

# Penalizing Holocaust Denial: A View from Europe

Aleksandra Gliszczyńska-Grabias\*

The visual evidence and the verbal testimony of starvation, cruelty and bestiality were so overpowering as to leave me a bit sick. In one room, where [there] were piled up twenty or thirty naked men, killed by starvation, George Patton would not even enter. He said that he would get sick if he did so. I made the visit deliberately, in order to be in a position to give first-hand evidence of these things if ever, in the future, there develops a tendency to charge these allegations merely to “propaganda.”

General Dwight D. Eisenhower<sup>1</sup>

The alleged Hitlerian gas chambers and the alleged genocide of the Jews form one and the same historical lie, which permitted a gigantic financial swindle whose chief beneficiaries have been the State of Israel and international Zionism, and whose main victims have been the German people and the Palestinian people as a whole.

Robert Faurisson<sup>2</sup>

## I. INTRODUCTION

Incorporating Holocaust denial into the catalogue of issues governed by legal provisions, and in particular by the provisions of criminal law, raises a number of understandable doubts. Aside from the controversies related to the indisputable interference with freedom of speech, there are problems concerning the form of legal provisions that would ban the dissemination of the negationists’ theories, as well as difficulties in guaranteeing the effectiveness and consistency of their proper enforcement.<sup>3</sup>

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\* Research Assistant, Poznań Human Rights Centre, Institute of Legal Studies of the Polish Academy of Sciences; Graduate Fellow, Yale Initiative for the Interdisciplinary Study of Antisemitism (YIISA), Yale University.

<sup>1</sup> Dwight D. Eisenhower, *Dear General: Eisenhower's Wartime Letters To Marshall* (1999), p. 223.

<sup>2</sup> Robert Faurisson, as quoted by the *Guardian Weekly*, Apr. 7, 1991.

<sup>3</sup> The term *negationism* in relation to Holocaust denial seems to be more appropriate than the frequently applied term *revisionism*. The school of revisionism may be associated with historical research, whereas Holocaust denial has nothing in common with any academic conduct. *Negationism* comprises multiple forms of denying historical truth. Most frequently however, it is used to describe various forms of Holocaust denial. See, e.g., Deborah Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory* (1994); Michael Shermer and Alex Grobman, *Denying History: Who Says the Holocaust Never Happened and Why Do They Say It?* (2000).

In the United States, the essential differences between the European and the American understanding of the free speech doctrine lead to distrust of and even objections to every single court trial or a custodial sentence for a Holocaust denier in Europe.<sup>4</sup> Moreover, the question whether—and if so how—to punish someone for Holocaust denial, but also more broadly for hate speech dissemination, poses a challenge, especially for those European enthusiasts of the greatest possible freedom of speech. This is because they simultaneously and (apparently) contradictorily acknowledge the need to resort to legal instruments that restrict this freedom, in order to protect different values and the rights of other individuals.

The US “First Amendment ethos” makes it almost impossible to accept the restrictive way of dealing with negationists that we see in so many European legal orders.<sup>5</sup> Conversely, most Europeans find the US legal doctrine of the unlimited freedom of speech, including Holocaust denial, disturbing. One of the primary reasons for such a discrepancy in legal attitudes is the estimated risk of the danger that negationists are likely to cause. As Professor Wojciech Sadurski puts it:

In the United States, the groups which feed on the literature such as “historical revisionism” are part of the political folklore, just as are flat-Earthers and Montana separatists: probably irritating and deeply offensive to many, but very unlikely to reach a capacity to challenge the democratic system to its core.<sup>6</sup>

However, there are numerous other complex and persuasive factors that are crucial to the establishment of a legal ban on Holocaust denial in Europe. This article introduces the most fundamental arguments raised in the European discourse in favor of penalizing Holocaust denial.

## II. HOLOCAUST DENIAL — DEFINITIONAL CONTROVERSIES

The basic difficulty that occurs while discussing the idea of penalizing Holocaust denial concerns the attempt to define the concept in legal terms. Due to the lack of a coherent, internationally recognized definition of the crime of negationism as a whole and Holocaust denial in particular, the scope of the penalization may differ considerably.<sup>7</sup> At the

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<sup>4</sup> The differences between the European and American perceptions of the conflict between free speech and hate speech cover many more issues than only Holocaust denial. A compelling description of the American understanding of the civil liberties doctrine in the context of hate speech can be found in a book by Aryeh Neier, former leader of the American Civil Liberties Union. See Aryeh Neier, *Taking Liberties. Four Decades in the Struggle for Rights* (2003), pp. 113–33.

<sup>5</sup> The European states that penalize Holocaust denial are: Austria, Belgium, Czech Republic, France, Germany, Lichtenstein, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Romania, Slovakia, and Switzerland. After the entry into force of EU Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, all EU member states are legally obliged to penalize certain forms of negationism.

<sup>6</sup> Wojciech Sadurski, “‘It All Depends’: The Universal and the Contingent in Human Rights,” European University Institute Working Paper LAW No. 2002/7 (2002), p. 28.

<sup>7</sup> The UN General Assembly has stated that it condemns without any reservation *any* denial of the Holocaust. See G.A. Res. 61/251, UN Doc. A/RES/61/255, Mar. 22, 2007. See also Jonathan Cooper and Adrian Marshall Williams, *Hate Speech, Holocaust Denial and International Human Rights Law*, 6 *European Human Rights Law Review* (1999), p. 593.

same time, such divergence in definitions allows for a more flexible approach, in which the newly generated forms of Holocaust denial can also be considered as legally forbidden negationism.

### *A. Domestic law in European states*

We observe different approaches to negationism in the legal provisions of European states that penalize the public dissemination of Holocaust denial. It speaks for itself that historical factors play a major role in defining the crime of negationism, as well as the political intention to shape and influence the memory of the nation.

Under Polish law, it is legally forbidden to deny, publicly and contrary to the facts, Nazi crimes, communist crimes, and other crimes constituting crimes against peace, crimes against humanity, or war crimes perpetrated against persons of Polish nationality and Polish citizens of other ethnicity or nationality in the period between September 1, 1939 and July 31, 1990. Such denial is subject to a fine or a custodial penalty of up to three years, and the judgment is to be made public.<sup>8</sup> The objective scope of the provision is not limited to negationism concerning crimes committed by Nazi Germany; it also covers denial of the Katyn massacre.<sup>9</sup>

The French Gayssot Act, named after its initiator, Jean-Claude Gayssot (a socialist deputy in the French parliament), imposes a punishment of one month to one year of imprisonment or a fine for individuals who publicly question the existence of one or more crimes against humanity. These are crimes that have been defined in the statute of the International Military Tribunal at Nuremberg, included in the London Agreement of 8 August 1945 and carried out either by members of an organization declared criminal pursuant to Article 9 of the aforementioned statute or by a person found guilty of such crimes under French or international jurisdiction.<sup>10</sup>

German law regulates the issue of penalizing Holocaust denial in a more complex way. There are several provisions that may be invoked against Holocaust deniers. One of the provisions allows for penalizing anyone who publicly approves of, denies, or belittles an act committed under the rule of National Socialism in a manner capable of disturbing the public peace. Such a person shall be punished with imprisonment of up to five years or a fine.<sup>11</sup>

The Austrian solution for penalizing Holocaust denial was introduced in 1992 in the form of an amendment to the Prohibition Act of 1947, a special bill that banned the Nazi Party and provided the legal framework for the process of removing all possible consequences of Nazism from Austria. It was designed to suppress any potential future revival of the murderous Nazi regime.<sup>12</sup> However, the foremost reason for introducing the legal ban on Holocaust denial in Austria was a number of court proceedings in

<sup>8</sup> Polish Official Journal, No. 155, Item 1016, Dec. 18, 1998, available at: <<http://isap.sejm.gov.pl>>.

<sup>9</sup> In the spring of 1940, the Soviets murdered almost 20,000 Polish prisoners of war – military officers, policemen, and intellectuals – in the forest of Katyn.

<sup>10</sup> French Official Journal, No. 162, July 13, 1990, available at: <<http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006076185&dateTexte=vig>>.

<sup>11</sup> German Official Journal, Nov. 13, 1998, available at: <[http://bundesrecht.juris.de/stgb/\\_130.html](http://bundesrecht.juris.de/stgb/_130.html)>.

<sup>12</sup> Austrian Official Journal, No. 148/1992, Mar. 19, 1992, available at: <[http://www.nachkriegsjustiz.at/service/gesetze/BGBl\\_148\\_1992.gif](http://www.nachkriegsjustiz.at/service/gesetze/BGBl_148_1992.gif)>.

which Holocaust deniers were acquitted due to an ineffective basis for accusation. Austrian judges regarded the legal ban on incitement to racial hatred as inapplicable to the negation of the Holocaust.<sup>13</sup> As a result, a new provision was introduced. It stipulates that whoever denies, grossly plays down, approves of, or tries to excuse the National Socialist genocide or other National Socialist crimes against humanity in a printed publication, in a broadcast, or in any other media shall be punished with imprisonment for one to ten years and, in cases of particularly dangerous suspects or activity, up to twenty years. The court may also decide in favor of the forfeiture of property, which usually relates to the entire print run of the publication containing the negationists' theories.

Liechtenstein<sup>14</sup> and Romania<sup>15</sup> explicitly mention the Holocaust in their negationism penalization laws. Liechtenstein law penalizes anyone who through speech, pictures, writing, or electronic media denies, crudely deprecates, or tries to justify the Holocaust or other crimes against humanity with imprisonment for up to two years. Romanian law, on the other hand, punishes public negation of the Holocaust or its effects with imprisonment for six months to five years. It is also prohibited to erect or maintain in a public space statues, statuary groups, or commemorative plaques celebrating persons guilty of committing crimes against peace or humanity, or to name streets, boulevards, squares, parks, or other public spaces after such persons.<sup>16</sup>

If one agrees that penalizing this form of negationism is legitimate and relevant, it should be stated that, in order to make the penal method effective, the legal definition of Holocaust denial must be sufficiently broad and encompass not only the negation of the Holocaust but also, *inter alia*, its trivialization and justification. However, accepting such an extensive definition obviously implies a higher risk of excessive interference in the sphere of free speech and freedom of scientific research. It is also bound up with doubts concerning the legal interpretation of such legally imprecise concepts as *trivialization* or *justification*. Nevertheless, the Europeans remain firmly convinced that the interpretative difficulties do not prevail over the need to legally regulate the dissemination of Holocaust denial. This is because the boundary between legal and illegal behavior in this area is very fine, making it highly inadvisable to leave such behavior without clarification and an appropriate legal response.

### B. The Council of Europe

The creation of the Council of Europe is inextricably linked to the horrors of World War II and the Holocaust. Accordingly, all member states of the Council of Europe unanimously recognize any manifestation of antisemitism as a human rights violation and regard the obligation to fight it as an integral part of counteracting racism in Europe.

<sup>13</sup> See Stephen J. Roth, *Denial of the Holocaust. An Issue of Law* (1994), pp. 221-22.

<sup>14</sup> Liechtenstein's Official Journal, Article 283, June 24, 1987, available at: <<http://www.gesetze.li/Seite1.jsp?LGBIm=1988037>>.

<sup>15</sup> Emergency Ordinance 31/2002 of the Penal Code, Monitorul oficial al Romaniei, Mar. 28, 2003, cited in *Final Report of the International Commission on the Holocaust in Romania*, presented to President Ion Iliescu, Bucharest, Nov. 11, 2004, p. 36.

<sup>16</sup> See databases of the EU Fundamental Rights Agency, available at: <[http://fra.europa.eu/fra/Website/products/products\\_en.htm](http://fra.europa.eu/fra/Website/products/products_en.htm)>.

This position of the Council of Europe has been confirmed repeatedly.<sup>17</sup> The need to engage in an active and effective fight against antisemitism, together with the willingness to do so, was also one of the motivations behind the establishment of the Council of Europe's European Commission against Racism and Intolerance (ECRI), which occurred during the First Vienna Summit Conference of Heads of State and Government of the member states of the Council of Europe in 1993.<sup>18</sup> In the "Vienna Declaration" adopted at that time, a common policy for counteracting racism, xenophobia, antisemitism, and intolerance was agreed upon. In this declaration, the member states of the Council of Europe declared that they would combat all ideologies, policies, and practices constituting incitement of racial hatred, violence, and discrimination, as well as any action or language likely to strengthen fears and tensions between groups of different racial, ethnic, national, religious, or social background.

In 1997, the executive body of the Committee of Ministers of the Council of Europe issued a recommendation that deals exclusively with the phenomenon of hate speech.<sup>19</sup> In the appendix to that recommendation, hate speech was defined as speech covering all forms of expression that spread, incite, promote, or justify racial hatred, xenophobia, antisemitism, or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, and discrimination and hostility against minorities, migrants and people of immigrant origin. It is important that the concept of Holocaust denial was included in the category of speech that disseminates and propagates antisemitism.

In light of the growing wave of antisemitic attitudes in the member states of the Council of Europe, the Parliamentary Assembly of the Council of Europe adopted Resolution No. 1563, entitled "Combating anti-Semitism in Europe."<sup>20</sup> The Assembly emphasized the immense danger of antisemitism and called on all member states of the Council of Europe to vigorously and systematically enforce legislation criminalizing antisemitic and other hate speech, in particular any incitement to violence. In addition, it called on all member states to make public denial, as well as trivialization, justification, or praise, with racist intentions, of crimes of genocide, crimes against humanity, or war crimes, a criminal offense. The resolution also includes a call to actively and strongly condemn all states sponsoring antisemitism, Holocaust denial, and incitement to genocide.

<sup>17</sup> See, e.g., Council of Europe Parliamentary Assembly Recommendations: No. 1222 (1993) on the fight against racism, xenophobia and intolerance; No. 1275 (1995) on the fight against racism, xenophobia, anti-Semitism and intolerance; No. 1438 (2000) on the threat posed to democracy by extremist parties and movements in Europe; and No. 1543 (2001) on racism and xenophobia in cyberspace. See also Council of Europe Parliamentary Assembly Resolutions: No. 1308 (2002) on restrictions on political parties in the Council of Europe member states; and No. 1345 (2003) on racist, xenophobic and intolerant discourse in politics. All available at: <[http://assembly.coe.int/ASP/Doc/ATListing\\_E.asp](http://assembly.coe.int/ASP/Doc/ATListing_E.asp)>.

<sup>18</sup> The compilation of the Council of Europe documents, available at: <[http://www.coe.int/t/dcr/summit/decl\\_vienne\\_pl.asp](http://www.coe.int/t/dcr/summit/decl_vienne_pl.asp)>.

<sup>19</sup> Council of Europe Committee of Ministers Recommendation No. R (97) 20 on hate speech, available at: <<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=568168&SecMode=1&DocId=582600&Usage=2>>.

<sup>20</sup> Council of Europe Parliamentary Assembly Resolution No. 1563 (2007) on combating anti-Semitism in Europe, available at: <<http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/tat07/eres1563.htm>>.

Moreover, the Additional Protocol to the Council of Europe Convention on Cyber-crime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, deals with the issue of Holocaust denial in its Article 6, which stipulates that the each state party to the protocol:

shall adopt such legislative measures as may be necessary to establish the following conduct as criminal offences under its domestic law, when committed intentionally and without right: distributing or otherwise making available, through a computer system to the public, material which denies, grossly minimizes, approves or justifies acts constituting genocide or crimes against humanity....<sup>21</sup>

A direct reference to the need to penalize Holocaust denial may also be found in ECRI General Policy Recommendation No. 9: "The fight against anti-Semitism."<sup>22</sup> The most important aspect of the this recommendation concerns the form of legal provisions in the Council of Europe member states and their effective implementation. States should ensure that for all criminal offenses, antisemitic motivation will be regarded as an aggravating circumstance. The ECRI mentions the following actions, which, if committed intentionally, should be penalized: the public denial, trivialization, justification, or condoning of the Holocaust and the public denial, trivialization, justification, or condoning, with an antisemitic aim, of crimes of genocide, crimes against humanity, or war crimes committed against persons on the grounds of their Jewish identity or origin. Moreover, the ECRI recommendation indicates the need to punish by legal means the public dissemination or public distribution, or the production or storage aimed at public dissemination or public distribution, of antisemitic written, pictorial, or other material containing, inter alia, Holocaust denial.<sup>23</sup> The need to implement an effective legal ban on disseminating Holocaust denial is thus emphasized here in the most explicit way.

### C. European Union

The record of the debates, which took place over many years, on the shape of the common Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law indicate that those who supported the introduction of an obligation to penalize Holocaust denial by the EU member states followed the European *rationale* for such penalization.<sup>24</sup> It should be emphasized that these provisions were the object of serious and turbulent disagreement, which obviously stemmed from the different approaches of individual EU member states to the general problem of penalizing speech.

Article 1(1)(d) of the Framework Decision obliges the EU member states to take the necessary measures to ensure that the following intentional conduct is punishable:

<sup>21</sup> Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, available at: <<http://conventions.coe.int/Treaty/en/Treaties/Html/189.htm>>. The Additional Protocol entered into force on March 1, 2006 and has been by now ratified by 19 European states.

<sup>22</sup> ECRI General Policy Recommendation No. 9 on the fight against anti-Semitism, CRI (2004) 37, available at: <<http://www.legislationline.org/documents/action/popup/id/7388>>.

<sup>23</sup> Id.

<sup>24</sup> Council of the European Union Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ L 328/55, Dec. 6, 2008.

publicly condoning, denying or grossly trivialising the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945,<sup>25</sup> 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 when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group.

Article 1 also introduces a similar ban with respect to genocide, crimes against humanity, and war crimes as defined by the Statute of the International Crime Court.<sup>26</sup> Not

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<sup>25</sup> Article 6 of the Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (“London Agreement”) stipulates:

The Tribunal established by the Agreement referred to in article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) War crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to Wave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

See Appendix II of *The Charter and Judgment of the Nürnberg Tribunal: History and Analysis*, United Nations General Assembly/International Law Commission, New York, 1949, Doc. A/CN.4/5, available at: <<http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain>>.

<sup>26</sup> Article 6 of the Rome Statute of the International Criminal Court defines the crime of genocide as:

... any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

See Rome Statute of the International Criminal Court, Doc. A/CONF.183/9, available at: <<http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools>>.

withstanding these provisions, the final content of the Framework Decision was disappointing to its supporters.<sup>27</sup> Rapporteur Martine Roure of the EU Committee on Civil Liberties, Justice, and Home Affairs stated in her report on the proposal for a Council Framework Decision, she “regrets the failure of the Council’s text to move strongly forward and rise to the political challenge posed by the fight against racism and xenophobia.” She vociferously opposed the limits placed on the scope of the Framework Decision concerning the penalization of negationism in domestic law, according to which member states are free to choose to punish only such behavior that is likely to incite to violence or hatred. Martine Roure rightly claimed that: “Trivialisation of the crime of genocide is a form of racism, and Member States should be able to punish it even where incitement to hatred or violence is not involved.”

The Framework Decision indeed makes it possible to significantly limit the obligations imposed on member states. In addition to the remarks quoted above, member states may also declare that denying or grossly trivializing the crimes listed in the Framework Decision shall be penalized only if these crimes have been established by a final decision of a national court of a particular member state and/or an international court or by final decision of an international court only.<sup>28</sup>

The Framework Decision came into force in December 2008, but the substance of the decision required a prolonged period of transposition in the EU member states.<sup>29</sup> The states were obliged to take the necessary measures to comply with the provisions of this Framework Decision by November 28, 2010. By the same date, they were required to transmit to the General Secretariat of the Council and to the Commission the text of the provisions transposing the Framework Decision into their domestic legal orders. By November 28, 2013, the Council will assess the extent to which member states have complied with the provisions of the Framework Decision and review the Framework Decision. It seems highly likely that those member states that had not penalized any form of negationism before the entry into force of the Framework Decision will find it very difficult to comply with this part of the Decision. It remains an open question whether, or to what extent, the 2013 review process will indicate the need to exclude the ban on negationism from the scope of the Framework Decision.

It was claimed, in light of the significant differences in the legislation of the EU member states in the areas covered by the framework decision, as well as their different political and social traditions, that the compromise achieved was the only possible solution at this stage of the negotiations. However, although the Framework Decision contains several important and necessary elements, the document as a whole appears to be rather limited in scope. Nevertheless, the efforts to harmonize legislation at the EU level and the establishment of a consolidated catalogue of sanctions to be imposed against hate crimes and hate speech (including the public dissemination of negationism) is an important step in combating all forms of racism and intolerance.

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<sup>27</sup> See, e.g., Report on the proposal for a Council framework decision on combating certain forms and expressions of racism and xenophobia by means of criminal law, Nov. 14, 2007, presented by Martine Roure MEP. The description of the entire tumultuous negotiation process related to the adoption of the Framework Decision is available at: <[http://ec.europa.eu/prelex/detail\\_dossier\\_real.cfm?CL=en&DosId=169885](http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=169885)>.

<sup>28</sup> Article 1(4) of the Framework Decision.

<sup>29</sup> Article 10 of the Framework Decision.

### III. FUNDAMENTAL PREREQUISITES FOR HOLOCAUST DENIAL PENALIZATION IN EUROPE

As discussed above, the issue of Holocaust denial and its penalization is of a profound significance for Europe. In order to carefully identify the reasons that justify restricting the freedom of speech of Holocaust deniers, it is essential to explain the essence of this phenomenon beyond its legal definition.

In layman's terms, Holocaust denial is a form of negationism that refers mainly to the act of denying, trivializing, or justifying the crimes committed by Nazi Germany against the Jews during World War II, although it should be clear that denying these crimes affects all victims and not only the Jewish ones. In practice, however, Holocaust denial is carried out almost exclusively in relation to Jews, and this is how it is being popularized throughout the world. Professor Wojciech Sadurski rightly describes this phenomenon as "a part of a larger package of an ideology which maintains that Jews cannot be trusted on anything, even on their own past."<sup>30</sup>

In 1984, during a seminar held at the Hebrew University of Jerusalem, Professor Yisrael Gutman posed the question whether Holocaust denial was simply a short-lived phenomenon, or whether it had a future and would have to be dealt with.<sup>31</sup> Today, when the theories spread by negationists have supporters all around the world, and the president of Iran openly claims that Holocaust is a fiction made up by Jews, raising Holocaust denial to the rank of a state doctrine, the answer to Professor Gutman's question is, unfortunately, straightforward.

The circle that has gathered around the idea of Holocaust denial has always consisted of people from many different milieus, representing a wide spectrum of personal backgrounds and political ideals, even though the representatives of the post-war neo-Nazi movement in Germany, France, and the United Kingdom initially prevailed.<sup>32</sup> Currently, the circle of Holocaust deniers around the world is much wider and has strengthened enormously, also in a financial sense, due to the support it obtains from many Arab states.<sup>33</sup>

As time has passed, the range of statements described as Holocaust denial has also changed. The opinion of researchers dealing with the issue was initially that Holocaust denial was meant to clear the blame for the ideas of National Socialism and Hitler.<sup>34</sup> Since then, the claims of Holocaust deniers have become more nuanced. They argue, inter alia, that even if Holocaust really took place, the number of victims was signifi-

<sup>30</sup> Sadurski, *supra* note 6, p. 27.

<sup>31</sup> See Yisrael Gutman, *Denying the Holocaust* (1985), pp. 20-25.

<sup>32</sup> See, e.g., Shermer and Grobman, *supra* note 3; Walter Laqueur, *The Changing Face of Anti-Semitism: From Ancient Times to the Present Day* (2006), pp. 135-39.

<sup>33</sup> The most well-known examples are nowadays the statements of Iranian President Mahmoud Ahmadinejad, who repeatedly claims that the Holocaust was nothing but a "Jewish swindle." For coverage, see, e.g., Anne Appelbaum, "Teheran's Holocaust Lesson," *The Washington Post online*, Dec. 12, 2006, available at: <<http://www.washingtonpost.com/wp-dyn/content/article/2006/12/11/AR2006121101163.html>>.

<sup>34</sup> Deborah E. Lipstadt calls this kind of Holocaust denial *hard core* Holocaust denial, distinguishing it from *soft core* Holocaust denial, which includes, for example, describing military interventions of the Israeli army as the "Palestinian Holocaust." See Deborah E. Lipstadt's blog at: <<http://lipstadt.blogspot.com>>.

cantly lower than what the official statistics indicate; that it is true that many Jews perished during the war, but most of them were victims of contagious diseases and hard living conditions; that Hitler had never signed any written order to murder the whole Jewish population in Europe, so the Holocaust could not be described as a complex, precise plan; that Auschwitz was not a concentration camp but only a labor camp, equipped with such facilities as a swimming pool or a dance hall; that Zyklon B was only used for disinfection purposes; that gas chambers were first built after the war; that the testimonies of the former prisoners of the camps are not veracious, as they were given only to gain undue financial benefits; and that the evidence given by the former camp guards and Nazis was elicited by means of torture.

The threat stemming from the dissemination of Holocaust denial becomes even more apparent when one considers that general knowledge about World War II and the Holocaust in Europe. The level of historical awareness in society has always been the best guarantor of preserving historical memory. However, as indicated by a poll conducted in Great Britain in 2004, over 60 percent of the British population under the age of 35 have not heard of the "Final Solution," and 30 percent of students surveyed in high schools in Brussels in 2005 were convinced that Oskar Schindler was one of Hitler's advisers. It is thus clear how much opportunity has arisen for those who wish to distort and misrepresent historical truth.<sup>35</sup> It should also be emphasized that, in the age of the Internet, the possibilities for disseminating negationist theories are almost limitless. This is proven by thousands of websites that furnish information about the "great Jewish lie" in a way that makes them appear to be based on reliable, scientifically-proven facts.<sup>36</sup>

It is clear that the low level knowledge in society about the Holocaust and the lack of an appropriate response to its negation or trivialization are not in themselves a sufficient justification for penalizing Holocaust denial. Also, penalization should not stem solely from the fact that the claims of negationists are outrageous and evoke moral objections. If so, what are the reasons for recognizing the legitimacy of punishing words in the case of Holocaust denial? The most fundamental grounds for such legitimacy, identified in the European discourse, are the following:

- the necessity to turn the memory and honor of the victims of the Holocaust into a legally protected value;
- the conviction that restricting the negationists' freedom of speech is acceptable in order to protect the very fundamental element of the history and national identity of certain European states and the heritage of European civilization as a whole; and
- the recognition of Holocaust denial as one of the modern forms of antisemitism and a form of hate speech directed at Jews that may lead not only to a rise in antisemitic moods and attitudes but also to a rise in hate crimes committed on this basis.

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<sup>35</sup> The data cited are sourced from a survey commissioned by the BBC in December 2004 and from an opinion poll conducted by *Res Publica*, a Belgian political quarterly, in January 2005. Quoted from the *Znak* website, available at: <<http://www.forumznak.org.pl/?lang1=pl&page1=news&subpage1=news00&infopassid1=2432&scrt1=sn>> (in Polish).

<sup>36</sup> The significance of the problem of the dissemination of hate speech and Holocaust denial via the internet was explicitly acknowledged in the above-mentioned Additional Protocol to the Convention on Cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems.

Such universal and axiological reasons (which are to be distinguished from the formal prerequisites that must be fulfilled in order to use a specific legal provision limiting the freedom of speech of the individual) should be seen as an attempt to formulate a justification for introducing a legal ban on disseminating Holocaust denial, in the sense that they indicate the European legislators' rationale for using penal sanctions against negationists.

#### *A. Memory and honor of the victims*

The *memory and honor of the victims* has been strongly emphasized in Germany, where the dissemination of Holocaust denial is punishable on the basis of regulations that prohibit insulting and humiliating the dead, among other legal methods.<sup>37</sup> However, this approach to penalization carries with it the risk of the negative effects of trials involving Holocaust deniers, which often turn into bizarre shows during which negationists get a chance to present their theories to a wider audience. This, in turn, may be perceived as an additional insult to the memory of the dead.

However, the consequence of trying to avoid such situations would be that no person who is willing to defend the legitimacy of his or her actions in court would be punished, on the grounds that it might encourage others to take similar actions or insult the feelings of individuals who suffered as victims of such actions. Moreover, the public spectacle of David Irving, the notorious Holocaust denier, denouncing his theories in front of an Austrian judge and loudly admitting that the Holocaust was indeed a crime perpetrated by Nazi Germany and that gas chambers were indeed used to kill the Jewish people ridicules the whole negationist movement and illustrates the weakness of this ideology. Thus, the existing negative aspects of the judicial consideration of Holocaust deniers' guilt should not be seen as a sufficient argument against punishing Holocaust denial by means of legal instruments.

#### *B. Historical truth and identity*

The essence of the second reason for penalizing Holocaust denial, which is related to the preservation of historical heritage, is well captured in the words of Marek Safjan, a Polish judge of the European Court of Justice in Luxembourg. In the context of the discussion on the penalization of Holocaust denial in Poland, Professor Safjan has noted: "Human memory is short and deceptive, while the trivialization of lies and hatred disseminated in public space may have shocking and destructive effects, particularly for the young generation of Europeans."<sup>38</sup> In other words, punishing negationists is also aimed at halting the process of the gradual fading of the memory of the Holocaust and the crimes of totalitarian regimes, which are still not yet a thing of the past.

This argument also emphasizes the educational role of the state, which by introducing a legally protected taboo affirms certain values, such as a commitment to non-discrimination on the grounds of national, racial, or ethnic grounds. However, this

<sup>37</sup> German Official Journal, Nov. 13, 1998, available at: <[http://bundesrecht.juris.de/stgb/\\_189.html](http://bundesrecht.juris.de/stgb/_189.html)>.

<sup>38</sup> Marek Safjan, *Wolność słowa w debacie europejskiej*, *Otwarta Rzeczpospolita Stowarzyszenie przeciwko Antysemityzmowi i Ksenofobii*, available at: <<http://www.otwarta.org/marek-safjan-wolnosc-slowa-w-debacie-europejskiej,400.html>> (in Polish).

approach also carries a certain risk, namely that regulations that are only of a symbolic character will not be strictly executed. As a result of their controversial nature or vague wording, such provisions can thus be a risky method of assuring justice. Yet in the case of Holocaust denial, the significance of such provisions is deemed to prevail over any doubts. Moreover, from a European perspective, a proper legal response is an explicit form of warning against totalitarian regimes, which are always capable of resurgence.

### *C. Hate speech and hate crime*

With regard to the third reason for penalizing Holocaust denial, which concerns the correlation between hate speech and hate crimes, it is important to remember that while most statements denying the Holocaust do not contain openly hostile or hateful antisemitic messages, the antisemitic motives for disseminating such statements are obvious to anybody who analyzes them in a broader context. For example, denying the Holocaust has been described as a manifestation of antisemitism in ECRI Recommendation No. 9 and in the working definition of antisemitism prepared by the European Monitoring Center on Racism and Xenophobia (which became the European Union Agency for Fundamental Rights in 2007), as well as in resolutions of the European Parliament.<sup>39</sup>

Therefore, if we assume that Holocaust denial is a form or at least a manifestation of antisemitism, the legal regulations that would ban its dissemination must be regarded as part of a broader state strategy that aims to fight all forms of racial, national, or religious hatred and intolerance. The European states have undertaken international obligations in this respect, also in the legal sphere, by becoming parties to a number of international human rights treaties.<sup>40</sup>

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<sup>39</sup> See, e.g., European Parliament resolution on remembrance of the Holocaust, anti-Semitism and racism, P6\_TA (2005) 0018, available at: <<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2005-0018&language=EN>>.

<sup>40</sup> See, e.g., Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination, which stipulates that:

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

- (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;
- (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

International Convention on the Elimination of All Forms of Racial Discrimination, adopted and opened for signature and ratification by General Assembly resolution 2106 (XX), available at: <<http://www2.ohchr.org/english/law/cerd.htm#4>>.

It is possible that Holocaust denial does not translate into sudden, intense explosions of antisemitic sentiment or lead directly to acts of violence against Jews. However, a strong correlation between words and actions is indisputable, although it is difficult to determine when the critical transition takes place. Various forms of antagonism may lie dormant for long periods of time only to suddenly escalate, reaching the proportions of a mass psychosis. The history of the Third Reich's hate propaganda leaves no room for doubt regarding the influence that words may have on deeds.

One recent, dramatic example of this correlation is the radio broadcasts aired on a Rwandan radio stations at the time of the genocide. Due to high rates of illiteracy in Rwanda, radio served as a powerful and effective way of inciting hate and violence against the *inyenzi* (cockroaches), a derogatory term used to describe the Tutsis.<sup>41</sup> One of the key figures engaged in using words as a tool of genocide was Georges Ruggiu, a Belgian journalist who was found guilty of public incitement to commit genocide and crimes against humanity by the International Criminal Tribunal for Rwanda.<sup>42</sup> As the Tribunal stated in its judgment:

The media, particularly RTLM radio, was a key tool used by extremists within the political parties to mobilize and incite the population to commit the massacres. RTLM had a large audience in Rwanda and became an effective propaganda instrument. The accused, who was a journalist and broadcaster with the RTLM, played a crucial role in the incitement of ethnic hatred and violence, which RTLM vigorously pursued. ... His broadcasts incited massacres of the Tutsi population.<sup>43</sup>

In this context, attention should also be drawn to the annual reports of the European Union Agency for Fundamental Rights and the Council of Europe's European Commission Against Racism and Intolerance, which point not only to an apparent increase in racist, xenophobic, and antisemitic attitudes in most European countries but also to the growing number of assaults, beatings, and other acts of violence committed on the same grounds.<sup>44</sup>

#### IV. THE EUROPEAN COURT OF HUMAN RIGHTS

The essence of each of the above-mentioned reasons for penalizing Holocaust denial is clearly mirrored in the case law of the Strasbourg-based European Court of Human Rights (ECtHR), the supervisory body of the European system of human rights protec-

<sup>41</sup> Report by the International Development Research Centre, "Hate media in Rwanda," available at: <[http://www.idrc.ca/rwandagenocide/ev-108178-201-1-DO\\_TOPIC.html](http://www.idrc.ca/rwandagenocide/ev-108178-201-1-DO_TOPIC.html)>.

<sup>42</sup> *The Prosecutor v. Georges Ruggiu*, Judgment and Sentence, ICTR-97-32-I, International Criminal Tribunal for Rwanda, June 1, 2000.

<sup>43</sup> *Id.*

<sup>44</sup> See, e.g., the following reports of the Fundamental Rights Agency: "Anti-Semitism: Summary overview of the situation in the European Union 2001-2009"; "Anti-Semitism: Summary overview of the situation in the European Union 2001-2008 (updated version February 2009)"; "Annual report 2007: Report on Racism and Xenophobia in the Member States of the EU"; and "Racist Violence in 15 EU Member States Based on RAXEN information," all available at: <[http://www.fra.europa.eu/fraWebsite/research/research\\_en.htm](http://www.fra.europa.eu/fraWebsite/research/research_en.htm)>. See also the reports of the European Commission against Racism and Intolerance in which it examines the situation concerning manifestations of racism and intolerance in each of the Council of Europe member states, all available at: <[http://www.coe.int/t/dghl/monitoring/ecri/activities/countrybycountry\\_en.asp](http://www.coe.int/t/dghl/monitoring/ecri/activities/countrybycountry_en.asp)>.

tion.<sup>45</sup> The Court (and previously also the European Commission of Human Rights, which served as a part of the Strasbourg system until 1998) has repeatedly been faced with the problem of evaluating the methods by which the member states of the Council of Europe limit the freedom of speech of Holocaust deniers by means of their domestic legislation. It is significant that up until now the ECtHR has consistently and unambiguously refused to grant protection to Holocaust deniers, ruling that their complaints concerning the limitation of free speech were inadmissible.<sup>46</sup>

However, the ECtHR's position in regard to Holocaust denial has never been based on one consistent way of reasoning. The Strasbourg Court has used various techniques to establish the inadmissibility of negationists' attempts to defend their views under Article 10 (freedom of speech) of the European Convention on Human Rights.<sup>47</sup> In several cases, it has ruled that the legal limitations imposed on Holocaust deniers' free speech by the member states were necessary for the protection of the rights of others, the public security, or public morals in a democratic society. At other times, the ECtHR has invoked Article 17 of the Convention, which stipulates that: "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...." As a result, every attempt by negationists to rely on Article 10 is regarded as an abuse of the rights guaranteed in this international human rights treaty.

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<sup>45</sup> The European Court of Human Rights is an international court set up in 1959. It rules on individual or state applications alleging violations of the civil and political rights set out in the European Convention on Human Rights. Since 1998 it has sat as a full-time court and individuals can apply to it directly. The Court's case law makes the Convention a powerful living instrument for meeting new challenges and consolidating the rule of law and democracy in Europe. On the case law of the Strasbourg Court regarding hate speech and Holocaust denial, see, e.g., Uladzislau Belavusau, "A Dernier Cri from Strasbourg: An Ever Formidable Challenge of Hate Speech," *European Public Law*, Vol. 16(3) (2010), pp. 373-89; Ivan Hare, "Extreme Speech under International and Regional Human Rights Standards," in Ivan Hare and James Weinstein (eds.), *Extreme Speech and Democracy* (2009); M.G. Schmidt and R.L. Vojtovic, "Holocaust Denial and Freedom of Expression," in T.S. Orlin and M. Scheinin, *The Jurisprudence of the Human Rights Law: A Comparative Interpretive Approach* (2000).

<sup>46</sup> Complaints by Holocaust deniers were found inadmissible in numerous cases, including: *T. v. Belgium*, App. No. 9777/82 (1983); *F.P. v. Germany*, App. No. 19459/92 (1993); *Honsik v. Austria*, App. No. 25062/94 (1995); *Remer v. Germany*, App. No. 25096/94 (1995); *Nachtmann v. Austria*, App. No. 36773/97 (1998); and *Witzsch v. Germany*, App. No. 41448/98 (1999).

<sup>47</sup> Article 10 of the European Convention of Human Rights stipulates:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No. 5, available at: <<http://conventions.coe.int/treaty/Commun/QueVoulezVous.asp?NT=005&CL=ENG>>.

*X. v. Germany* is one of the earliest cases concerning Holocaust denial that were examined by the Strasbourg Court.<sup>48</sup> The author of the complaint had displayed pamphlets that described the Holocaust as an “unacceptable lie” and a “Zionist swindle” on a notice board located on the fence of his property. A neighbor of Jewish descent whose grandfather had been murdered in Auschwitz filed a civil lawsuit against him. The Court of First Instance ruled that despite the fact that the pamphlets did not directly address the neighbor or his grandfather, they must be considered offensive to all Jewish victims of National Socialism and their surviving relatives. The court instructed Mr. X. to refrain from expressing his beliefs publicly. However, the Court of Appeal ruled that contents of the pamphlets, which denied the facts of the Holocaust, did not insult people of Jewish origin as a whole but only individuals who expressed certain opinions on the extermination of Jews during the Third Reich, opinions which, according to Mr. X., were untrue. The Federal Court of Justice issued a decision reiterating its previous rulings on this issue, according to which in Germany, because of its history, every individual of Jewish descent may feel insulted by attacks on Jews as a group or as a community, regardless of his or her personal experiences during the time of the Nazi regime, and even regardless of whether the person was alive at the time. The Court emphasized that Holocaust denial is not covered by the freedom of speech enshrined in the German Constitution.

The complaint filed by Mr. X. before the Strasbourg Court referred specifically to an alleged violation of Article 10 (freedom of speech) of the Convention, which in his opinion had taken place as a result of the distortion of historical truth by the German nation for political reasons. He also claimed a violation of Article 6 (right to a fair trial) of the Convention, due to the German court’s refusal to order a review of popular Holocaust denial publications and views, which were supposed to serve as evidence in the civil suit.

Concerning the alleged violation of Article 10, the European Commission of Human Rights (which at that time decided on the admissibility of applications) delivered a very significant judgment, finding that:

it was neither arbitrary nor unreasonable to consider the pamphlets displayed by the applicant as a defamatory attack against the Jewish community and against each individual member of this community. By describing the historical fact of the assassination of millions of Jews, a fact which was even admitted by the applicant himself, as a lie and a Zionist swindle, the pamphlets in question not only gave a distorted picture of the relevant historical facts but also contained an attack on the reputation of all those who were described as liars or swindlers, or at least as persons profiting from or interested in such lies or swindles. The Commission considers that the courts rightly identified this as the underlying tendency of the pamphlets in question. Their restriction was therefore not only covered by a legitimate purpose recognised by the Convention (namely the protection of the reputation of others), but could also be considered as necessary in a democratic society. Such a society rests on the principles of tolerance and broadmindedness which the pamphlets in question clearly failed to observe. The protection of these principles may be especially indicated vis-à-vis groups which have historically suffered from discrimination. The fact that collective protec-

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<sup>48</sup> *X. v. Federal Republic of Germany*, App. No. 9235/81 (1982).

tion against defamation is limited to certain specific groups including Jews is based on objective considerations and does not involve any element of, discrimination contrary to Article 14 of the Convention.

Furthermore, in response to the accusation that, by not admitting the negationist materials as evidence, the German courts had violated Article 6 of the Convention, the Commission reiterated that the crime of the Holocaust was a historical fact that was proven beyond any reasonable doubt and did not need to be proven in the courtroom again. The German courts were not required to rule on whether or not the contents of the pamphlets were true but to consider the question concerning their insulting nature. In conclusion, the European Commission stated that the entire complaint of Mr. X. was manifestly ill-founded.

The Strasbourg Court also considered the penalization of Holocaust denial in another interesting context. This complaint concerned the imposition by the authorities of the city of Munich of various duties on the far-right National Democratic Party of Germany (NDP) relating to the organization of a conference, entitled "Germany's future in the shade of political extortion?," where David Irving, a well-known antisemite and Holocaust denier, was to deliver a key lecture.<sup>49</sup> The NDP was obliged to ensure that the crime of the Holocaust would not be denied during the course of the entire conference and to inform participants of the sanctions resulting from incitement to hatred and insulting the memory of the dead. If statements denying the Holocaust were made, the organizers of the conference were obliged to block them or even to discontinue the conference immediately. Because of David Irving's participation in the conference, the risk that statements negating the Holocaust would be made during the course of the conference was regarded as very high. The NDP's complaint regarding the decision of the Munich authorities was rejected in subsequent court proceedings. Ultimately, the German Federal Constitutional Court ruled yet again that Holocaust denial did not fall under the constitutional protection of freedom of speech.

The authors of the application submitted to the Strasbourg Court claimed in particular that:

statements denying the persecution of Jews under the Nazi regime, in particular the denial of the existence of gas chambers were protected by the Convention as statements or opinions relating to contemporary history. In this respect, the applicant organisation maintains that, according to scientific research, the gas chambers in Auschwitz were not authentic.

In the NDP's opinion, the scheduled conference was only meant to discuss the concept of anti-German atrocity propaganda.

The European Commission of Human Rights held that the application was clearly inadmissible and that the intervention of the German authorities had been justified and proportionate. According to the Commission, David Irving's presence had rightly been regarded as a factor that made it highly probable that statements denying the Holocaust would be made and that public order disturbances would occur. The German authorities had been thus right to take steps to prevent this from happening. Referring to Article 17

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<sup>49</sup> *Nationaldemokratische Partei Deutschlands, Bezirksverband Muenchen-Oberbayern v. Germany*, App. No. 25992/94 (1995).

of the Convention, the Commission ruled that statements negating the persecution of millions of Jews by the Nationalist Socialist regime made in the context of a discussion about "anti-German atrocity propaganda," were contrary to the essential values underlying the entire Convention.

Among the numerous complaints submitted to the ECtHR by Holocaust deniers is the one of Roger Garaudy, one of the key leaders of the European negationist movement, who had been fined by the French courts for denying the Holocaust.<sup>50</sup> In the process of considering the legitimacy of said complaint, the Court unambiguously articulated its standpoint regarding attempts to use the Convention by persons who disseminate Holocaust denial. In its decision, the Court firmly asserted that Holocaust denial is:

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.... Such acts are incompatible with democracy and human rights because they infringe the rights of others.

As a result, the complaint was found inadmissible on the basis of Article 17 of the Convention.

The fact that the ECtHR relies on Article 17 of the European Convention on Human Rights in its case law concerning the public dissemination of Holocaust denial is very significant. However, it simultaneously raises several doubts arising from the exceptional character of this provision. According to the case law of the Strasbourg Court, as well as the ideas underlying the Convention itself, Article 17 was designed to serve as a "last resort" in cases where the limitation clauses appended to those provisions of the Convention that grant specific rights and freedoms could no longer be applied or might be deemed insufficient. The essence of the meaning of Article 17 was expressed during the consideration of the complaint in *De Becker v. Belgium*,<sup>51</sup> where the ECtHR emphasized that Article 17 was applicable only to those individuals who posed a threat to the democratic order of the states parties to the Convention.

The fact that the ECtHR regards Holocaust deniers as individuals who pose this kind of threat is a clear sign that the Strasbourg Court understands and is ready to fight the dangers resulting from Holocaust denial in Europe. However, a question arises as to the scope and wording of negationists' statements that are covered by Article 17. Would a similar line of argument apply to the efforts to negate the genocide that took place in Bosnia during the Balkan wars? The fact that the crime of genocide was committed in Bosnia at that time has also been proven beyond all reasonable doubt.<sup>52</sup> Moreover, new provisions penalizing the negation of other genocides are being implemented by individual European states, as was the case with the French law prohibiting the negation of

<sup>50</sup> *Roger Garaudy v. France*, App. No. 65831/01 (2003).

<sup>51</sup> *De Becker v. Belgium*, App. No. 214/56 (1962).

<sup>52</sup> In *Prosecutor v. Radislav Krstic*, Trial Chamber I, Judgment, IT-98-33 (2001), ICTY8, Aug. 2, 2001, the International Criminal Tribunal for the Former Yugoslavia found that genocide had been committed. It was upheld in *Prosecutor v. Radislav Krstic*, Appeals Chamber, Judgment, IT-98-33 (2004), ICTY 7, Apr. 19, 2004, available at: <<http://www.icty.org>>.

the genocide committed by the Turks against the Armenian people.<sup>53</sup> Until now, the ECtHR has not been required to respond to this question, but it is most likely that it will soon face such challenges. Only then will it be possible to assert with certainty that the antisemitic character of Holocaust denial is a decisive factor on which the invocation of Article 17 of the Convention relies in the context of negationism.

## V. UN HUMAN RIGHTS COMMITTEE AND HOLOCAUST DENIAL IN THE EUROPEAN CONTEXT

The question of the freedom of speech of Holocaust deniers in the European context was also examined by an international, quasi-judicial body in the universal human rights protection system, namely the UN Human Rights Committee, after Robert Faurisson, another prominent representative of the European negationist movement, submitted a complaint to the Committee.<sup>54</sup> Shortly after the so-called Gayssot Act, which penalizes Holocaust denial<sup>55</sup>, had been adopted in France, Faurisson gave a press interview in which he stated, *inter alia*, that he did not believe in the existence of a “policy of extermination of Jews” and “magical gas chambers.” Eventually, a French court fined Faurisson.

During the proceedings before of the UN Committee, where Faurisson submitted his complaint, France raised the issue of the admissibility of the communication, arguing that it should be dismissed as inconsistent *ratione materiae* with the provisions of the International Covenant on Civil and Political Rights.<sup>55</sup> It invoked Article 5 of the Covenant, which is similar in character and effect to Article 17 of the European Convention on Human Rights and stipulates that: “Nothing in the present Covenant 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 recognized herein....” It was emphasized that Faurisson’s complaint should be treated in the same manner as similar complaints submitted to the Strasbourg Court and found inadmissible. Article 20 of the Covenant was also invoked. This provision explicitly imposes an obligation on all states parties to prohibit by law any war propaganda, as well as any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence. However, the UN Human Rights Committee did not share the position of the French government and found the complaint admissible as regards the alleged violation of Faurisson’s freedom of speech, guaranteed by Article 19 of the Covenant.

When considering the merits of the communication, the Committee stated that, in certain circumstances, the Gayssot Act might lead to a breach of the Covenant, as it limits freedom of speech too extensively. However, it also emphasized that, in the case of Roger Faurisson, the French courts had managed to eliminate such a risk by carefully analyzing all circumstances of the case. Furthermore, the Committee referred to its

<sup>53</sup> The French bill on Armenian genocide denial is available at: <[http://www.assemblee-nationale.fr/12/dossiers/reconnaissance\\_genocide\\_armenien\\_1915\\_loi\\_2001.asp](http://www.assemblee-nationale.fr/12/dossiers/reconnaissance_genocide_armenien_1915_loi_2001.asp)> (in French). See also reports on a Turkish politician fined over genocide denial by the Swiss courts, available at: <[http://www.swissinfo.ch/eng/Home/Archive/Court\\_confirms\\_verdict\\_against\\_Perincek.html?cid=6324022](http://www.swissinfo.ch/eng/Home/Archive/Court_confirms_verdict_against_Perincek.html?cid=6324022)>.

<sup>54</sup> *Robert Faurisson v. France*, App. No. 550/1993 (1996).

<sup>55</sup> International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, available at: <<http://www2.ohchr.org/english/law/ccpr.htm>>.

General Comment No. 10, which explicitly states that restrictions on the freedom of speech may be necessary in order to protect and ensure the interests of other persons and specific groups as a whole.<sup>56</sup> Restricting the free speech of a Holocaust denier thus served to protect the right of the Jewish community in France to live a life free of fear and antisemitism. The statements made by Faurisson, interpreted in their wider context, stirred antisemitic feelings. As a result, the Committee decided that France did not violate any provisions of the Covenant. However, the Committee's decision was accompanied by a number of individual opinions of the Committee's members, who emphasized their concerns regarding the overly restrictive nature of French legal provisions penalizing Holocaust denial. Although they all agreed with the final conclusion of the Committee, they perceived the Gayssot Act as a potential threat to freedom of speech if used in a context other than the penalization of antisemitism.

One of the most striking elements of the Committee's decision in Faurisson's case was a statement by Professor Thomas Buergenthal, who is currently a judge of the International Court of Justice in the Hague: "As a survivor of the concentration camps of Auschwitz and Sachsenhausen whose father, maternal grandparents and many other family members were killed in the Nazi Holocaust, I have no choice but to reclude myself from participating in the decision of this case." This powerful confession of a Holocaust survivor, forced by the Holocaust denier's demand for protection of his antisemitic views in front of a UN human rights protection body, is indeed a symbolic one.

## VI. CONCLUSIONS

The question of the legitimacy of penalizing Holocaust denial is part of a broader doctrinal dispute in which the views of those who advocate the unrestricted freedom of speech of the negationists clash with the views of those who see the need to use a specific legal barrier in cases of drastic abuse of this freedom. This question is also constantly present within European states. In 2007, the Constitutional Court of Spain found a legal provision penalizing Holocaust denial unconstitutional.<sup>57</sup> It stated that the danger of restricting free public debate within the democratic society of Spain overrides the need to counteract dissemination of Holocaust denial.

Beyond such free speech violation controversies, the fact that European legislators and judges are having serious doubts about this issue is also caused by another disturbing phenomenon, namely the multiplication of so-called "memory laws" in many European states. In recent times, an increasing number of legal provisions penalizing various "historical lies" have been adopted, some of which are far from rational.<sup>58</sup> For example, as already noted above, under the Turkish Penal Code it is forbidden to publicly claim that the Armenian genocide ever took place. In 2005, a world-famous Turkish

<sup>56</sup> General Comment No. 10: Freedom of expression, Art. 19, available at: <<http://www2.ohchr.org/english/bodies/hrc/comments.htm>>.

<sup>57</sup> Constitutional Court of Spain, Judgment No. 235/2007, Nov. 7, 2007, available at: <<http://www.tribunalconstitucional.es/ES/JURISPRUDENCIA/RESTRAD/Paginas/JCC2352007en.aspx>>.

<sup>58</sup> See, e.g., Timothy Garthorn Ash, "This is the moment for Europe to dismantle taboos, not erect them," *The Guardian online*, Oct. 19, 2006, available at: <<http://www.guardian.co.uk/commentisfree/2006/oct/19/comment.france>>; "Editorial: Turkey, Armenia and Denial," *New York Times online*, May 16, 2006, available at: <<http://www.nytimes.com/2006/05/16/opinion/16tue3.html>>.

writer and Noble Prize winner, Orhan Pamuk, was accused of publicly insulting Turkishness after stating in an interview that the murder of Armenians by the Turks was nothing short of genocide.<sup>59</sup> Grotesque as it may seem, at the same time France and Switzerland decided to penalize public denial of the Armenian genocide. The Russian parliament, on the other hand, has recently started drafting a law that could result in penalizing any critique of the actions of the Soviets in World War II—an unprecedented abuse of the truth from the Polish perspective.<sup>60</sup> Which historical claims deserves legal protection? When does justified action against the abuse of historical truth turn into state-sponsored decreeing of an official version of history? These questions remain open, as the answers depend to a large extent on the specific historical context and the individual “memory law.”

And yet, in the case of Holocaust denial, it is not enough to speak of falsifying facts and historical events. It is an unprecedented phenomenon that has spread all over the world for a very specific reason: to incite hatred of one particular nation—the Jewish people. The fact that Holocaust denial is currently part of official state doctrine in Iran is terrifying. This makes it all the more problematic that a fellow at one of America’s most prestigious universities organized a meeting for students with the president of Iran, the very same person who has been saying for years that the Jews invented Holocaust and that Israel should be wiped off the world map.<sup>61</sup>

The antisemitic motivation for spreading Holocaust denial is the most convincing reason for the need to punish negationists for their words. What is debatable is whether or not they should be punished by imprisonment. It is possible that establishing very high financial penalties for denying the Holocaust, combined with an obligation to publicize and publicly announce the judicial ruling in question, could also produce the desired effect. At the same time, we should be wary of the idea that it is only necessary to penalize Holocaust denial. Even though Germany has a special responsibility in this area, denying the murder of millions of Jews has the same objective and the same harrowing effects all over the world.

It is clear that the problem of penalizing Holocaust denial does not merely come down to making arguments for or against such penalization. The very shape of the particular legal provision, including the form and scope of the penal sanction and the manner in which national courts and law enforcement agencies use the available legal instruments, is equally important and controversial. These are the elements that most often determine whether or not the boundary between justified restriction of freedom of speech and excessive penal repression has been crossed.

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<sup>59</sup> The charges against the writer caused an international outcry and led to public reactions by the European Parliament and the European Union. See European Parliament, Question for written answer to the Commission, Subject: Turkish court judgment against Orhan Pamuk, E-003754/2011, Apr. 19, 2011, available at: <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2011-003754+0+DOC+XML+V0//EN&language=EN>>.

<sup>60</sup> Andrew Osborn, “Medvedev Creates History Commission,” *Wall Street Journal online*, May 21, 2009, available at: <<http://online.wsj.com/article/SB124277297306236553.html>>.

<sup>61</sup> Sam Greenberg, “Relating to Iran, in seminar and in person. Jackson Institute fellow arranges private meeting with Iranian president for students in her graduate seminar,” *Yale Daily News*, Sep. 27, 2010, available at: <<http://www.yaledailynews.com/news/2010/sep/27/relating-to-iran-in-seminar-and-in-person>>.