact that the danger posed by the threat of 'Holocaust denial' and rehabilitation of the Nazi-socialist regime to the functioning of newly established democratic institutions in countries like Germany or Austria was still a current issue.

As far as the reasons for limiting such expressions are concerned, the Commission as a rule agreed with states that national rules on Holocaust denial or trivialisation serve such aims as maintenance of public order and prevention of crime or protection of dignity of deceased victims of Nazi regime and reputation of Jews. For instance, in *H.,W.,P.* and *K. v. Austria* the Committee relied on 'national security interests' and 'prevention of crime' as a basis to justify the criminal conviction for the promotion of pamphlets suggesting that the killing of six million Jews by Nazis was a lie.[37] In a later case, *Nationaldemokratische Partei Deutschlands v. Germany*, the issue concerned a city's ordinance imposing an obligation on the applicant's organisation to ensure that in the context of a conference the Nazi persecution of Jews was not denied. The Commission found both the 'prevention of crime' and 'protection of the reputation and rights of Jews' as a basis to justify the imposed restrictions on the applicant's expression.[38]

When it comes to the assessment of the 'necessity' of restrictions in these cases, the Commission has constantly emphasised that restrictions prescribed by states should be justifiable and proportionate. However, the 'Commission's decisions reflect a

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readiness to grant national authorities an extremely ample "margin of appreciation"' (Pech 2009), which might be explained by the inclination 'to pay due respect to the specific historical past of each country' (Pech 2009). This is evidenced by the fact that the Commission had always found the applications regarding the restrictions on Holocaust denial 'necessary in a democratic society'. While initial applications lodged in front of the Commission and the Court have concerned Holocaust denial or downplaying of Nazi atrocities, at a later stage the Court was confronted with questions about the legitimacy of restrictions on the interpretation of other tragic historical events. Contrary to the cases related to the denial or downplaying the Holocaust, the Court had taken a firm approach against attempts of states to limit deviations from commonly accepted interpretation of these sensitive historical events.

The first case of this kind was *Lexideux and Isorni v. France*,[39] which concerned the conviction of two members of the Association for the Defence of the Memory of Marshal Petain for public advertisement in *Le Monde*, which asked for his retrial and presented him in a positive light. Philippe Pétain was head of the Vichy government, who was sentenced to death in 1945 by the High Court of Justice for collaboration with Nazi Germany. While the Court recognised that debates about Petain's role in society are very sensitive and controversial and publication related to a very grim and painful period in history of France, it emphasised its well-established principle that speech that offends is also protected by the ECHR.[40] Furthermore, the Court stressed that it has to consider the content of disputed expressions not in abstract, but in the context of the publication as whole, taking into account also the need to apply criminal sanctions[41] while other measures were available to authorities. The Court acknowledged the relevance of the French Government's argument about the unbalanced character of the publication, which did not mention any of the offences of which Pétain had been accused. Nevertheless, it referred to the well-known principle in its case law that: 'Article 10 protects not only the substance of the ideas and information expressed but also the form in which they are conveyed'.[42] In view of the seriousness of a criminal conviction and lapse of time from the disputed events, the Court found the applicants' criminal conviction disproportionate. However, the Court's decision was not unanimous. A number of judges made a dissenting opinion expressing the view that French authorities had not exceeded the margin of appreciation in view of 'their particular familiarity with the historical background and current context'.[43]

The Court followed this strict approach against limitations on alternative interpretation of historical events also in subsequent cases. In *Fatullayev v. Azerbaijan* the journalist was convicted for a publication which differed from the commonly accepted version of the events during the war between Armenia and Azerbaijan in Nagorno-Karabakh. The Court found the violation of Article 10 and declared that it is an integral part of the freedom of expression to seek historical truth and that debates on historic events is a matter of general public interest.[44] The Court has also emphasised that it is not its task to arbitrate historical debates in another case concerning the publication of disputed version of events surrounding the arrest of

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French Resistance leaders in 1943.[45] However, extensive scholarly criticism (Cannie and Voorhoof 2011) has been devoted to the recent approach of the Court to exclude from this rigorous assessment restrictions denying or downplaying those historical facts which the Court declares to be 'clearly established'. Contrary to the earlier approach of the Commission to assessing complaints related to Holocaust denial or trivialisation according the requirements of Article 10(2), the Court has endorsed a practice of dismissing such petitions on the basis of Article 17. The threat of the Court's extensive reliance on Article 17 when deciding on the limitation of expressions which downplay 'clearly established historical facts' are analysed in the next section.

Assessment of Restrictions under Article 17 of the Convention

The founding of Article 17 of the Convention, which has analogies in other human rights treaties,[46] is linked to the often recalled principle of 'democracy being capable of defending itself'.[47] Safeguards against abuse of rights and activities of extremist groups were essential in the aftermath of the end of the Second World War. Therefore, Article 17 entitles states to establish extensive restrictions to prevent radical groups and individuals from exploiting the rights guaranteed by the Convention for the purpose of undermining the free operation of democratic institutions and to destroy human rights of others. It states:

> Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.[48]

In applying Article 17, the Court has stressed the need to protect underlying values of the Convention. These include justice and social peace,[49] tolerance and non-discrimination.[50]

In its earlier decisions, the Commission took into account the impact of Article 17 in assessing the necessity of restrictions imposed on denial or trivialisation of Holocaust (Pech 2009). However, in view of the wide possibility for restrictions on the rights this provision entails it has avoided reliance solely on this clause in assessing the restrictions of the right to the freedom of expression. Therefore, the change practice by the Court without giving due reasoning for its stance is subject to severe criticism. The first signs of a broader approach to the exclusion of certain expressions from the protection of the Convention were seen already in *Lexideux and Isorni v. France*. In refusing the Government's argument about the need to apply Article 17, the Court stated that the events the applicants questioned did not 'belong to 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'.[51] The critics of widening the scope of Article 17 question the necessity for the application of an exceptional regime of abuse clause in present day situation. The

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carte blanche approach of the Court towards Holocaust denial or revision could be understandable if one takes into account the consequences of the Second World War and threats to the new democratic institutions posed by a resurgence of totalitarian ideas at the time when the Convention was adopted. Moreover, the need to introduce Article 17 was precisely motivated by the concern to prevent persons relying on the rights enshrined in the Convention or its Protocols in order to attempt to derive the right to conduct what amounts in practice to activities intended to destroy the rights or freedoms set forth in the Convention.[52] However, one might question, whether today such expressions constitute threats to democratic institutions at a level which would justify the use of abuse clause instead of case-by-case assessment of the necessity of restrictions under criteria provided by Article 10(2) (Cannie and Voorhoof 2011).

The principal differences between the two approaches lie in the level of scrutiny of assessment of restrictions. For instance, the Courts review of the necessity of restrictions is superficial if the complaint is considered under Article 17. The Court also does not measure the proportionality of sanctions and even if there might be legitimate grounds to restrict the questions at issue, the sanctions applied might be disproportionate (Ovey and White 2006, 436). Furthermore, the criticism is increased by the way the Court has applied the abuse clause.

The Court's admissibility decision in case *Garaudy v. France* is among the most illustrative of gaps of the Court's approach in applying Article 17. Garaudy was a historian who was convicted in France for publicly challenging certain historical facts about the Holocaust and the existence of Hitler's 'final solution'. In line with its previous jurisprudence, the ECtHR stated that Garaudy's expressions are not protected by Article 17. The Court also highlights a basis for its reasoning. It characterises the statements of the applicant denying crimes against humanity as 'one of the most serious forms of racial defamation of Jews and of incitement to hatred of them'. The Court concludes that:

> 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 the rights of others. Its proponents indisputably have designs that fall into the category of aims prohibited by Article 17 of the Convention.[53]

However, the Court fails to provide an analysis as to how the challenged expressions contribute to the destruction of the rights of others guaranteed by the Convention. The Court's unsatisfactory analysis of restrictions sends a very bad signal to states. While respect for the memory of the Holocaust should be ensured this should not be achieved by allowing states to disregard any constraints in their rulings by norms of legal fairness.

Moreover, the Court denies the quality of historians to those denying the reality of clearly established historical facts, such as the Holocaust.[54] Such a sweeping statement in fact could deprive even *bona fide* research of protection. The Court bases this

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statement on the rationale that the real aim of such persons is not the quest for the truth, but to 'to rehabilitate the National-Socialist regime and, as a consequence, accuse the victims themselves of falsifying history'.[55] While it would be less problematic to agree that explicit denial of Holocaust is not motivated by the 'quest for truth', it becomes a more complex issue when the memory laws are applied to controversial interpretations of historical events, including the Holocaust. The dilemma the Court faces lies in the fact that Holocaust deniers use coded language to avoid the breach of law. However, the Court's response attacking these expressions under Article 17 endorses the expansion of the scope of 'memory laws' presenting a chilling effect on the freedom of speech.

Critics also question the Court's notion of 'clearly established facts'. Who decides that debate among historians has ended? A number of French historians opposing the draft of new 'memory laws' in France state in their public appeal: 'History is not a juridical issue. In a free state, neither the Parliament nor the judicial courts have the right to define historical truth. State policy, even with best case will, is not history policy'.[56] The concept of 'clearly established facts' is also difficult to reconcile with the Courts stance in relation to other historical events, namely, that it is not the task of the Court to settle historical disputes (Pech 2009). If the Court takes a restrictive stance towards expressions denying or trivialising Nazi crimes, it would need to provide very convincing reasons to treat, for instance, the denial of crimes against humanity perpetrated by Communist regimes differently when such cases come before the Court. While the Court has so far characterised views on other historical events as an opinion instead of facts and characterised them as part of an ongoing historical discussion, this would seem an artificial argument in relation to crimes perpetrated by Communist regimes. These crimes have gained a growing recognition within European institutions,[57] and the sole reason they have not been condemned and recognised for such a long time lies in the fact that eastern and central European states were subject to Soviet rule or in case of Baltic States, occupied by the Soviet Union.

Those who advocate the change of the Court's practice to avoid the extensive application of Article 17 do not favour the toleration of the denial of Holocaust or crimes against humanity. The goal is that Court should approach these expressions in the same way as other types of hate or defamatory speech and provide a detailed assessment of necessity or restrictions according to Article 10(2). This approach would be inherent in the Court's role as the guardian of the Convention's rights and would give a clear indication to states that they will not be able to avoid strict scrutiny of the Court and should provide sufficient reasons as regards the necessity to restrict free speech. Furthermore, instead of focusing on 'clearly established historical facts' the Court should focus on the wider context of expressions, and take into account the intentions pursued by the authors of challenged expressions. Otherwise, the Court creates a slippery slope where member states taking into account their particular history find justification for enlarging the list of 'clearly established historical facts'.

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Concluding Observations

The *travaux preparatoire* of the ICCPR and the ECHR illustrates that Article 20 of the ICCPR obliging states to prohibit advocacy of hatred and Article 17 of the ECHR were historically drafted as a response to Nazi racial hatred campaigns and to prevent the re-emergence of Nazi ideology. Therefore, it is not surprising that so far HRC and ECtHR have almost exclusively decided on restrictions of expressions involving Holocaust negationists or revisionists. However, after the end of the cold war the legal developments and debates in European countries demonstrate a trend to apply analogous rules in relation to expressions denying other genocides and crimes against humanity. Such examples include the debates in France about criminalising the denial of Armenian genocide (Frazer 2011) and discussions in central and European States about prohibition of denial or glorification of crimes perpetrated by the Communist regime. Therefore, both HRC and even more ECtHR will have to develop a policy as to how to consider cases concerning the denial or glorification of crimes perpetrated by other totalitarian regimes.

The proclaimed motives of European states in adopting such laws are often but not always overlapping. As noted above, the protection of public order has been the fundamental argument in drafting rules preventing at the outset the dissemination and implementation of ideas of Nazi or similar totalitarian ideology. Prevention of racial defamation and incitement to hatred against victim groups are among other most common goals. This is complemented by the need to protect the dignity of the victims and the memory of particular crimes (Kahn 2011). The need for wider international recognition of certain crimes is also often behind such rules. While, for instance, Nazi crimes were internationally adjudicated by the Nurnberg tribunal, there has not been analogous assessment of crimes perpetrated by Communist regimes.

All of these goals are legitimate and are still valid in most European states, but to different degree. Therefore, the approach developed by the ECtHR to proclaim in abstract that certain historical facts, such as the Holocaust, are clearly established and any disputes about this event are not protected by the guarantees of the freedom of expression, provides an over-broad discretion for states in limiting free speech. The Court methodology is flawed in a number of ways. It fails to take into account the different historical realities of European states, which were apparent during the discussions on the final text of the EU's FD (Cajani 2011). While in many states prohibition of Holocaust denial still serve the need to protect the Jewish population against incitement to hatred and discrimination, as evidenced also by the Court's jurisprudence, the UK government, for instance, objected to the need to single out this crime on the basis that it does not constitute the primary tool of anti-Semitism (Pech 2009). Likewise, the Spanish Constitutional Court found unconstitutional the national law provision criminalising mere Holocaust denial without any value judgement (Salvador-Coderch and Rubi-Puig 2008).

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Furthermore, a number of scholars argue that with a lapse of time those who deny the Holocaust do not pose a real threat to the democratic order and therefore their statements should be treated equally with other forms of hate speech (Cannie and Voorhoof 2011). The case law of even those states having a firm approach towards restricting expressions denying or downplaying the Holocaust shows that threats to public order are often not a primary goal behind the restrictions. If the principal reason for restrictions is protection of human dignity and due respect to memory of victims of Nazi crimes, than it is equally legitimate for the victims of other crimes against humanity to require that those crimes are included in the category of events that cannot be challenged. In this way, the case law of ECtHR endorses the widening the scope of the so-called 'memory laws'.

Another objection relates to the fact that 'memory laws' are often couched in abstract and vague terms apart from 'denial', encompassing 'condoning' and 'trivialisation' per se as the basis for conviction, thus presenting a chilling effect on free speech and academic research. In view of this vulnerability, and contrary to the ECtHR notion of 'clearly established historical facts', the Spanish Constitutional Court argued that historical research is always by definition disputable and polemic, since it is constructed around affirmations and judgements on whose objective true is impossible full certainty. To prevent national legislators banning by force of law alternative interpretations of history the HRC has distanced itself from its earlier practice of allowing states to restrict such expressions without giving detailed reasons as to the necessity of restrictions. The new General Comment of HRC on the freedom of expression as well as HRC's Concluding Observations on state reports reaffirms this practice of the Committee.[58]

The crimes perpetrated by Nazi and other totalitarian regimes are part of history. Nevertheless, the historical truth should not be transformed into dogma. Even the fiercest critics of the ECtHR case law under Article 17 acknowledge that as far as expressions of Holocaust deniers are concerned the Court would have legitimate grounds to restrict the challenged expressions if assessed under the criteria provided by Article 10(2). But making a broad reference to a category of 'clearly established historical facts' and applying an interpretation of Article 17 which excludes strict scrutiny of restrictions, widens the scope of such practice among the European states with chilling effect on the freedom of speech. This is certainly not what the ECtHR as the guardian of human rights should encourage. Lastly, if the ECtHR chooses to single out crimes perpetrated by Nazi regime this would create a sense of inequality among those whose sufferings the Court seems to disregard and would reflect a lack of understanding of different historical realities of European states. Therefore, the Court's well-established principles of protecting also shocking ideas and the right to seek historical truth should be equally applied to all expressions coming in front of the Court's assessment.

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Notes

[1] Framework Decision of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ L328/55 [2008]. The first draft proposal was prepared in 2001 (Proposal for a Council Framework Decision on combating racism and xenophobia, COM(2001)664, OJ C 75 E, 26 March 2002, p. 269).

[2] Article 1 of the FD.

[3] The FD is limited to crimes committed on the grounds of race, colour, religion, descent, national or ethnic origin, but the crimes committed by communist regimes were most often based on a person's political affiliation or suspicion of disloyalty towards the regime.

[4] For instance, one year after the occupation of the Republic of Latvia in June 1941 Soviet officials deported around 15,000 people to gulags in Siberia, around 0.74 per cent of the country's population. A second large wave of deportations occurred in March 1949.

[5] Council of the European Union, Annex Statements to be entered in the minutes of the Council, 16351/1/08, 26 November 2008.

[6] These countries include Lithuania, Poland, Czech Republic and Hungary. *The memory of the crimes committed by totalitarian regimes in Europe*, Report from the Commission to the European Parliament and to the Council, European Commission, Brussels, COM(2010) 783, p.5.

[7] Law of Ukraine No 376–V 'On Holodomor of 1932 - 33 in Ukraine', http://www.ukremb.ca/canada/en/26651.htm, accessed 14 September 2012.

[8] Article 20 (2) of the International Covenant on Civil and Political Rights, http://www.unhchr.ch/html/menu3/b/a_ccpr.htm, accessed 15 June 2011.

[9] Article 19 (2) of the ICCPR.

[10] Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1985/4 (1985), Principle 2, http://wwwserver.law.wits.ac.za/humanrts/instree/siracusaprinciples.html, accessed 27 June 2012.

[11] Communication Ballantyne, Davidson, McIntyre v. Canada, No 385/1989: Canada, 05/05/93, CCPR/C/47/D/359/1989, (Jurisprudence) paragraph 11.4, http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/eca9df4fd85650a6c1256ae300493208?Opendocument, accessed 15 August 2012.

[12] Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1985/4 (1985), Principle 3.

[13] Article 20 (2) of the International Covenant on Civil and Political Rights, http://www.unhchr.ch/html/menu3/b/a_ccpr.htm, accessed 15 June 2011.

[14] During discussions in the Commission on Human Rights there was a proposal to prohibit 'any advocacy of national or racial exclusiveness, hatred and contempt, or religious hostility, particularly of such nature as to constitute incitement to violence as well as the propaganda of fascist-Nazi views'. This was not adopted since 'fascist-Nazi views' was considered too vague an expression (Bossuyt 1987, 404–405).

[15] This view was also expressed by HRC in the revised Commentary on Article 19 (HR Committee, General Comment No. 34, CCPR/C/GC/34, 21 June 2011, para. 52).

[16] Communication *J.R.T. and the W.G. Party v. Canada*, No. 104/1981: Canada. 06/04/83. CCPR/C/18/D/104/1981. (Jurisprudence).

[17] Communication *Faurisson v. France*, No 550/1993: France. 16/12/96. CCPR/C/58/D/550/1993.

[18] Communication *Faurisson v. France*, No 550/1993: France. 16/12/96. CCPR/C/58/D/550/1993.

[19] HRC followed this practice also in a later case Ross v. Canada. See Communication Ross v. Canada, No 736/2000: Canada. 26/10/2000. CCPR/C/70/D/736/1997, paragraph 10.5.

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[20] Communication *Faurisson v. France*, No 550/1993: France. 16/12/96. CCPR/C/58/D/550/1993, paragraph 2.6.
[21] Communication *Faurisson v. France*, No 550/1993: France. 16/12/96. CCPR/C/58/D/550/1993, paragraph 9.2.
[22] Communication *Faurisson v. France*, No 550/1993: France. 16/12/96. CCPR/C/58/D/550/1993, paragraph 9.5.
[23] Communication *Faurisson v. France*, No 550/1993: France. 16/12/96. CCPR/C/58/D/550/1993, paragraph 9.6.
[24] The Gayssot Act was introduced in 1990 after a Jewish cemetery in Avignon was desecrated.
[25] Communication *Faurisson v. France*, No 550/1993: France. 16/12/96. CCPR/C/58/D/550/1993, para. 9.7.
[26] HR Committee, General Comment No. 34, CCPR/C/GC/34, 21 June 2011, para.36.
[27] Communication *Faurisson v. France*, No 550/1993: France. 16/12/96. CCPR/C/58/D/550/1993, para. 8.3.
[28] Individual opinion by Prafullachandra Bhagwati, Communication 550/1993: France. 16/12/96. CCPR/C/58/D/550/1993.
[29] Individual opinion by Rajsoomer Lallah, Communication *Faurisson v. France*, No 550/1993: France. 16/12/96. CCPR/C/58/D/550/1993.
[30] Individual opinion by Elizabeth Evatt and David Kretzmer, co-signed by Eckart Klein, Communication *Faurisson v. France*, No 550/1993: France. 16/12/96. CCPR/C/58/D/550/ 1993.
[31] Individual opinion by Elizabeth Evatt and David Kretzmer, co-signed by Eckart Klein, Communication *Faurisson v. France*, No 550/1993: France. 16/12/96. CCPR/C/58/D/550/1993, para.9.
[32] HR Committee, General Comment No. 34, CCPR/C/GC/34, 21 June 2011, para.49.
[33] *Handyside v. the United Kingdom*, European Court of Human Rights, Judgment of 7 December 1976.
[34] The European Convention on Human Rights and Fundamental Freedoms. Cited from the home page of the Council of Europe, online at http://conventions.coe.int/treaty/Commun/QueVoulezVous.asp?NT=005&CL=ENG, accessed 15 June 2011.
[35] Communication *Faurisson v. France*, No 550/1993: France. 16/12/96. CCPR/C/58/D/550/1993.
[36] European Commission on Human Rights (ECommHR), *Kommunistische Partei Deutschlands vs Germany*, 20 July 1957, Application No. 250/57.
[37] *H., W., P. and K. v Austria*, European Court of Human Rights, Decision as to the admissibility of 12 October 1989.
[38] European Commission on Human Rights (ECommHR), *Nationaldemokratische Partei Deutschlands, Bezirksverband München-Oberbayern v Germany*, 29 November 1989, Application No. 25992/94.
[39] *Lexideux and Isorni v. France*, European Court of Human Rights, Judgment of 23 September 1998.
[40] *Lexideux and Isorni v. France*, European Court of Human Rights, Judgment of 23 September 1998. para.55.
[41] See note 40 above.
[42] See note 40 above.
[43] See note 40 above.
[44] *Fatullayev v. Azerbaijan*, European Court of Human Rights, Judgment of 22 April 2010.
[45] *Chauvy and others v. France*, European Court of Human Rights, Judgment of 29 June 2004.
[46] e.g. Article 5(1) of the ICCPR.
[47] *Vogt v. Germany*, European Court of Human Rights, Judgment of 26 September 1995.

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[48] The European Convention on Human Rights and Fundamental Freedoms, http://conventions.coe.int/treaty/Commun/QueVoulezVous.asp?NT=005&CL=ENG, accessed 15 June 2011.

[49] *Garaudy v. France*, European Court of Human Rights, Decision as to the admissibility of 24 June 2003.

[50] *Norwood v. The United Kingdom*, European Court of Human Rights, Decision as to the admissibility of 16th November 2004.

[51] *Lexideux and Isorni v. France*, European Court of Human Rights, Judgment of 23 September 1998.

[52] *Ždanoka v. Latvia*, European Court of Human Rights, Judgment of 16 of March 2006, paragraph 99.

[53] *Garaudy v. France*, European Court of Human Rights, Decision as to the admissibility of 24 June 2003.

[54] *Garaudy v. France*, European Court of Human Rights, Decision as to the admissibility of 24 June 2003.

[55] *Garaudy v. France*, European Court of Human Rights, Decision as to the admissibility of 24 June 2003.

[56] 'L'appel du 12 décembre 2005', *Liberté pour l'histoire*, http://www.lph-asso.fr/index.php?option=com_content&view=article&id=2&(Itemid=13&lang=fr, accessed 7 October 2012.

[57] See for example the CE Parliamentary Assembly Resolution 1481 (2006) 'Need for international condemnation of crimes of totalitarian communist regimes', adopted on 25th of January 2006, http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta06/Eres1481.htm, accessed 7 October 2012.

[58] For instance, HRC made the following statement in its Concluding Observations on Hungary (Hungary, CCPR/C/HUN/CO/5, para.19):

> The Committee is concerned that the evolution of the so-called "memory laws" in the State party risks criminalizing a wide range of views on the understanding of the post-World War II history of the State party…The State party should review its "memory laws" so as to ensure their compatibility with Articles 19 and 20 of the Covenant.

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