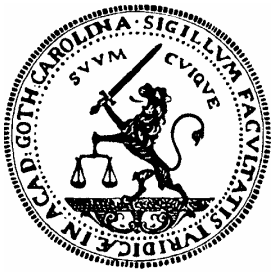

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Telling History

An Effective Means of Safeguarding Human Rights?

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Contents

Preface

During a visit to Armenia, September 30, 2006, Jacques Chirac, then President of the French Republic, clearly expressed his view that before being allowed to join the European Union, Turkey should acknowledge its past, and specifically, the Armenian genocide committed in 1915-1916 by the Ottoman Empire. A few days later was launched the "Year of Armenia in France" (*Année de l'Arménie en France*.) From October 2006 to July 2007, a series of events centred on Armenian culture, traditions and history would be organised in France. In this context, in October 2006, the French National Assembly (lower house of the Parliament) discussed a bill first deposited before it by the Socialist group in May 2006. The proposed law would establish as an offence the denial of the genocidal nature of the events that took in Armenia in 1915-1916. Although the French government did not support the motion, deputies adopted the bill which prompted angry reactions in Turkey but also in France, among historians and lawyers in particular.

The bill and its adoption by the National Assembly faced many criticisms. In France, they revived the traditional debate which arises each time the legislator enters the field of History. An example of such "memorial law" is the legal recognition, in 2001, of the 1915 Armenian genocide. The controversial 2006 proposition aimed to render effective the 2001 merely declarative act by punishing the denial of the previously recognised Armenian genocide. A number of intellectuals, especially historians and lawyers, opposed what they considered a new undue intervention of the legislator in History, by invoking mainly freedom of expression and freedom to research, allegedly a component of the former. Already in May 2006, when the text was introduced in the National Assembly, the then French Ministry of Foreign Affairs, Philippe Douste-Blazy, expressed his concerns about the bill. He contended that the adoption of such law would jeopardise the patient and constructive efforts made by historians in both Armenia and Turkey, and eventually compromise the reconciliation between the two countries. The law could moreover be detrimental to French interests in Turkey and in the region.[1] Similar concerns were again phrased after the National Assembly voted on the text. French newspaper *Le Monde* thus described the bill as counterproductive, whereas Turkish academics and journalists who had succeeded in initiating a debate on the genocide feared the law would undermine their achievements by reviving nationalism in Turkey.

The discussion prompted further angry reactions in Turkey, both popular and governmental. Demonstrations took place outside the French consulate in Istanbul and newspapers severely criticised France, ironically recalling its reputation as the home of human rights and justice. Turkey's Foreign

[1] Assemblée nationale, compte-rendu des débats, 1ère séance du jeudi 18 mai 2006, 225ème séance de la session ordinaire 2005-2006.

Minister, Abdullah Gul, and Minister of Economy, Ali Babacan (also chief negotiator in EU membership talks), warned the bill would harm the relations between France and Turkey, including commercial relations[2].

Moreover, detractors of the law highlighted the political aspect of the issue to both explain the introduction of the bill, and oppose its enactment. The vote, scheduled six months ahead of French presidential elections, in a country where the majority of the population is against the entry of Turkey in the European Union, and where 400 000 persons of Armenian descent live (the largest community in Europe), has been denounced as electioneering. In December 2004, M. Chirac advocating for the addition of the official recognition of the Armenian genocide as a criterion for the admission of Turkey in the EU, already stressed the importance of the Armenian community in France and its contributions to the cultural, technical and scientific fields.[3] In the minds of commentators, this population constituted an important political lobby which was being taken into account, a few months before presidential elections.

Be it due to the fear of commercial reprisals, of the adoption by Turkey of a 'counter-law' recognising an "Algerian genocide" carried out by French colonial forces in 1945, to the fact that the European Parliament dropped the clause that would have made the recognition of the mass killing of Armenians in Ottoman Turkey as genocide a pre-condition for Turkey's membership in the EU, or to the pressure of academics and politicians, in France and abroad, the Senate, more than a year after the vote in the National Assembly, still has not discussed the text. Some commentators argue that, given the procedure for placing items on the Senate's agenda and the role of the Government in it, it is actually unlikely the bill will ever be discussed by the higher chamber. Furthermore, should the bill eventually pass the French Senate, it would still have to be promulgated by the President of the Republic who has the power to suspend his decision by sending the text back to the Parliament for new deliberations, or by submitting it to the Constitutional Council. It should be borne in mind that the President in office (2007-2012), Nicolas Sarkozy, Minister of Interior of Chirac government at the time the bill was discussed, then expressed his doubts as to the adoption of such law.

If the French proposal seems to have been set aside for the time being, the incident nevertheless revived discussions as to the opportunity and legality of an intervention of lawmakers in the field of History. Such debate had already divided commentators, in the 1990s especially, when a number of European countries criminalised the denial of the National-Socialist crimes

[2] The Turkish Minister of Economy, Ali Babacan, thus did not exclude a boycott of French products might occur in Turkey, on the population's own initiative. Alice Pouyat (Reuters), "Génocide arménien: la loi contestée", *L'Express*, October 13, 2006, available at: <http://www.lexpress.fr/info/quotidien/actu.asp?id=6396>. *See* also: "Turkey firm on 'genocide' bill", *Turkish Daily News*, September 30, 2006.

[3] *See* the Press conference given by Jacques Chirac after the European Council of 17 December 2004 in Brussels, available at: <http://www.ena.lu/europe/1998-2007-unification-europe/conference-presse-jacques-chirac-bruxelles-2004.htm>.

committed during the Second World War. Beside the discussions around the French proposal, a number of events which occurred in 2006-2007 clearly indicate that a consensus is yet to be reached on the issue of a criminalisation of negationism. In the Netherlands, in the run up to the elections, the two leading political parties have expelled from their lists Turkish-Dutch members – prospective members of Parliament – because they refused to acknowledge the Armenian genocide.[4] In Switzerland, Turkish politician Doğu Perincek has been convicted for having publicly denied the Armenian genocide during a conference in Lausanne,[5] although stating the contrary would have made him liable of prosecutions in Turkey.[6] Lastly, in Spain, in November 2007, the Constitutional Tribunal stated the incompatibility of the criminalisation of negationism with Spanish Constitution and in particular, with the right to freedom of expression. Those incidents illustrate contemporary diverging trends.

A survey of relevant national and international law, of the origins of the criminalisation of negationism, and of the discussions surrounding it appeared as an effective means of acquiring a better understanding of the issue. Through the readings and discussions this research led to, it appeared that freedom of expression is only one of the aspects of the criminalisation of negationism. This sensitive question, which touches upon history and national collective memory, also relates to the protection of the rights and reputation of others as well as to the fight against racism, and closely interacts with politics.

Before elaborating on the subject matter of this study, I wish to thank all the persons who have contributed to this work, through valuable – and valued – opinions and advice, fruitful discussions, and patient guidance, in Sweden, France, Haiti or Cambodia.

[4] Andy Clark, "Genocide denial causes Dutch election upset", *Radio Netherlands Worldwide*, 27 September 2006.

[5] Doğu Perincek was sanctioned in first instance, 9 March 2007; the conviction was upheld by the Vaud District Supreme Court, June 18, 2007 and lastly upheld by the Federal Supreme Court, December 12, 2007 (no. 6B_398/2007/rod.)

[6] The complexity of the criminalisation of negationism is evident in this case. Persons stating that the Armenian genocide did take place can be prosecuted in Turkey under criminal code Article 301 (journalist Hrant Dink was prosecuted twice on this ground, before his assassination in 2007.) Doğu Perincek could thus either deny the genocide and be prosecuted under Swiss law, or acknowledge it, and be liable to prosecution under Turkish law.

Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECoHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
ECRI	European Commission against Racism and Intolerance
EU	European Union
HRC	Human Rights Committee
ICC	International Criminal Court
ICJ	International Court of Justice
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
UDHR	Universal Declaration of Human Rights
UNGA	United Nations General Assembly

Introduction

"Everyone has the right to freedom of opinion and expression."[7] The principle set forth in the Universal Declaration of Human Rights (UDHR) is echoed by a number of conventions at the global and regional levels, such as the ICCPR[8] (Article 19), the ECHR[9] (Article 10), the ACHR[10] (Article 13), and the ACHPR[11] (Article 9(2)), as well as by the constitutions of most countries.[12]

However, although the right to freedom of expression is considered one of the fundamental principles of a free and democratic society,[13] and despite the wording of Article 19 of the UDHR which seems to confer on the right an absolute nature, Article 29 of the Declaration allows restrictions to be placed upon the right. Comparably, limitations are to be found in the various national, regional, and global instruments protecting freedom of expression.

The possibility given to States to place restrictions upon this right flows from the acknowledgement, by the drafters of the above-mentioned texts, of the potentially damageable repercussions on others of the use – or abuse – by someone of his or her right to freedom of expression. The ICCPR and the ECHR likewise thus first guarantee everyone's right to freedom of expression before limiting its exercise in that it "carries with it special duties and responsibilities."[14] Those limitations being exceptions to the fundamental principle of freedom of expression, states are not completely free to act at their own discretion when restricting the said right. Under both

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[7] Universal Declaration of Human Rights (hereinafter UDHR) of 10 December 1948, art.19.
[8] International Covenant on Civil and political Rights, 16 December 1966 (entered into force 23 March 1976.)
[9] European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov 1950 (entered into force: 3 Sept 1953.)
[10] American Convention on Human Rights, 22 Nov 1969 (entered into force 18 July 1978.)
[11] African Charter on Human and Peoples' Rights, 27 June 1981 (entered into force Oct. 21, 1986.)
[12] All members of the European Union are parties to the European Convention on Human Rights and as such, they are bound to implement Article 10 of the Convention; they all moreover have varying constitutional and legal protections for freedom of expression at the national level. Similar protection can be found in the constitution of most African countries as well as in other non-European countries, such as: Canada (section 2(b) of the Canadian Charter of Rights and Freedoms); United States of America (First Amendment of the Constitution); Turkey (Constitution Article 26); India (Constitution Article 19); People's Republic of China (Constitution Article 35); and South Korea (Constitution Article 21) for example.
[13] *See* for instance the United Nations General Assembly (UNGA): "Freedom of information is a fundamental human right and ... the touchstone of all of the freedoms to which the United Nations is consecrated" (G.A. Resolution 59(I), 14 December 1946); and the European Court of Human Rights (ECtHR): "Freedom of expression constitutes one of the essential foundations of such [democratic] society, one of the basic conditions for its progress and for the development of every man" (*Handyside v. United Kingdom*, para. 49, judgement of 7 December 1976, *Publications of the European Court of Human Rights*, Series 1, no.24.)
[14] ICCPR, art.19 (3) and ECHR, art.10 (2).

conventions, restrictions must fulfil a set of criteria in order for them to be lawful under international law: they must be prescribed by law, and necessary for, among others, the protection of the rights and reputation of others.[15] Accordingly, the right to disseminate an opinion which may harm the reputation or rights of others can be restricted. In that sense, most countries have adopted laws prohibiting defamation, insults, and libel as well as incitement to violence.

In France, the relevant legislation is the Freedom of the Press Act, adopted in 1881 and amended since. It not only condemns public speech or writings that are defamatory or incite to racial or religious hatred (hate speech), but also, since the adoption of the Gayssot Act in 1990, makes it a punishable offence to contest the occurrence of any crime against humanity committed during the Second World War by persons acting in the interest of the European Axis countries.[16] The 1990 Act created the crime[17] of "*négationnisme*" (negationism[18]), to be understood as an effort of revising history by denying the occurrence of a clearly established historical fact, that is, in the context of the Gayssot Act, the Holocaust. According to the then Minister of Justice, Pierre Arpaillange, advocating for the bill during the Parliamentary debates, denying the occurrence of the Holocaust is an expression of racism and the principal vehicle for anti-Semitism.[19] It is in that sense that the French Parliament voted in favour of the bill which was in fact entitled "proposal for a law aiming to repress all racist, anti-Semitic, or xenophobic act."[20]

As formulated by Schmidt and Vojtovic, if revisionist theories, disseminated via various forms of expression and media, are expressed in such a way as to exhibit elements of racial discrimination or hatred, or amount to incitement to racial hatred or acts of violence against those individuals to whom they are addressed, their writings may put them in direct conflict with domestic and international legal norms.[21] Revising history would thus be lawful inasmuch as it is not motivated by racial discrimination or hatred. It is thus only the abuse, by authors, of their right to freedom of expression that the prohibition of genocide denial aims to sanction. The nuance

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[15] Idem, and in particular: ICCPR, art.19 (3), Para. a.

[16] Loi du 29 juillet 1881, *Loi sur la liberté de la presse* (JORF 20 juillet 1881, p.4201), Article 24*bis* modifié par la loi Gayssot (*Loi tendant à réprimer tout acte raciste, antisémite ou xénophobe*, Loi n°90-615 du 13 juillet 1990 (JORF 14 juillet 1990, p.8333.)

[17] Under French criminal law (Penal Code art. 111-2), infractions are grouped by severity in '*contraventions*' (petty offences), '*délits*' (crimes, or misdemeanours), and '*crimes*' (felonies). 'Négationisme' is a '*délit' (délit de presse)* under French law (Freedom of the Press Act, Art.24bis.) The English meaning of the word 'crime' is therefore not to be mistaken here for the French one.

[18] The term will be further explained below.

[19] JO, 3 mai 1990, Débats, Assemblée nationale, p.905 ("*la négation de l'Holocauste [...] n'est, aujourd'hui, qu'une expression du racisme et le principal vecteur de l'antisémitisme*.")

[20] *Proposition de loi n°43 tendant à réprimer tout acte raciste, antisémite ou xénophobe.*

[21] Markus G. Schmidt and Raphaëlle L. Vojtovic, "Holocaust Denial and Freedom of Expression" in *The Jurisprudence of Human Rights Law: A Comparative Interpretive Approach*, edited by Theodore S. Orlin, Allan Rosas and Martin Scheinin. Institute for Human Rights, Åbo Akademi University.

highlighted between lawful and unlawful attempts to revise history is reflected in the wording chosen by part of the doctrine and in the following. For the purpose of this thesis, revisionism, or 'historical revisionism', is to be understood as the lawful attempt by historians to revise history, where, for instance, new facts or pieces of evidence are unveiled. It is generally accepted as part of historical work.[22] Negationism on the other hand, which originally corresponded to the denial of the Holocaust only, has been extended in doctrine and will be used here to designate the revision, often on grounds of racist motives, of clearly established historical facts such as the Holocaust, but not limited to it. Such revision is viewed as an immoral and abusive use of the right to freedom of expression.[23]

The first law sanctioning negationism as such was adopted by Israel, in 1986. In the decay following the adoption of the French Act, mainly between 1994[24] and 2002, Holocaust denial was similarly made illegal in many other European countries - the ones most directly affected by the genocide of minority groups (predominantly Jews) during the Second World War.[25] Some countries further chose to extend the prohibition of negationism to the denial of other crimes, be they genocide and crimes against humanity in general, or, more specifically, Communist crimes.

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[22] On the distinction between revisionism and negationism, a reference can be made to French case law: "the term 'revisionist' is not *per se* defamatory, but it becomes so when it can only be interpreted as being synonymous of 'negationist'; such an insinuation then constitutes a specific fact which affects the honour and consideration of the complainant…" (Paris Court of Appeal, 16 December 1993, unpublished.) The court thus draws a distinction between negationism and revisionism pursuant to which the former only is reprehensible.

[23] Negationist authors therefore often try to defend themselves by alleging that their work is in fact revisionist. *See* for example: Institute of Jewish Affairs in association with the World Jewish Congress, *Antisemitism World Report, 1993* (London: Tony Lerman and Howard Spier (general eds.), 1993): "[d]enial of the Holocaust – misleadingly referred to as 'revisionism', which lends it a legitimacy it does not deserve – remained an important common denominator for both overtly and covertly anti-Semitic groups and individuals."

[24] In 1985, the German Criminal Code (StGB) was amended to sanction, in its Article 194, insults to the memory of victims of Nationalsocialism. Some negationist authors were sanctioned pursuant to this provision. However, the provision was controversial and interpreted in different ways by the Federal Supreme Court (Bundesgerichtshof) and the Constitutional Court (Bundesverfassungsgerichtshof.) Therefore, in May 1994, the Bundestag adopted a law prohibiting explicitly Holocaust denial (StGB Article 130,3.)

[25] *See* Supplement B, Tables 1 and 2. The legal prohibition of negationism exists in: Austria (*Verbotsgesetz*, Art.1§3h: National Socialism Prohibition Law, 1947, amended in 1992 to sanction negationism), Belgium (23 March 1995: *Loi tendant à réprimer la négation, la minimisation, la justification ou l'approbation du genocide commis pas le regime national-socialiste allemande pendant la seconde guerre mondiale*), Czech Republic and Slovakia (Law Against Support and Dissemination of Movements Oppressing Human Rights and Freedoms, 2001), Germany (*Strafgesetzbuch – StGB*, Criminal Code as amended in 1994, Section 130(3)), Luxemburg (Penal Code, art.457-3, introduced in 1997), Poland (1999 Act of the Institute of National Remembrance, art.55), Portugal (Penal Code, art.240(2)), Romania (2002 Emergency Ordinance no.31), Spain (Penal Code Art.607(2) introduced in 1995 but declared unconstitutional in November 2007), and Switzerland (Penal Code, art. 261bis, introduced in 1993, in force since 1995.) The adoption of similar laws have been discussed but rejected in the UK and Hungary. ECRI also urged the Danish government to forbid negationism; ECRI recommendation was however not followed by Denmark (ECRI, Third report on Denmark, 16 December 2005, CRI(2006)18, para.86.)

Typically, the rationale of such law, which restricts freedom of expression, is the protection of the memory and honour of victims and family of victims of past crimes, against negationist attempts to dispute or deny the occurrence of those crimes. For that reason, such legislation usually fits in a broader framework of laws and policies aimed at combating racism. By entering the field of History and sanctioning whoever contests certain clearly established historical facts, the legislator aims to fight racist discrimination and protect the "rights and reputation of others." However clear and legitimate the motive, it is nevertheless questionable whether legislating on History is, or not, an effective means of safeguarding human rights.

In view of formulating an answer to the above question, this thesis will elaborate on five successive points. In the first section, a comparative study of relevant national laws will highlight the similarities and differences between them. A survey of the theoretical and teleological backgrounds of the adoption of those laws reveals that, albeit controversial, such legislation can be, to some extent, justified. Leaving the national level, the discussion in the second section elevates to the international level. Individuals willing to contest their convictions for genocide denial under their domestic laws have indeed turned to judicial and quasi-judicial instances, at the global or regional level – in the context of negationism, the regional instances concerned are those of the Council of Europe. The European Court of Human Rights, the European Commission of Human Rights and the Human Rights Committee all have declared that, in the circumstances of the cases brought before them, State interferences with the right to freedom of expression were lawful since the impugned negationist statements amounted to a punishable form of racism. The section will elaborate on the reasoning and motives underlying those decisions. Although the relevant decisions at the European and global level all found the restrictions on negationist speech to be compatible with the ECHR and the ICCPR respectively, they also stressed that the lawfulness only concerned the impugned restriction, but not the domestic legislation pursuant to which the restrictive measure had been adopted. Therefore, and despite the rulings of the ECtHR, ECoHR and HRC, the debate surrounding the question of the criminalisation of negationism is not over. Doubts as to its opportunity and legality are indeed still formulated. The third section will give an overview of the various arguments raised both in favour and against the criminalisation of negationism. Those diverse points of views provide important input in giving a broader picture of the question. The fourth part seeks to assess the legality and opportunity of national legislation against negationism in view of the mechanisms available at the regional and global levels, and reveals that no state obligation to establish negationism as an offence can be deduced from international law. The lack of uniformity between pertinent national laws, the absence of an explicit provision of binding international law on the criminalisation of negationism, and the inherent sensitivity and politicisation of the issue lead to the conclusion that the establishment of

negationism as an offence *per se* might not be an appropriate nor effective means of safeguarding human rights.

I. Criminalisation of negationism at the national level

Holocaust denial is illegal in a number of European countries;[26] in fact, among the twenty-seven Member State of the European Union, twelve have enacted legislation to this end. Those States consider that the right to freedom of expression can be restricted in order to protect the memory and honour of the victims and families of victims of the Holocaust, against attempts of historical revisionism aimed at disputing or denying the occurrence of this genocide. In other European countries, a different understanding of the right to freedom of expression prevails where most - if not all - ideas and opinions are protected, and public authorities are neither to sanction communications made public, not to interfere in their contents. Those two different approaches to the right to freedom of expression can be summarised as reflecting either what has been termed the "American libertarian and absolutist conception of the freedom" or the conception that prevails in international law and in most national constitutions: "a liberal democratic and balanced conception of the freedom."[27]
The nuance between the two conceptions of the right to freedom of expression was analysed in the following terms by Luc Frieden – President in office of the Justice and Home Affairs Council within the Council of the European Union – after no agreement was reached on the Framework Decision on Combating Racism and Xenophobia:

> In some countries (…) freedom of expression knows almost no boundaries, certainly no boundaries imposed through criminal law sanctions. For others, freedom of expression does have limits. Those limits that freely elected parliaments put into the criminal code, where the interests of others are in conflict with some fundamental human rights.

[26] Such legislation is found in the European countries which appear to have been the most directly affected by the genocide of minority groups and predominantly of Jews, during the Second World War: Austria, Belgium, Czech Republic, France, Germany, Lithuania, Luxemburg, Poland, Portugal, Romania, Slovakia, Spain, and Switzerland. Israel also adopted a law prohibiting Holocaust denial.
[27] Kevin Boyle and Cherian George, Preliminary Paper to the 8th Informal ASEM Seminar on Human Rights: "Freedom of Expression", 2007 (unpublished), p.3. This distinction between the two traditional conceptions of the right to freedom of expression is often mentioned in doctrine. Patrick Wachsmann for instance refers to the United States absolutist conception of freedom of expression ("*[les] Etats Unis d'Amérique, pays dans lequel cet idéal [la conception absolutiste de la liberté d'expression] trouve certainement son écho le plus net*") in Patrick Wachsmann, "Liberté d'expression et négationnisme", *Rev. trim. dr. h.*, numéro special (46), 2001, p.588. The United States absolutist approach is already obvious in the First Amendment to the American Constitution which states: "Congress shall make no law (…) abridging the freedom of speech, or of the press."

It is precisely in order to protect the interests and rights of others that various countries have adopted legislation criminalising negationism. These laws vary on several points, reflecting to some extent the countries different approaches to the right to freedom of expression, their legal cultures, their historical backgrounds and their political situations.

A. A comparative approach

By comparing several countries, some similarities and nuances can be identified among domestic legal acts prohibiting negationism, and their interpretations by national courts.
A common feature of all laws is the precondition that the statements be made public. Despite this similarity, national laws differ on several points; four main elements can be identified. Firstly, national laws vary on the issue of standing: the possibility to initiate proceedings may belong to the alleged victim of negationist statements, to associations of victims, to public authorities or to any of them cumulatively. Secondly, the prescription of such crime varies from one country to another depending on the field of law - civil, criminal or more specifically press law - the legislation is deemed to be part of. The wording of the various domestic laws further varies as regards the criminalised expression itself, what it amounts to or consists of, what the object matter of the negation is and which terms the theory is phrased. It can consist for example in the denial or belittling, of the Holocaust itself or of the gas chambers in particular. Moreover, whereas some countries condemn negationism only when it touches upon the Holocaust, some adopt a broader definition of the crime and refer to genocides or crimes against humanity in general. This latter nuance is of particular importance for the purpose of the present study, as it will further discuss the legality and suitability of event-specific laws. Lastly, some legislation or their interpretation in case law set additional preconditions for the sanction of negationism.

1. Condition of publicity

To prohibit negationism amounts to restricting the freedom of authors – historians mainly – to express a certain type of views regarding events such as the Holocaust. Such a prohibition is in that sense a limit set by states to the right to freedom of expression, i.e. to the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, and through any media[28]. The criterion of publicity of the information or ideas expressed, present in the definition of the right to freedom of expression, is thus a constituent element of the crime of negationism. Accordingly, the various domestic laws examined similarly spell out the circumstances in which the condition of publicity is deemed to be fulfilled. The format of the

[28] ICCPR, art.19.

message and its recipients, be they intended or not, are among the elements the legal provisions take into consideration.

If Spanish law refers broadly to diffusion through "any medium whatsoever",[29] in Austria, Belgium, Czech Republic and Slovakia, France, Germany Luxembourg and Switzerland, a provision of the law lists those media. The list is similar in all five countries – though more or less detailed – and covers both oral and written forms of expression. The Belgian Penal Code can be cited as an example of such a list; it refers to assertions made:

> … either in public meetings or places; or in the presence of several persons, in a private place accessible to a number of people who are entitled to assemble there or visit; or in any place in the presence of the offended person and in front of witnesses; or through displayed, distributed, sold, offered for sale or publicly exhibited documents, printed or not, images or emblems; or, finally, through documents which have not been made public but which have been addressed or communicated to several persons.[30]

National laws view the crime of negationism as constituted regardless of the medium chosen to express negationist statements, and of the number of persons reached by those statements. 'Publicity' thus is given a broad understanding in the various national laws. This is particularly true of Switzerland and Germany. The means of commission of the offence are broadly defined in Switzerland where participation in the diffusion of negationist writings is regarded in case law as contribution to the genocide denial.[31] In Germany, with respect to writings specifically, which incite to hatred against segments of the population or against a nationality, race, or religion, the pertinent legislation punishes not only their distribution, public display, and presentation, but also, among others, their production, storing, importation, and exportation, as well as the dissemination of a presentation of their content by radio.[32] German and Swiss laws thus distinguish themselves from other similar legislation: as said, it is not merely the publication, be it broadly understood, that is prohibited, but also, any contribution to it.

When comparing domestic legal provisions on negationism with the definition of the right to freedom of expression as set forth in the ICCPR, one can observe that, among the freedoms included in the definition, most national laws only restrict one of them: the right to impart information. German law however expressly addresses the three freedoms constitutive of

[29] Spanish Penal Code, art.607.2 (approximate translation from Spanish.)
[30] Belgian Penal Code, art.444 (approximate translation from French.)
[31] ATF 127 IV 203, 206. The case concerned the publication of a notice advertising for the impugned negationist writing; the court found the participation in the diffusion of the writings was in itself constitutive of contribution to negationism, even though no sale was concluded subsequent to the publication of the advertisement.
[32] German Criminal Code, S.130(2).

the freedom of expression. By condemning the diffusion as well as the production, storing, and importation of negationist documents, German law indeed restricts the right to impart information, as well as the right to seek and receive it. Swiss law sanctioning participation in the diffusion of negationist statements as contribution to genocide denial might lead to sanctioning similar conducts as German law. This feature of both laws reflects the will of the German and Swiss legislators to effectively thwart the diffusion of negationist theories by "en amont". Measures adopted pursuant to such legislation being infringements on the right to freedom of expression, the law should however not be too frequently applied. In both countries, the legislation in fact include requirements which can be seen as correctives to the otherwise broad scope of the limitation to freedom of expression. Those additional requirements will be further discussed below.

2. The initiative of proceedings

Among the countries examined, the right to initiate proceedings in cases of alleged negationism belongs to different persons or authorities. The time limits in which such proceedings shall be initiated likewise vary. Regarding both the initiative of proceedings and the prescriptive period, the French and Belgian solutions can be singled out. Comparable between the two countries – the *travaux préparatoires* of the Belgian law show that the Members of Belgium Parliament extensively referred to the French provision– those approaches differ from the ones commonly adopted in other legal systems. In fact, there seems to be a divide between French and German legal traditions. This section will thus give a more detailed examination of the French and Belgian laws before it presents the situation in other countries.

Whether the right to initiate proceedings belongs exclusively to the public prosecutor or is granted to victims or associations too is of great importance as it helps define the "effective perimeter of the law."[33] The fact that the prosecuting authority does not have the monopoly of the initiative of proceedings, but instead shares it with the victim or, in particular, with associations of victims, is in fact a good indicator of the legislator's will to ensure negationist speech is sanctioned in reality.[34] However, granting a right of standing to private associations is a distinctive feature of the Belgian and French legal systems only. In France and Belgium, the public prosecutor as well as the victim itself and certain associations – aimed at protecting the victims' moral interests or dedicated to opposing racism – are entitled to bring legal proceedings against alleged negationists.[35] Victims

[33] Martine Valdès-Boulouque, "Les législations en vigueur en Europe" in *La lutte contre le négationisme, Bilan et perspective de la loi du 13 juillet 1990* (La documentation française), p.73.
[34] Ibid.
[35] In France are concerned associations which have been registered for 5 years or more and whose aim as indicated in their statutes is to defend the moral interests and honour of deportees and of the *Résistance* (LOI du 29 juillet 1881, *Loi sur la liberté de la presse*, art.48-2.) Same provisions are set in Belgian law which further grants the right to the *Centre pour l'égalité des chances et la lutte contre le racisme* (Loi du 23 mars 1995, *Loi*

and associations then act as plaintiffs claiming damages in criminal cases. On the other hand, Austria, Germany and Luxemburg for instance only allow the public prosecutor to do so.

In France, the prohibition of negationism is not part of criminal law but of the law on the freedom of the press as amended in 1990.[36] Whereas in ordinary criminal procedure law, the prescription would have been of 3 years, in keeping with the provisions of the law on the freedom of the press, complaints against alleged negationists could at first only be lodged within a period of 3 months after publication of the negationist statements. The short prescription period of three months was intended to form part of the protective regime granted to the media. This provision however adversely led to granting to racist expressions an extraordinary protection. Following an ECRI recommendation, in 2004, French criminal legislation aimed at sanctioning racist acts and statements has been reinforced. In particular, as concerns racist statements, the law of 9 March 2004 extended the prescription period for prosecuting the offence negationism, among other racist offences, from three months to one year.

In Belgium, pursuant to Constitution Article 150, crimes committed by means of publication of offending opinions (*délits de presses*) are in principle brought before the *Cour d'assises*, the criminal court competent to deal with serious crimes. It is the only Belgian court with a jury. However, such a procedure appeared to be inadequate, especially in the situation of racist allegations; in particular, it has been criticised as being too complex[37] and leading to too much publicity.[38] Commentators for instance denounced the quasi-impossibility of prosecuting negationist authors.[39] The Belgian Constitution was subsequently amended, so that those 'press offences' of a racist nature, including negationism, be brought before a *tribunal correctionnel*, criminal court of first instance, i.e. with no jury.[40]

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tendant à réprimer la négation, la minimisation, la justification ou l'approbation du génocide commis par le régime national-socialiste allemand pendant la seconde guerre mondiale, art.4.)

[36] Loi du 29 juillet 1881, Loi sur la liberté de la presse, Article 24*bis* modifié par la loi Gayssot (Loi n°90-615 du 13 juillet 1990 art. 9, JORF 14 juillet 1990.)

[37] European Commission against Racism and Intolerance (ECRI), Report on Belgium, September 1997, CRI (97) 49, 3. The ECRI finds that the procedure followed by Assize Courts, dealing with press offences, is too complex and suggests the pertinent Constitution provision (Article 150) be amended.

[38] Those criticisms are the reasons invoked for explaining that only one case had been brought before the court.

[39] Martine Valdès-Boulouque, "Les législations en vigueur en Europe" in *La lutte contre le négationisme, Bilan et perspective de la loi du 13 juillet 1990* (La documentation française), p.73.

[40] On the justifications for the amendment, *see* developments presented before the Senate prior to the adoption of the modifying provision; document available at: <http://www.senate.be/www/?MIval=/publications/viewPubDoc&TID=16780816&LANG=fr>.

In the other European countries surveyed, negationism is not a press offence but an ordinary offence. The applicable prescription period is therefore defined and regulated by ordinary criminal law procedure.[41]

3. Proscribed lines of argumentation

Among the national laws examined, the French one presents a distinctive feature. Indeed, whereas in Austria, Belgium, Germany, Luxemburg, Spain and Switzerland, a provision of the law applies to any act of denying, belittling, or justifying the genocide, under the French Gayssot Act, only the *contestation*, the questioning of the Holocaust is an offence. The scope of French legislation thus appears to be the narrowest.

However, this limited scope, as deduced from the wording of the law, has been extended in case law. The highest court in the French judiciary (*Cour de Cassation*), considered that proscribing the fact to deny the Holocaust actually encompassed the prohibition of the trivialisation, pejoration, minimisation, and questioning of the historical facts at stake. The court found that questioning the number of victims and cause of their deaths was constitutive of the offence of negationism, provided it had been done in bad faith.[42] The term of 'contestation' chosen by the legislator, though, at first, it seems to restrict the scope of the French criminal provision, actually appears to encompass the same conducts as other national laws. The court further interpreted the relevant provision as prohibiting the discreditation of institutions and evidence involved in the Nuremberg trials, and the disputation of the meaning of 'final solution.'[43]

As mentioned, the majority of country legislation addresses the justification of crimes against humanity under their provision on negationism. In France however, a different approach prevails whereby such behaviour constitutes an offence *per se* separate from negationism. There, the justification of the said crimes or the attempt to justify them falls under the prohibition of "apologia for crimes against humanity and war crimes."[44] It flows from this observation that, although France chose to deal with negationism and apologia in two separate provisions, those two behaviours are nevertheless criminalised in French law as it is in the other national laws referred to. To the author's knowledge, the legitimacy of criminalising the justification of crimes against humanity has not been questioned. This report hence focuses on negationism as defined, under French law, in article 24*bis* of the Gayssot

[41] Martine Valdès-Boulouque, "Les législations en vigueur en Europe" in *La lutte contre le négationisme, Bilan et perspective de la loi du 13 juillet 1990* (La documentation française), p.74.
[42] Cass. Crim. 12 September 2000, n° 98-88.204, *Garaudy Roger* and Cass. Crim., 17 June 1997, n°94-85126, on the 'outrageous undervaluation' (*minoration outrancière*) in bad faith of the number of victims.
[43] Ibid.
[44] 1881 Freedom of the Press Act, art.24(3)

Act, as it is of the two the most controversial restriction to freedom of expression.

As shown, the laws – together with their jurisprudential interpretations – are similar in the various countries under consideration. National laws can however differ on two main aspects: the historical facts whose denial is proscribed, and the possible existence of additional requirements.

4. The contested historical facts

In states where negationism is an offence, the historical facts whose occurrence shall not be questioned are crimes against humanity and/or genocides and/or war crimes, be they defined pursuant to to domestic law[45] or to international law[46]. Among those states, the majority (Austria, Belgium, France, Germany, and Romania) chose to address specifically the denial of crimes committed during the Second World War under the rule of the National-Socialist regime. Czech Republic proscribes the denial of those crimes and of Communist crimes. In Poland, the proscription extends to all crimes against humanity, genocide or war crimes committed between 1939 and 1989. Lastly, Switzerland, and, until recently, Spain[47], prohibit the denial of any genocide, whereas in Luxembourg and Portugal, the relevant provision also includes crimes against peace or humanity, and war crimes.

In Austria, this restriction *ratione materiae* follows the legislator's choice to integrate the sanction of negationism in the 1945 Constitutional Law on the prohibition of the National-Socialist Party.[48] In Germany, the offence of negationism is one of the crimes against public order punishable under the Criminal Code. The relevant provision of the code refers to "acts committed under the rule of National Socialism."[49] Similarly, in France, Holocaust denial is specifically targeted, yet indirectly: the undeniable historical facts are defined by reference to the statute of the Nuremberg international military tribunal.[50]

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[45] Section 130(3) of the German Criminal Code refers to the definition of genocide laid down in Section 220a of the same code.

[46] The Belgian law on negationism (Loi du 23 mars 1995, *Loi tendant à réprimer la négation, la minimisation, la justification ou l'approbation du génocide commis par le régime national-socialiste allemand pendant la seconde guerre mondiale*) refers to Article 2 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) for a definition of genocide.

[47] In November 2007, Spain Constitutional Tribunal found the prohibition to deny genocides to be incompatible with the constitutional protection of the right to freedom of expression. The provision has therefore been abrogated. El Pleno del Tribunal Constitucional, 8 November 2007, cuestión de inconstitucionalidad núm.5152-2000.

[48] Verbotsgesetz 1947 (National Socialism Prohibition Act), BGBI.Nr. 13/1945, amended in 1992, BGBI.Nr. 148/1992, § 3h.

[49] Criminal Code (Strafgesetzbuch), Section 130(3).

[50] Loi Gayssot, incorporated into the 1881 Freedom of the Press Act, art.24*bis*, referring to Art.6 of the Statute of the International Military Tribunal annexed to the London agreement of 8 August 1945.

The Luxembourgian, Portuguese, Spanish[51] and Swiss penal codes on the other hand do not limit the sanction of negationism to a given historical event. The relevant Swiss provision addresses revision of "a genocide or of other crimes against humanity."[52] The main application of this provision has concerned 'Auschwitz denial.'[53] Recently however, basing its decision on the said provision, a Swiss court convicted a Turkish politician for denying that the First World War era mass killings of Armenians by the Ottoman Turks amounted to genocide.[54] As mentioned above, the scope of this broad provision of Swiss criminal law is nevertheless restricted by the requirement of evidence of a racist motive underlying the negation.[55]

5. Additional requirements as to the motive for or effects of negationism

Some national legislation set additional criteria for the crime of negationism to be constituted. Those criteria can be described as "correctives"[56] to an otherwise too broad interference with the right to freedom of expression. It is possible to distinguish two categories of criteria: those related to the motive for making negationist statements, and those related to the possible consequences of such statements. Switzerland, Portugal and France illustrate the first approach whereas Germany adopted the second approach.

Swiss and Portuguese legislation both require the impugned negationist conduct be inspired by a racist motive[57] or the intention to inciting to racial or religious discrimination[58] respectively. Although the requirement to prove the intent of the author does not explicitly appear in the French provision, case law has interpreted the law as implying such intentional element.[59] Portuguese legislation has an additional feature, which distinguishes it from other national laws proscribing negationism. Portugal Criminal Code Article 240 sanctions negationism as a form of racial defamation or insult:

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[51] In Spain, the legislator had integrated the sanction of negationism in the Penal Code article defining genocide; all genocides, provided they met the Code definition of this crime, were covered by the prohibition of negationism. Codigo Penal, Art.607.2.

[52] Penal Code, Art.261*bis*.4.

[53] "La discrimination raciale au sens de l'article 261*bis* CP", Marcel A. Niggli and Gerhard Fiolka, Commission contre le racisme, résumé p.6.

[54] Lausanne district court ruling in the case of Doğu Perinçek, 9 March 2007 (Tribunal de police, tribunal d'arrondissement de Lausanne, Canton de Vaud, 9 mars 2007, dans la cause Doğu Perinçek.) confirmed by the Vaud Supreme Court (*cour de cassation*), 18 June 2007.

[55] For an example of the restrictive effect of the requirement of a racist motive, *see* Cour de cassation pénale, 16 octobre 2001, affaire Gaston-Armand Amaudruz (6S.399/2001/ROD) et références citées.

[56] For the use of the term "corrective", *see* Beate Rudolf, "Le droit allemand face au discours raciste et aux partis racistes", *Rev. trim. dr. h.*, numéro spécial (46), 2001, p.294.

[57] Swiss Penal Code, Article 261bis, 4. The wording of the provision is however ambiguous and has been interpreted in different ways. A discussion on this matter follows.

[58] Portugal Penal Code, Article 240, paragraph 2(b).

[59] French case-law will be further discussed below.

> anyone who (…) defames or insults a person or group of persons on grounds of their race, colour, or ethnic, national or religious origin, in particular by denying war crimes and crimes against peace or humanity, with the intention of inciting to or encouraging racial or religious discrimination.[60]

Negationism is sanctioned under Portuguese criminal code, not a distinct offence, but as an instance of racial defamation or insult, which aims to incite to racial discrimination. This approach to the sanction of negationism might in fact respond to a number of the criticisms raised against the criminalisation of negationism[61].

In both Germany and Switzerland, negationism is punishable as a crime against public peace, or public order.[62] However, in Germany, this aspect actually is a constitutive element of the offence: German criminal law indeed sets as a requirement for prosecutions that the negationist conduct was carried out "in a manner capable of disturbing public peace".[63]

Concerning the requirement that the negationist author was inspired by racist motives, it is particularly worth elaborating on Swiss legislation and case law. In Switzerland, Penal Code Article 261*bis* essentially protects the dignity of human beings as members of a race, ethnicity, or religion.[64] Its first three paragraphs target racial hatred by sanctioning racial agitation of the people, i.e. agitation of an indefinite number of persons. It is under the fourth paragraph prohibiting direct discriminatory attacks on persons or groups of persons, on grounds of their ethnicity, religion, or race, that revisionism is criminalised.[65] Revisionism is hence viewed as a direct attack on persons of a certain race[66], ethnicity or religion. Article 261bis of Swiss Criminal Code punishes, in its fourth paragraph:

> whoever publicly… disparages or discriminates in a way which violates the human dignity of an individual or of a group of individuals on ground of their race, ethnicity or religion, or whoever, on the same ground, denies, grossly minimises our attempts to justify a genocide or other crimes against humanity.[67]

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[60] Penal Code, Article 240, paragraph 2 (b) (approximate translation from Portuguese.)
[61] The arguments raised in favour and against the proscription of negationism will be discussed in Section 3.
[62] The prohibition of negationism falls under Art.261*Bis* in Title 12: "Crimes and Offences Against Public Peace" of the Swiss Penal Code; and under Section 130: "Agitation of the People", in Chapter Seven: "Crimes Against Public Order" of the German Criminal Code.
[63] German Criminal Code, S.130(3).
[64] ATF 124 IV 121 consid. 2c p. 125/126 ; ATF 123 IV 202 consid. 3a p. 206.
Cour de cassation pénale, 16/10/2001, *Gaston-Armand Amaudruz*, 6S.399/2001, consid. 2d aa.
[65] ATF 126 IV 20 consid. 1c p.24s; ATF 123 IV 202 consid. 3b p. 207.
[66] ATF 126 IV 20 consid. 1c p.24s. et les références citées.
[67] Swiss Penal Code, Article 261Bis paragraph 4, translated from French.

The Federal Tribunal has consistently interpreted this provision as implying that the motive ("on the same ground") was an element of the offence. In other words, the Federal Tribunal found that, on the subjective plane, the motive of the offence had to be racial discrimination.[68] The question that divided commentators is whether the words "on ground of their race, ethnicity or religion" were tantamount to the requirement that revisionism be inspired by racist motive. As a matter of fact, the phrase can be interpreted in two different ways: either objectively (e.g. Holocaust denial affects Jewish persons in that they are Jewish), or subjectively (e.g. negationists denying the Holocaust do so out of racial hatred against the Jewish population.) The question has not been solved yet, be it in case law[69] nor in literature. In the majority of cases however, it seems that the terms in question are read as a requirement of a racist motive to the negationist statement.[70]
The precondition that the negationist conduct was determined by racist motives limits the extensive criminalisation of negationism under Swiss law and safeguards the necessary balance between freedom of expression and restrictions adopted in view of combating racism and anti-Semitism.[71]

In France, the legal definition of negationism does not include any reference to the intention or motives of the author. The offence is merely constituted of a material element. However, the legal provision has been interpreted by courts which have found that the offence also implied the existence of an intentional element.[72] The Court of Cassation, while departing from the literal interpretation of the Gayssot Act in sanctioning the belittling of the Holocaust[73], indicated that contesting the number of victims did not fall, *per se*, within the scope of the proscription.[74] The Court established that such belittling was only punishable where it had been committed in bad faith. Given the imprecision of Article 24Bis, judges disposed of a large margin of

[68] ATF 123 IV 202, 4c, pp.209s. Similarly, the Federal Tribunal found that, for the statement to be criminalised, it had to affect a person's human dignity on grounds of that person's race, ethnicity or religion: "*le message doit atteindre la personne dans sa dignité humaine et ceci à raison de son appartenance raciale, ethnique ou religieuse*" (ATF 124 IV 121, 2b, pp.123s.)
[69] The Swiss federal supreme court has consistently found that, on the subjective plane, the offence of negationism (Penal Code Art. 261bis al.4) presupposed the intentional conduct of the author (*see* ATF 123 IV 202, 4c and ATF 124 IV 121, 2b.) However, the Court has not settled the question whether this intentional conduct had to be dictated by racist motives. *See* ATF 126 IV 20, 1d; ATF 127 IV 203, 3; and 12 December 2007, in the case of *Doğu Perinçek* (no. 6B.398/2007/rod), 5.
[70] In ATF 126 IV 20 (consid. 1d p. 25 s), the trial judges in the instant case had noted the author's racist motives. The federal Supreme Court being bound by lower courts' findings, it left the question open whether subjectively, racist motives had to motivate the attack. The same reasoning is found in 12 December 2007, in the case of *Doğu Perinçek* (no. 6B.398/2007/rod), 5. Those cases reveal that lower courts do interpret the law as requiring evidence of the racist motive of the author.
[71] In that sense, *see* Martine Valdès-Boulouque, "Les législations en vigueur en Europe" in *La lutte contre le négationisme, Bilan et perspective de la loi du 13 juillet 1990* (La documentation française), p.75.
[72] For instance, Cass.Crim. 13 March 2001 refers to the "intentional element of the crime."
[73] *See* sub-section 3, on the proscribed lines of argumentation.
[74] Cass. Crim., 17 juin 1997, n°94-85126.

interpretation of the text. They chose to stress the indispensable intentional element of the offence in order to prevent a too extensive interpretation of the provision,[75] which would be incompatible with the constitutional principle of freedom of expression[76]. Accordingly, the mere questioning of the number of victims of the Holocaust is not legally punishable; it is up to historians to address such assertion. On the other hand, the minimisation of this number, if it is extreme and thus reveals the author's bad faith, does fall within the scope of Article 24Bis. In requiring that the bad faith of the author be established, judges corrected the legal provision; had they not done so, the Gayssot Act might have led to the adoption of extremely stringent restrictions of the fundamental right to freedom of expression.

B. A criminalisation justifiable in theory and in context

The right to freedom of expression is universally recognised by States as a fundamental freedom which should be enjoyed by everyone to the largest extent possible (whether this recognition is reflected in reality is a different issue.) Accordingly, limitations to this fundamental right are to be exceptional only and duly justified.

In order better to comprehend the criminalisation of negationism and its implications, it is necessary to identify the reasons behind it. Why did States deem it necessary to adopt such conduct? What can justify the sanction of negationist utterances? The answers to those questions can be divided into two categories. Firstly, the criminalisation of negationism fits in the line of a certain constitutional doctrine which distinguishes between opinions and statements of facts. The second category of justifications relates to the goal pursued by the drafters of the legal provision: it was presented as an effective means of combating racism. This second element can itself be subdivided into three aspects: national history, social context, and political considerations.

1. Theoretical justification

As mentioned, ICCPR Article 19 states the right to freedom of expression as well as the conditions in which it can be restricted by States. But this article, in its first paragraph, also provides for "the right to hold opinions without interference."[77] Unlike the right to freedom of expression, the right to hold opinions may not be subject to any limitation by States.[78] This conception that opinions are free is accepted in the constitutional doctrine of both

[75] Cass. Crim., 17 juin 1997, *Dalloz* 1998, *jurisprudence*, p.50, note Jean-Philippe Feldman.
[76] Fabienne Goget, "Les politiques d'action publique", *Bilan et perspective de la loi du 13 juillet 1990* (Paris: La documentation française, 2002), p.62-63.
[77] ICCPR Article 19(1).
[78] This can be deduced from the wording of the provision ("without interference") and was stated by the Human Rights Committee: "[t]his is a right to which the Covenant permits no exception or restriction" (HRC, General Comment No. 10, 29 June 1983, §1.)

'absolutist' and 'liberal' States (the terms refer here to the State approach to freedom of expression.) It has led impugned negationists to argue that their theories were constitutive of opinions.[79] Likewise, the right to hold opinion has been invoked by commentators aiming at opposing anti-negationism legislation. A survey of national legislation and case law reveals that a distinction is indeed made between opinions, which can traditionally be held freely, and statements of facts, whose utterance can be sanctioned under certain circumstances. In Spain for example, Constitution Article 20 recognises and protects the right to freely communicate and receive *true* information; it seems possible to deduce that, *a contrario*, false information would thus not be constitutionally protected. In France, publishing, broadcasting and reproducing false news can also be sanctioned under criminal law (provided it is done in bad faith and disturbs or is likely to disturb public peace.)[80] However, in that respect, the United States and Germany provide the most interesting inputs. Although the right to freedom of expression is very broadly protected in the United States and is subject to only a few restrictions (which do not include negationism), United States constitutional doctrine is particularly elaborate on the distinction between opinions and statements of facts.

a) United States constitutional doctrine

For Patrick Wachsmann, the question of the legitimacy of a prohibition of negationism obviously is a "borderline case" in which liberals have to choose between abiding by an absolutist conception of freedom of expression and allowing restrictions.[81] United States courts, earnest supporters of an absolute freedom of expression, have consistently recalled the fundamental importance of the free flow of ideas; the Supreme Court for example stated that:

> …the freedom to speak one's mind is not only an aspect of individual liberty – and thus a good unto itself – but also is

[79] Faurisson, for example, invoked a violation of his right to freedom of opinion in his complaint submitted to the HRC against his conviction for negationism under French law. *See Robert Faurisson v. France* (Communication no.550/1993), views adopted on 8 November 1996, UN Doc. CCPR/C/58/D/550/1993, § 5.3.

[80] 1881 Freedom of the Press Act, Article 27. This Article has however been interpreted strictly by courts. The term "news" has for instance been construed as designating recent events of which the addressee has not been informed yet (Crim. 13 April 1999: *Bull. Crim. N°78*), or on which no information has yet been divulgated (Paris, 18 May 1988: *D. 1990. 35 (2nd esp.), note Drouot*.)

[81] P. Wachsmann further stresses the risk that those restrictions give way to dangerous drifts such as 'politically correctness': "La question [de la répression du négationnisme] constitue à l'évidence un cas-limite, qui expose le libéral à choisir entre une conception absolutiste de la liberté d'expression (…) et l'admission de limitations dont il reste de surcroît à s'assurer qu'elles n'ouvrent pas la porte à de dangereuses dérives (celle du « politically correct » n'étant pas la moindre.)" Patrick Wachsmann, "Liberté d'expression et négationnisme", *Rev. trim. dr. h.*, numéro spécial (46), 2001, p.587.

> essential to the common quest for truth and the vitality of society as a whole.[82]

Beyond stressing the importance of the freedom of expression, the Supreme Court also asserts its aim: the quest for truth. This theory has been developed by a number of authors and in particular by John Stuart Mill, who has argued that the discovery of truth is only possible if opinions can be expressed freely.[83] A similar idea was also formulated by Justice Holmes who first invoked the metaphor of a 'marketplace of ideas'[84] – subsequently referred to by the Supreme Court.[85] The highest jurisdiction, together with Justice Holmes, nevertheless found that the right to express one's opinions freely could be restricted in certain circumstances.[86] In spite of the absolutism which is said to characterise the American conception of freedom of expression, the right to speak and write is not unlimited in the United States,[87] and it would be erroneous to believe that everything can be said or written in the United States.[88] Restrictions to the right freely to express oneself are tolerated pursuant to a fundamental distinction made between opinions and statements of facts, the former being broadly protected:

> Under the First Amendment, there is no such thing as a false idea.[89]

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[82] *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S., 503-504 (1984).

[83] According to J. S. Mill, truth can only be attained if all ideas can be freely expressed: "on every subject on which difference of opinion is possible, the truth depends on a balance to be struck between two sets of conflicting reasons." Mill further argues that not only can truth arise from a free debate of opinions, but also that opinions are strengthened when surviving refutation: "[t]here is the greatest difference between presuming an opinion to be true, because, with every opportunity for contesting it, it has not been refuted, and assuming its truth for the purpose of not permitting its refutation. Complete liberty of contradicting and disproving our opinion, is the very condition which justifies us in assuming its truth for purposes of action; and on no other terms can a being with human faculties have any rational assurance of being right." John Stuart Mill, *On Liberty* (London: John W. Parker and Son,1859), Chapter II.

[84] *Abrahams v. United States*, 250 U.S. 616 (1919), Mr. Justice Holmes dissenting opinion: "[men] may come to believe … that the ultimate good desired is better reached by the free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market…"

[85] Justice Holmes reasoning is for instance cited by the Supreme Court in *Hustler Magazine, Inc. V. Falwell*, 485 U.S. 46 (1988).

[86] In *Schenck v. United States*, Justice Homes stated that "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." (*Schenck v. United States*, 249 U.S. 47 (1919), p.52.

[87] As stated by I. Loveland: "It is undoubtedly a gross exaggeration to claim that the First Amendment protects all speech", I. Loveland, "A Free Trade in Ideas – and Outcomes", in I. Loveland (ed.), *Importing the First Amendment: Freedom of Speech and Expression in American, English and European Law* (Northwestern University Press, 1999), p. 11.

[88] Laurent Pech, "La liberté d'expression et sa limitation" (Doctoral thesis, Université d'Auvergne, 2003), 726s: "il serait ainsi faux de croire que l'on peut tout dire ou écrire aux Etats-Unis." The author further reviews permissible restrictions to the right to freedom of expression in United States case law (726, n.1945.)

[89] *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), 340.

Opinions being inherently subjective, appreciating their truth or falsity – an objective criterion – is not only inappropriate but impossible: such appreciation would necessarily be subjective itself, and sanctions based on it thus depend on the personal opinions of the jurors and judges.[90] Therefore, there can be no restriction to the right to express opinions, and no sanction affecting certain opinions. Similarly, opinions are not to be assessed nor punished from the standpoint of their alleged usefulness or "outrageousness."[91]

An absolutist conception of freedom of expression thus appears to consist in the indiscriminate protection of all opinions. On the contrary, a similar 'immunity' does not protect false statements of facts:

> But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues.[92]

The Supreme Court elaborates:

> They belong to that category of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[93]

Giving precedence to the protection of order and morality over the social value erroneous statements of facts might have, the Supreme Court considers that such statements are not constitutionally protected. Despite the provision of the First Amendment, authors can be held liable and ordered by a court to pay damages for causing emotional distress by reason of their statements. Damages can be awarded if the emotional distress results from the publication of "a false statement of fact, made with "actual malice", i.e.,

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[90] In that sense, the Supreme Court found that "[h]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of ideas", *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), 340.

[91] J. S. Mill rejected the assumption that certain opinions could be dismissed on ground of their supposed uselessness: "The usefulness of an opinion is itself matter of opinion: as disputable, as open to discussion and requiring discussion as much, as the opinion itself", John Stuart Mill, *On Liberty*, (1869), Chapter II. The Supreme Court in like manner refused to identify and apply an "outrageousness standard" to distinguish between expressions which are constitutionally protected and those which are not: ""Outrageousness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression", *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

[92] *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), referring to *New York Times Co. v. Sullivan*, 376 U.S., 254 (1964), 270.

[93] *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), referring to *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), 572.

with knowledge that the statement was false or with reckless disregard as to whether or not it was true."[94]

This interpretation seems to be particularly relevant to the issue of negationism. Holocaust negationism consists in attempts to deny the occurrence of well established facts[95] in order to rehabilitate Nazism, often coupled with attacks against the Jewish population accused of making up the "myth" of the Holocaust. Therefore, it seems that – in theory at least – it would be possible to sanction it as the intentional publication of false statements of facts causing emotional distress.[96] Although this approach never was confirmed by any court in the United Stated, the American absolutist conception of freedom of expression thus appears to not be incompatible, theoretically, with a criminalisation of negationism.

The interpretation of the right to freedom of expression as grounded in the distinction between opinion and statements of facts is not specific to the United States only. For instance, German case law identifies a similar distinction, to which it referred, as it will be shown below, in order to deny constitutional protection to Holocaust denial.

b) German constitutional doctrine

Under German law, opinions lie within the protective scope of the right to freedom of expression[97], be they deemed well-founded or unfounded, emotional or rational, valuable or worthless, dangerous or harmless.[98] To that extent, the protection granted to opinions seems to be as broad in Germany as it is in the United States:

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[94] *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

[95] Judge Thomas T. Johnson declares, in a case opposing Mel Mermelstein to the Institute for Historical Review, sitting in the Superior Court of California (County of Los Angeles) stated that "this court does take judicial notice of the fact that Jews were gassed to death at the Auschwitz Concentration Camp in Poland during the summer of 1944 (…) It is not reasonably subject to dispute. And it is capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. It is simply a fact", *Mel Mermelstein v. Institute for Historical Review*, et al., No. C 356 542 (1981), Statement of Record and Letter of Apology to Mel Mermelstein.

[96] *See* Patrick Wachsmann, "Liberté d'expression et négationnisme", *Rev. trim. dr. h.*, numéro spécial (46), 2001, p.590. The supposed compatibility is merely theoretical, P. Wachsmann in particular stresses that, according to Michel Troper, American jurists are unanimous thinking that the criminalisation of negationism would be incompatible with the First Amendment. P. Wachsmann however explains this reluctance (without criticising it) as being the "fruit/product" of a "liberal reflex" rather than the application of the reasoning formulated in case law to the question of negationism.

[97] The German Federal Constitutional Court stated that opinions were central to the constitutional protection of freedom of expression (Article 5 (1) of the Basic Law): "*Gegenstand des grundrechtlichen Schutzes aus Art. 5 Abs. 1 Satz 1 GC sind Meinungen. Auf sie bezieht die Freiheit der Äußerung und Verbreitung.* " BVerfG 90, 241, 247.

[98] BVerfGE 33, 1 [14 ff], translated by Winfried Brugger in "The Treatment of Hate Speech in German Constitutional Law (Part I)", *German Law Journal*, Vol. 3, No. 12 (1 December 2002): 20.

> [A]ggressive, repulsive value judgement regarding third parties (…) may be painful to the persons or groups at whom they are directed, and these people may feel that their dignity and right to be respected and treated equally is being violated. Nevertheless, the argument that the words in question are "words that wound" is not strong enough to deprive hate speech of the constitutional protection of Art 5 (1) of the Basic Law.[99]

The public expression of opinions is free under constitutional law, even if they are offensive to others. Hate speech being regarded as an opinion in Germany, it is likewise protected.[100] It could be inferred that negationism, since it is commonly viewed as a form of racism – and subsequently, as a form of hate speech – cannot be prosecuted under German law. Yet, as we know, such is not the case: Holocaust denial can be sanctioned under German criminal law[101]. Negationist speech thus constitutes an exception to the otherwise inclusive term 'opinion'.[102] In its landmark 1994 *Auschwitzlüge* decision, the German Federal Constitutional Court, distinguishing between opinions and factual statements, asserted the compatibility of the criminalisation of Holocaust denial with the Constitution.[103]

In this decision, pursuant to a reasoning which cannot but recall the abovementioned American constitutional doctrine, the Constitutional Court elaborates on the respective value and protection of opinions and statements of facts. Factual assertions are found not to be deprived of all protection: the constitutional protection enjoyed by opinions actually extends to the factual assertions on which those opinions are grounded.[104] Conversely, the protection ends where such statements of facts do not contribute anything to the formation of any opinion.[105] The Court finds that incorrect information falls within this category and is, as such, not an interest worth being protected[106]; it further recalls that it has consistently stated that the protection of the freedom of expression did not encompass statements of facts which their authors know are untrue, or which are proven to be

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[99] Winfried Brugger, "The Treatment of Hate Speech in German Constitutional Law (Part I)", *German Law Journal*, Vol. 3, No. 12 (1 December 2002): 22.
[100] Ibid.
[101] So-called "simple" Holocaust denial constitutes a criminal offence under Criminal Code Section 130 (3) and "qualified" Holocaust denial can be – and has been – sanctioned under Criminal Code Sections 130 (hate speech, including incitement to hatred and defamation) and 185 (insult.)
[102] *See* Laurent Pech, "La liberté d'expression et sa limitation" (Doctoral thesis, Université d'Auvergne, 2003) 575.
[103] BVerfG 90, 241-254, Decision of 13 April, 1994.
[104] BVerfG 90, 241, 248, translated by Winfried Brugger in "The Treatment of Hate Speech in German Constitutional Law (Part I)", *German Law Journal*, Vol. 3, No. 12 (1 December 2002): 23.
[105] BVerfG 90, 241, 248: "*Infolgedessen endet der Schutz von Tatsachenbehauptungen erst dort, wo sie zu der verfassungsrechtlich vorausgesetzten Meinugsbildung nichts beitragen können*."
[106] Ibid.: "*Unter diesem Gesichtspunkt ist unrichtige Information kein schützenwertes Gut.*"

untrue.[107] In sum, factual statements can be demonstrated to be either true or false – unlike opinions[108] – and, should they be found untrue, are likely to be sanctioned.

In 1994, the Court, presumably influenced by the historical context specific to Germany[109], refused to grant constitutional protection to negationism. In order to do so, the Court first denied to negationism the character of an opinion and instead identified it as a mere statement of fact. In doing so, the Court appeared to be willing not to contradict its settled case law: Holocaust denial, as a factual assertion whose falsity is either known of its author or proven, can be criminalised.

> The prohibited utterance, that there has been no persecution of the Jews during the Third Reich, is a factual assertion that has been proven untrue according to innumerable eyewitness accounts and documents, to court findings in numerous criminal cases, and to historians' conclusions. Taken on its own, therefore, a statement having this content does not enjoy the protection of freedom of expression.[110]

The "Holocaust lie" consisting in the denial of facts which have been well-established by numerous pieces of evidence, it lies outside the protective scope of the constitutional guaranty of freedom of expression. In other words, the facts being undisputable, any assertion or alleged 'value judgement' of the contrary would first require to dismiss hallowed evidence such as testimonies of victims. Such statement would thus not deserve to be valued as an 'opinion'; the notion of bad faith would thus come into play to prevent the author from invoking a right to freedom of expression.

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[107] The German Constitutional Court distinguishes between opinions and statements of facts. Opinions are central to the constitutional protection of freedom of expression; to the extent that they are inherently subjective, it is impossible to demonstrate their truth – or untruth: "Gegenstand des grundrechtlichen Schutzes aus Art. 5 Abs. 1 Satz 1 GC sind Meinungen. Auf sie bezieht die Freiheit der Äußerung und Verbreitung. (…)

[108] The Constitutional Court found that to the extent that they are inherently subjective, opinions do not permit any demonstration of their veracity – or falsity: *Meinungen sind durch die subjective Beziehung des Einzelnen sum Inhalt seiner Aussage geprägt (...) Insofern lassen sie sich auch nicht als wahr oder unwahr erweisen*." BVerfG 90, 241, 247.

[109] According to L. Pech, it is under the influence of Germany's historical context that the Constitutional Court accepted the criminalisation of negationist publications after a rather obscure reasoning ("*Le contexte historique à l'Allemagne va cependant conduire la Court constitutionnelle à accepter la répression des propos négationnistes au terme d'un raisonnement quelque peu difficile à suivre*"), Laurent Pech, "La liberté d'expression et sa limitation" (Doctoral thesis, Université d'Auvergne, 2003), 570.

[110] "*Bei der untersagten Äußerung, daß es im Dritten Reich keine Judenverfolgung gegeben habe, handelt es sich um eine Tatsachenbehauptung, die nach ungezählten Augenzeugenberichten und Dokumenten, den Feststellungen der Gerichte in zahlreichen Strafverfahren und den Erkenntnissen der Geschichtswissenschaft erwiesen unwahr ist. Für sich genomment genießt einer Behauptung dieses Inhalts daher nicht den Schutz der Meinungsfreiheit.*" BVerfG 90, 241, 249, translated by Winfried Brugger in "The Treatment of Hate Speech in German Constitutional Law (Part I)", *German Law Journal*, Vol. 3, No. 12 (1 December 2002): 23.

The *Auschwitzlüge* decision of the Constitutional Court, in that it is based on the traditional distinction between opinions and factual assertions, thus appears to be a direct continuity of previous decisions. This observation could however be nuanced: the perception of Holocaust denial as a mere statement of false facts, vehicle for no opinion, might be considered simplistic – if not convenient. Negationism is commonly found to be a form of anti-Semitism, the expression of racist *ideas*, rather than a neutral, albeit false, statement of facts. As such, and hate speech being construed as an opinion under German law, it would appear to fall in the category of opinions, constitutionally protected regardless of their alleged offensiveness or outrageousness. The conflicting interests at stake – i.e. for instance freedom of expression and, on the other hand, the fight against racism and anti-Semitism especially, given Germany's historical context – placed the Court in a predicament which the incidental ambiguity of the decision discloses.[111] The Court acknowledged that clearly distinguishing between opinions and factual statements was difficult,[112] and seemed to itself encounter such difficulty, in two instances at least. Firstly, after asserting that Holocaust denial, as an assertion of false fact, could not enjoy the protection granted to opinions, the Court established a subtle distinction between utterances which go beyond a mere factual assertion and those which do not.[113] Secondly, the Court noted that, even if Holocaust denial actually were to be the expression of an opinion, it is not worth being protected since it is constitutive of a criminal offence: it is a violation of the honour of Jews living in Germany.[114]

In the end, the question whether Holocaust denial constitutes a statement of fact or the expression of an opinion appears to be not all that influential since the Court concludes in favour of the constitutionality of its criminalisation, whichever category it falls under.

In conclusion, both American and German constitutional doctrines abide by the distinction between opinions and statements of facts to decide which utterances may enjoy the protection of freedom of expression. However, although it is clear-cut in theory, this distinction appears to be uneasy to manoeuvre in reality.[115] The question of its appropriateness, in cases

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[111] W. Brugger in particular considered that "the rationale used [by the Constitutional Court] to refuse simple Holocaust denial the character of "opinion" under Art. 5 (1) Basic Law is not convincing. Statements such as these are not individual facts that can be clearly isolated from the formation of opinions or the development of complex views of historical events…", Winfried Bruger in "The Treatment of Hate Speech in German Constitutional Law (Part I)", *German Law Journal*, Vol. 3, No. 12 (1 December 2002): at 65.

[112] Laurent Pech, "La liberté d'expression et sa limitation" (Doctoral thesis, Université d'Auvergne, 2003), 570.

[113] Ibid., 570, n.1554: utterances which could not be construed as mere assertions of facts would, for example, carry statements as to the guilt and responsibility of Germany in the outbreak of the Second World War (L. Pech refers to BVerfG 90, 241, 250.)

[114] Laurent Pech, "La liberté d'expression et sa limitation" (Doctoral thesis, Université d'Auvergne, 2003), 570, n.1555.

[115] The Canadian Supreme Court formulated a similar observation in the Zündel case where it stated that "[w]hat is an assertion of fact, as opposed to an expression of opinion, is a question of great difficulty", *R. v. Zundel*, [1992] 2 S.C.R. 731, p.6.

concerning negationist utterances in particular, can thus be raised, and leads to eventually questioning the legitimacy of a criminalisation of negationism, its legal justification being unclear. Such consideration however did not hold the European Commission for Human Rights, the European Court for Human Rights and the Human Rights Committee from approving of the sanction of negationism. Before elaborating on those decisions, it is therefore worth identifying the other elements which came into play in the criminalisation of negationism, and supplement the unconvincing legal argument.

2. Teleological justifications

Two series of teleological justifications can be identified. Firstly, the criminalisation of negationism is presented as belonging to a broader framework of measures intended to combat racism and discrimination. Although this justification appears to be strongest, a second series of justifications, political in nature, can also be identified.

a) Amendment to the legislation against racism

As mentioned in the *travaux préparatoires* of the laws proscribing negationism, in subsequent judicial decisions, and in academic writings, the criminalisation of negationism fits into the broader framework of measures adopted by States to combat racism.

According to the Paris Court of Appeal, the contestation of crimes against humanity not only fails to contribute to the debate intended to establish historical truth, but also involves racial defamation and incitement to hatred against the Jews, and violates the memory of victims; in consequence, it can only be construed as the expression of "racist ideas."[116] The perception of negationism as a form of racism in fact motivated its criminalisation in 1990: the bill proposed by Jean-Claude Gayssot aimed to fill in the gaps of the then obsolete 'repressive arsenal', and to ensure that criminal law fulfil its dissuasive and repressive roles.[117] The perception of negationism as a form of racism is thus evident. Incidentally, the Parliamentary law committee who examined the bill referred to the aforementioned distinction between utterances which convey opinions, and those which do not. Like the German Constitutional Court, this committee finds that Holocaust denial cannot enjoy the protection granted to opinion but justifies this interpretation through a clear syllogism: racism is not an opinion; negationism is a form of racism; therefore, negationism is not an

[116] Paris Court of Appeal, 16 December 1988, *Garaudy,* cited by Charles Korman in "La répression des discours racistes en France", *Rev. trim. dr. h.*, numéro special (46), 2001, p.397.

[117] Assemblée nationale, Rapport de la commission des lois constitutionnelles, de la législation et de l'administration générale de la République sur la proposition de loi (n°43) de M. Jean-Claude Gayssot, 26 avril 1990 (N°1296), p.5.

opinion.[118][119] The prohibition of negationism thus is presented as a measure States adopt to combat racism, be it because they feel bound to do so by law, or for other reasons, mainly contextual.

A number of States in fact argued that they enacted legislation proscribing negationism in order to implement the Convention on the Elimination of all forms of Racial Discrimination (CERD) to which they are Parties.[120] In France, the Court of Appeal for instance stated that the criminalisation of the 'contestation of crimes against humanity' is a means for France of honouring its commitments consecutive to its adhesion to the CERD.[121] In Luxemburg, negationism is seen as a form of discrimination; the non-inclusion, in the 1980 anti-racist legislation, of any provision sanctioning it was described as an omission.[122] The 1980 legislation, which aimed to implement the CERD in Luxembourg, therefore had to be amended to include the offence of negationism.[123] Finally, it is probably in Switzerland that the connexity between the criminalisation of negationist speech and State obligations under CERD is the most obvious. In 1994, new criminal provisions sanctioning racial discrimination (including negationism) were submitted by the Swiss Government to the Parliament – and subsequently adopted – jointly with the proposal of accession by Switzerland to the CERD.[124] The accession to the CERD in fact appears to be the primary reason why Switzerland amended its penal code (and military penal code), and criminalised racial discrimination. Indeed, the Government, in

[118] In support of its argumentation, the Parliamentary Law Committee (*Commission des lois constitutionnelles, de la législation et de l'administration générale de la République*) quoted Jean-Paul Sartre who had stated that anti-Semitic doctrine, because it aims at destroying a certain group of persons, or at depriving its members of their rights, could not be seen as an opinion ("*Je me refuse à nommer opinion une doctrine qui vise expressément des personnes particulières et qui tend à supprimer leurs droits ou à les exterminer*", Jean-Paul Sartre, in *Réflexions sur la question juive*, Gallimard, 1954.)

[119] However clear the syllogism is, the legitimacy of the Parliamentary committee interpretation is as questionable as that of the German Constitutional Court. The German constitutional doctrine did not provide for explicit reasons why negationism was not constitutive of an opinion. On the other hand, the Parliamentary committee's reason is clear – negationism is not protected since it is a form of racism; but the committee in fact only bypassed the difficulty: why then can racism not be seen as an opinion?

[120] Although it seems that Spain did not invoke its obligations under CERD to justify the sanction of negationist speech, the criminalisation of negationism was nevertheless part of the group of anti-discriminatory measures designed to thwart the propagation of racist attitudes and ideologies.

[121] Paris Court of Appeal, 9 December 1992, *Associations des déportés v. Boizeau, Faurisson, SARL les Editions Choc*, note Charles Korman, *Légipresse*, 1993, n°103, III, pp.90 f.

[122] The fact that in the 1980s, unlike in France, the UK, Switzerland and other European countries, the phenomenon of negationism had not spread yet in Luxembourg could be the reason why the legislator omitted to include a provision sanctioning such speech in the anti-discrimination act. *See* Alphonse Spielmann, "Du racisme, la situation au Luxembourg", *Rev. trim. dr. h.*, numéro special (46), 2001, p. 426.

[123] Alphonse Spielmann, "Du racisme, la situation au Luxembourg", *Rev. trim. dr. h.*, numéro special (46), 2001, pp. 418-419, 425-426.

[124] *See* "Message concernant l'adhésion de la Suisse à la Convention internationale de 1965 sur l'élimination de toutes les formes de discrimination raciale et le révision y relative du droit pénal", 2 mars 1992, in *Feuille fédérale*, 144ème année. Vol. III.

advocating for the enactment of its law proposal, only briefly mentioned the increase in racist violence in the country but did not infer from it a need for the State to legislate in this area.[125] The necessity for Switzerland to criminalise racial discrimination, and negationism, mainly – if not only – resulted from its accession to CERD. Such is not the case in many other countries where the country internal situation appears to have motivated or played a major role in the enactment of a proscription of negationism.

Besides the legal justification inferred by a State from its obligation under CERD Article 4, contemporary socio-political circumstances can be a motivating factor in the State decision. The case of France will be particularly elaborated upon as numerous major events and elements appear to have been decisive, both prior to and during the adoption process of the Gayssot Act. Examples from other countries will also be mentioned briefly.

The contextualization of the introduction and discussion of the Gayssot Act in France is indeed highly important to understand its adoption. In May 1981, soon after the affair was disclosed in the press[126], the first of a series of criminal complaints was filed against Maurice Papon for crimes against humanity, along with an application to join the proceedings as a civil party. As new elements were discovered by the investigating judge, the Manichean vision of the Second World War and of the respected roles and attitudes of its actors faded away.[127] The examination of the case lasted seventeen years and Maurice Papon was sentenced to prison in 1990. In the meantime, in July 1987, Klaus Barbie was convicted for crimes against humanity. An increase in reporting of incidents of racist violence coincided with the two month trial.[128]

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[125] Hanspeter Mock, "Le discours raciste et la liberté d'expression en Suisse", *Rev. trim. dr. h.*, numéro special (46), 2001, p.470, n.4 (H. Mock refers to E. Koerfer, "Der Neue Artikel 261*bis* StGB, eine unanwendbare Srafnorm?", in *Tangram*, N°1, September 1996, pp. 20 f; A. Guyat, *L'incrimination de la discrimination raciale*, (Berne, Stämpfli 1996), p.110.)

[126] On May 6, 1981, *le Canard enchaîné* questioned the role of Papon in the deportation.

[127] J.-M. Matisson, E. Dahan, A. Soum-Pougalet, E. Fernandez, *Historique de l'affaire Papon*, available on the website of the victims who acted jointly with the public prosecutor in the case (site des parties civiles: <http://www.matisson-consultants.com/affaire-papon/index01.php>). The *Papon case* is said to have unveiled the complexity of a period, through many depositions and testimonies, and to have wiped out the 'black and white' understanding of the respective roles and responsibilities of the different actors. The authors mention in particular the "Gaullist myth of the *Résistance*" which did not remain unblemished.

[128] In its 2001 Report, the *Commission Nationale Consultative des Droits de l'Homme* (CNCDH) in fact highlighted that traditionally, racist, xenophobic and anti-Semitic violence in France are, in a great part, connected with contemporary events occurring in nationally and internationally. The CNCDH identified a "contagion process" ("*processus de contagion*") which would contribute to amplify the number and severity of violent acts; such was the case during the 1987 Barbie trial, the profanation of the Carpentras cemetery (May 9, 1990) [discussed below], the Gulf War (January 1991), the Algerian crisis (1995), the Israelo-Palestinian conflict (beginning of the second *Intifada*, Sept. 28, 2000), and the terrorist attacks in the United States (Sept. 11, 2001.) According to the communist deputies, drafters of the Gayssot bill, the economic crisis existing at that time was also a favourable context to the development of racism (as cited by the National Assembly legal committee reporting on the Gayssot bill, Rapport N°1296, April 26, 1990, p.7.)

Statistics as well as a report issued by the *Commission nationale consultative des droits de l'homme* (CNCDH), based on data of the Ministry of Interior, indicated the global increase in racist acts since 1982, and in anti-Semitic acts since 1987.[129] Statistics further revealed that a growing proportion of the population was being doubtful as to the existence and use of gas chambers in Nazi concentration camps. It is worth noticing that the spread of doubts concerning the Holocaust is contemporary with the award of public space, in the media, to negationists. Theories denying the occurrence of the Holocaust, the methods used by the Nazis, or the number of casualties have existed ever since the armistice[130], however, they have long been addressed to a limited circle of persons only, themselves adhering to the same ideology. In the late 1970s however, newspapers started to provide a platform for Holocaust deniers[131] who could then reach – and possibly influence – public opinion, as the statistics tend to demonstrate. Holocaust denial thus became a matter of public concern. Negationist books and reviews were on the increase, along with publications contesting them. Moreover, the *Front National* embraced negationist theories thus contributing to their spread.[132] The leader of the *Front National*, J-M Le Pen, embodied this new party line and was prosecuted after he stated that the gas chambers were a "point of detail" in the history of the Second World War.[133]

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[129] Manifestations of anti-Semitism appeared to have been fluctuating in time but, globally, in the increase since 1987. CNCDH 1990 Report (as cited by the National Assembly legal committee reporting on the Gayssot bill, Rapport N°1296, April 26, 1990, p.6.)

[130] One of the first European negationists, Maurice Bardèche, published *Nuremberg or the Promised Land* in 1948. The arguments provided therein have been repeatedly developed since by Holocaust deniers. Bardèche was convicted for apologia for war crimes and his book banned in 1952. In 1950, Paul Rassinier published *The Lie of Ulysses* in which he attempted to exculpate National Socialism (he was convincted in 1951.) The book gave rise to a debate within the Parliament, concerned with Rassinier's theories. *See*, for a chronology of negationism in France from 1948 to 2001, "Inventaire du négationnisme", *Association Internationale de Recherche sur les Crimes contre l'Humanité et les Génocides* (*AIRCRIGE*), based on a research conducted by Nadine Fersco and Valérie Igounet, and available at: <http://aircrigeweb.free.fr>.

[131] Before 1978, Robert Faurisson had in vain tried to have newspapers publish his writings. The situation changed after, in October 1978, the newspaper *L'Express* published an interview of Louis Darquier, former member of the Vichy administration (as head of the *Commissariat général aux questions juives*.) Darquier's negationist statements were deemed scandalous and attracted public attention. Faurisson took this opportunity to send articles to several newspapers; two of them quoted Faurisson and in December 1978, Faurisson's infamous text "*Le problème des chambres à gaz*" appeared in the French widely-read *Le Monde*, together with refutations of Faurisson's theories. *See*, for instance, Nadine Fresco, "Négationnisme", *Encyclopaedia Universalis*, 2004.

[132] On the relationship between negationism and the *Front National*, *see* Valérie Igounet, "Dossier "Les terroirs de l'extrême-droite": Un négationisme stratégique" in *Le Monde Diplomatique*, May 1998.

[133] First convincted by the *Tribunal de grande instance de Nanterre* in September 1987 under Civil Code Article 1982 (wrongful act causing damage to others), J.-M. Le Pen appealed against the decision. The proceedings ended in 1995 with the Court of Cassation upholding the decision (Cour de cassation, 2ème Chambre civile, 18 December 1995, Bulletin 1995 II N°314, p.184.)

It is in this context that, in July 1988, Jean-Claude Gayssot, on behalf of the communist deputies, introduced a bill aimed at punishing any racist, anti-Semitic or xenophobic act was introduced before the Parliament first chamber (*Assemblée nationale*).[134] The proposed provisions were intended to complement existing anti-racist criminal legislation and ensure it be dissuasive and repressive. The goals pursued were to eventually help in transforming people's minds and habits, and in providing information as well as civic education to the population,[135] since, in particular, "the perpetuation of ignorance is a precondition to the success of racist ideas."[136] The text, adopted by the first chamber, was introduced before the Senate on May, 3 1990.

A week later, public opinion was appalled by the profanation of a Jewish cemetery in Southern France.[137] The then ministry of Interior (Pierre Joxe) blamed racism, anti-Semitism and intolerance for this revolting behaviour. Massive demonstrations against racism and anti-Semitism followed the macabre discovery and, for the first time in France, the President of the Republic in office (François Mitterrand) took part in a demonstration. The news of the profanation came as a shock in the French population whose emotion was manifest, and provoked a 'witch-hunt', widely covered by the media. The nationalist right wing party (*Front National*) was thus soon pointed at, among other plausible causes for such criminal behaviour.[138] This crime was unanimously described as a racist attack against the Jewish population (although the perpetrators had not been identified) and added to the list of racially motivated crimes the CNCDH had already denounced.

Among the Senate legal committee, conflicting opinions were voiced. Some members argued that the national context made the need for a criminalisation of negationism even more urgent[139]; others instead considered it was neither possible nor appropriate to legislate on an issue which circumstances had made too emotional.[140] The latter argued in

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[134] *Proposition de loi (n°43) tendant à réprimer tout acte raciste, antisémite ou xénophobe*.

[135] Assemblée nationale, *Rapport de la commission des lois constitutionnelles, de la législation et de l'administration générale de la République sur la proposition de loi (n°43) de M. Jean-Claude Gayssot*, 26 avril 1990 (N°1296), p.5.

[136] Ibid., p.7.

[137] The profanation of *Carpentras* Israelite cemetery took place on May 9, 1990.

[138] Besides the *Front National*, a number of other factors were invoked in an attempt to explain the occurrence of the profanation. The baneful influence of exposing the youth to hateful ideologies or violent images – on television, in video games, role-play, etc. – was for instance stigmatized.

[139] Michel Dreyfus-Schmidt thus argued against those willing to suspend the discussions that the context made it important, vis-à-vis public opinion, to resume the debates. Guy Allouche underscored the necessity of the law so that France would not forget its past. *See* Sénat, *Rapport fait au nom de la commission des Lois constitutionnelles, de législation, du suffrage universel, du Règlement et d'administration générale sur la proposition de loi, adoptée par l'Assemblée Nationale, tendant à réprimer tout acte raciste, antisémite ou xénophobe*, N°337 (31 May 1990) [hereinafter *Rapport* N°337] p.31 and 32.

[140] Several members of the Senate legal committee opposed either the criminalisation of negationism itself or the fact to discuss its adoption in the specific context of May 1990, among them: Paul Masson ("il n'est pas possible de légiférer sous le coup de l'émotion,

particular that discussing and criminalising negationism would give too much credit to racist movements and eventually aggravate the situation.[141] As we know, the law was nevertheless enacted, in July 1990.

In Germany and Austria, negationism is closely linked with neo-Nazism[142], and its need, in order to seduce followers, to absolve National Socialism from the crimes of the Second World War. In Austria, neo-Nazis can be punished under the 1945 *Verbotzgesetz* which prohibited the NSDAP in order to hinder the revival of the party and of its ideology. Although Holocaust denial was not explicitly proscribed, courts interpreted the law as implying it.[143] However, with negationism becoming a central argument in neo-Nazi propaganda, and neo-Nazi and rights wing extremist activities seducing a growing proportion of public opinion, an amendment of the law appeared to be necessary.[144] The law was enacted in February 1992 and is found to have facilitated the handling by courts of cases involving neo-Nazi propaganda and negationism.[145] In Germany, criminal law was in like manner amended in 1994. The amendment was enacted after a decision of the Federal Court caused indignation within the public opinion, in Germany and abroad. Deckert, president of the NPD (*Nationaldemokratische Partei Deutschland*) had been sentenced by a tribunal for denying the existence of gas chambers in three concentration camps. The Federal Court quashed the decision in June 1994, on the account that the tribunal had not sufficiently established that Deckert's declarations went beyond 'simple negationism'[146] (i.e. not uttered in connection with racial defamation), which was then not sanctioned under German Criminal Law. The decision was perceived as an endorsement of the impugn negationist theories. According to commentators, considerations for the then up-coming federal elections hastened the amendment of the Criminal Code, as a response to the highly critical reactions which followed the Federal Court decision.[147]

In Belgium, besides reference made to the increase in racism in the country, a different justification for criminalising negationism was invoked. In a note cited by the Members of Parliament during the discussion on the bill, the *Centre pour l'égalité des chances et la lutte contre le racisme* underscored

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légitime, devant les événements survenus à Carpentras", *Rapport* N°337, p.30), René-Georges Laurin, *Rapport* N°337, p.32

[141] Another argument was raised against the discussion of the text; Paul Masson for example viewed it as a political move aimed at opposing the *Front National*, whose line increasingly integrated negationist ideas over the years. *Rapport* N°337, p.33 (on the relationship between negationism and the *Front National*, *see* Valérie Igounet article in *Le Monde diplomatique*, supra note 132.)

[142] Brigitte Bailer-Galanda, ""Revisionism" in Germany and Austria: The Evolution of a Doctrine", Document Centre of Austrian Resistance (DÖW), available at: <http://www.doew.at/information/mitarbeiter/beitrage/revisionism.html>.

[143] Ibid.

[144] Ibid.

[145] Ibid.

[146] BGH, 15 March, 1994, cited by Beate Rudolf, "Le droit allemand face au discours raciste et aux partis racistes", *Rev. trim. dr. h.*, numéro spécial (46), 2001, p.293.

[147] Beate Rudolf, "Le droit allemand face au discours raciste et aux partis racistes", *Rev. trim. dr. h.*, numéro spécial (46), 2001, p.293.

that Belgium had become a "plaque tournante" of the diffusion of negationist publications. Negationist authors being prosecuted in Germany, Austria, France, Switzerland and the Netherlands[148], they tend to use Belgium as a platform wherefrom they can freely disseminate their writings. The Centre thus mentions that revisionist publications published in Belgium are circulated in France and the Netherlands. Additionally, the American neo-Nazi organisation, NSDAP-AO, is presumed to use Belgium and its local representative in the country to export its material.[149] The criminalisation of Holocaust denial in Belgium thus appeared to be necessary in order not to thwart the effort made and measures adopted in neighbouring and other European countries to combat anti-Semitism.

tIn adopting a broader time perspective regarding the adoption of legislation criminalising negationism, geopolitics is obviously a crucial factor. The mapping of countries where Holocaust denial is proscribed indeed globally mirrors the geographical area in which the human and material casualties of the Second World War were the most severe. Moreover, among countries proscribing negationism, whereas most Western European countries sanction only Holocaust denial, in Eastern Europe, Czech Republic, Poland and Slovakia – torn between Nazi Germany and the USSR during the Second World War and later brought under Soviet control – extend the scope of the proscription to the denial of communist crimes.[150]

As for Germany, according to Winfried Brugger, the criminalisation of Holocaust denial can be justified only against the background of the "singular significance of the Holocaust to the self-image of all Germans."[151] This would apparently also be true of Austria. In both countries, the sanction of Holocaust denial is interpreted as a reaction to the wide success of negationist theories. The National Socialist past of those countries is said to be a burden for the present population who is willing to break free from it. People are therefore particularly receptive to negationist theories which, by playing down or denying National Socialist crimes, offer a possibility to thrust aside the national feelings of guilt and responsibility those crimes.[152] As highlighted by Brigitte Bailer-Galanda, "a lot of people in Austria and Germany do not want to be remembered of Nazism; the past is felt as a burden"; a rewrite of history, cleared of its embarrassing parts, is thus

[148] In the Netherlands, negationists are prosecuted under the prohibition of defamation, but not under a provision addressing negationism specifically.

[149] Centre pour l'égalité des chances et la lutte contre le racisme, *Note sur le révisionisme / le négationnisme,* Chambre des Représentants de Belgique, Rapport fait au nom de la Commission de la Justice, 27 January 1995, 557/5 – 91/92 (S.E.), Annex 1, pp. 25-27.

[150] Romania legislation also includes a prohibition of negationism but limited to Holocaust denial. The adoption of such criminalisation was strongly criticized in the country in that it did not encompass communist crimes, which have greatly affected Romania (information available on the Zundelsite – website dedicated to Ernest Zündel, at: <http://www.zundelsite.org/english/news/070828_Revisionism _in_Europe.php>.)

[151] Winfried Brugger, "The Treatment of Hate Speech in German Constitutional Law (Part II)", *German Law Journal*, Vol. 4, No. 1 (1 January 2003): 73.

[152] *See* in that sense Brigitte Baler-Galanda, ""Revisionism" in Germany and Austria: The Evolution of a Doctrine", Document Centre of Austrian Resistance (DÖW), available at: <http://www.doew.at/information/mitarbeiter/beitrage/revisionism.html>.

welcome, and allow the population to reconcile with its traumatic past. On the other hand, the majority of the population and the States resolve to oppose the recurrence of National Socialism and like ideologies, and to prevent attacks on the equal status of all human beings[153]:

> Based on this maxim ["Never Forget, Never Again!"], the use of criminal law to encroach upon the freedom to deny the Holocaust is considered justified, even if the usual doctrinal safeguard to the freedom of opinion are substantially skirted in the process.[154]

The infringement on the right to freedom of expression – along with the aforementioned criticised decision of the German Constitutional Court – is thus fully justified, in Germany and in other countries alike[155], by the traumatising experience of the Second World War and the commitment of countries to adopt measures to prevent the recurrence of such events. Closely linked to history as well, a second series of justifications can be identified, which are mainly political.

b) Political motives

Two elements can be pointed to, suggesting that interests other than the fight against racism were also being protected at the time of the adoption of the legislation at stake. A first category of interests relates to the expected political or electoral benefit the adoption of the legislation might induce. This observation can easily lead to a criticism of the laws, taxed with "penal populism"[156], and will therefore be further discussed in Section V. The symbolism of the law is the second aspect of this question.

Firstly, the criminalisation of negationism has been construed – by its opponents mainly – as resulting from the lobbying of religious, racial or ethnic minorities. As mentioned above, Germany for example is said to have hasted the adoption of its legislation proscribing Holocaust denial under the pressure of the Jewish community and public indignation, in a context of approaching federal elections.[157] As underscored by J.V. Roberts, "all policies – and the individuals responsible for them – are subject to pressures relating to the reality of electoral politics."[158] In that sense, it seems possible

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[153] Winfried Brugger, "The Treatment of Hate Speech in German Constitutional Law (Part II)", *German Law Journal*, Vol. 4, No. 1 (1 January 2003): 49.
[154] Ibid., 73.
[155] According to A. Spielmann, Luxembourg still bears the scars of its Nazi experience of Luxembourg and *de facto* annexion by the Third Reich: "*l'expérience du nazisme et l'annexion de facto du pays au Reich ont laissé de profondes séquelles*." Alphonse Spielmann, "Du racisme, la situation au Luxembourg", *Rev. trim. dr. h.*, numéro spécial (46), 2001, p. 415.
[156] For a discussion on the alleged populist character of the criminalisation of negationism, *see* Section 3 below.
[157] *Supra* note 147.
[158] Julian V. Roberts, Loretta J. Stalans, David Indermaur, Mike Hough, *Penal Populism and Public Opinion: Lessons From Five Countries* (Oxford: Oxford University Press, 2003), p.3.

to reinforce the strength of the lobbyist argument by observing the proportion of Jewish people within a country population. It is thus interesting to notice that France, first European State to adopt specific legislation against Holocaust denial, also is the principal country of the Diaspora in Europe.[159] In fact, France, Belgium, Switzerland, Luxembourg, Germany and Austria, which all criminalised the denial of the Holocaust, are among the European countries where the proportion of Jewish people in the population is the largest.[160] In all those countries, the Jewish minority can thus be reasonably perceived as an important electoral target and as such, as indirectly influential on law-making. The influence of politics in the law-making process is further evidenced in France by the fact that the bill introduced by J.-C. Gayssot, albeit controversial and opposed by a number of deputies, never was submitted to the Constitutional Council; no political party within the Parliament could indeed afford to seem hostile to the text and its inspiration.[161]

Besides vote-catching (or 'vote-retaining'), the prohibition of negationism can also be intended to fulfil a symbolic role. Patrick Weil, addressing the questions raised by the adoption of a number of 'memorial laws' in France, including the Gayssot Act, argues that, in order to understand such legislation, it is necessary to replace it in the framework of existing commemorations and laws. The Gayssot Act would thus fit in the line of measures priory taken, intended to commemorate the defeat of Nazism and thwart the recurrence of similar ideologies. The Gayssot Act and other memorial laws would in fact amount to responses to past traumatic events:

> …in the aftermath of major cleavages or great traumas, the nation representatives decide to adopt extraordinary, albeit legal, measures in order to ensure civil and social peace.[162]

The notion of 'political rationale' of laws translates well this notion of an influence of symbolism and politics on law-making.[163] A detour through

[159] It is the second in the world, after the United States. An estimate reveals that 8,8‰ of French population is Jewish (Cf. tables in Supplement B.)

[160] The United Kingdom especially, Denmark and Sweden also have a rather large Jewish population but those three countries traditionally abide by a broad conception of the right to freedom of expression. The Jewish population of the Netherlands is likewise quite large; although the Netherlands have no specific legislation against negationism, negationists are nevertheless prosecuted, under the prohibition of racial defamation and insult (Criminal Code Art. 137c and e.)

[161] Furthermore, the *Front National*, which would have most likely taken that step, did not have enough seats in the Parliament to do so (Constitution Article 61 states that a bill can only be brought before the Constitutional Council before its enactment, by the President of the Republic, the Prime Minister, the President of either Chamber, or by sixty deputies or sixty senators.) *See* Patrick Wachsmann, "Liberté d'expression et négationnisme", *Rev. trim. dr. h.*, numéro spécial (46), 2001, p.587.

[162] Patrick Weil, "Politique de la mémoire: l'interdit et la commémoration", *ESPRIT*, February 2007, pp.124-142.

[163] In the sensibly different context of legislation adopted by China to protect its natural resources, Benjamin van Rooij, observing a correlation between a number of changes in lawmaking and law enforcement in China and the contemporary concerns of political leaders, analysed that "political leaders seemed to want to show their commitment to deal

other memorial laws allows strengthening this theory. In 2001, France enacted a law whereby people smuggling and slavery were recognised as crimes against humanity.[164] In the years preceding the adoption of the Taubira Act, the amount of French Overseas inhabitants settling in metropolitan France had consistently increased; those settlers, despite their French nationality, underwent racism and discrimination. This migration phenomenon thus contributed to highlight the prevalence of racism in France. In addition, in 1998, the one hundred and fiftieth anniversary of the abolition of slavery was celebrated. This celebration, together with the occurrence of racism against people whose ancestors had been enslaved in French colonies cumulated and initiated a claim for recognition of slavery as a crime against humanity. In his analysis, Patrick Weil views this recognition as a means of further celebrating the abolition of slavery, and, more significantly, as a reminder of the constitutional principle of equality of all citizens, regardless of their origins or ethnicity.[165] The same is true for the prohibition of negationism.

> Those laws constitute "some of the tools the Republic as made use of, at certain key moments, after periods of major cleavages, in order to institute a new co-citizenship, a new unity grounded in fundamental values, through two coupled means of action: celebration and radical prohibition."[166]

Preserving the remembrance of certain historical events, and ensure they form part of a country memory by officially condemning the crimes as well as any attempts to deny them or their scale, or to justify them, would thus be a means of ensuring the cohesion of the nation. Presumably, a common memory and understanding of the past would eventually lead to a unanimous moral condemnation of past crimes, to sympathy for former victims and solidarity within the nation. Those cohesive factors could indeed be powerful adversaries to racism and discrimination; therefore memorial laws, including the criminalisation of negationism, could contribute to the fight against racism.

As illustrated in this section, adopting a broad perspective is necessary in order to analyse the prohibition of negationism. The laws indeed have to be replaced in their context and in a broader framework of measures adopted to combat racism. They reflect the evolution of national priorities, and highlight the State commitment to achieve the protection fundamental human rights and a tangible respect for the principle of equality.[167] Through

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with incidents in a strong manner. The changes witnessed here thus had a *political rationale*." Benjamin van Rooij, "Regulating Land and Pollution in China: Lawmaking, Compliance, and Enforcement; Theory and Cases" (Doctoral thesis, Leiden University, 2006), pp.384-385.

[164] Taubira Act, 21 May 2001.

[165] Patrick Weil, "Politique de la mémoire: l'interdit et la commémoration", *ESPRIT*, February 2007, pp.140-141.

[166] Ibid.

[167] Ibid., p.142.

the enactment of such legislation, States aim to give a clear and strong signal of their commitment towards those values.

In conclusion, the above elements provide apparently solid justifications, at the national level, for the criminalisation of negationism. The adoption of such legislation can indeed be construed as the continuation of national legal theory; its contextualisation can also be legitimately invoked. Nevertheless, however justifiable the sanction of negationist utterances can be domestically, given, in particular, the country history, it is necessary to assess its legality under international human rights law.

II. Criminalisation of negationism at the Regional and global level

In order to assess the legitimacy of the prohibition of negationism at the regional and global level, it is necessary to first identify which legal norms bind states at those levels. The major treaties and legal instruments that provide for the protection of the right to freedom of expression are the UDHR, the ICCPR, the ECHR, the ACHR, and the ACHPR.

The Universal Declaration proclaims and elaborates on the regimes of a number of human rights. It is generally accepted that certain provisions of the UDHR, including article 19 on the right to freedom of expression, are declaratory of customary norms of international law.[168] As such, they are binding upon all states. UDHR Article 19 defines the right to freedom of expression as including freedom "to seek, receive and impart information and ideas through any media and regardless of frontiers." It is however not an absolute right; restrictions are indeed permissible under article 29, provided they are "solely for the purpose of securing (...) respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society." This regime of the right to freedom of expression has been reaffirmed and refined in other international instruments, global as well as regional in scope. The majority of human rights instruments drafted after the proclamation of the UDHR were elaborated with the UDHR as framework.[169] Their understanding of the right freedom of expression therefore naturally echoes the one adopted by the Universal Declaration.

At the global level, the ICCPR codified the civil and political rights contained in the UDHR and at the regional level, the three main regional human rights instruments that are the European Convention, the American Convention, and the African Charter all refer to the UDHR in their Preamble. Those four human rights treaties state the right to freedom of expression, and permissible limitations to it, in similar terms. However, the states previously referred to as prohibiting negationism being predominantly European states and members of the Council of Europe, the present study will focus, at the regional level, on the ECHR protection of the right to freedom of expression. Furthermore, those states are bound at the global level, as states, by customary international law – and thus by the UDHR in that it reflects custom, and as parties to it, by the ICCPR.

[168] *See* for instance: The Universal Declaration of Human Rights: A Commentary. by Asbjørn Eide, Gudmundur Alfredsson, Göran Melander.
[169] As mentioned below, many human rights instruments refer to the Universal Declaration and the principles it proclaimed in their preambles.

Upon ratification of the ICCPR as well as of the ECHR, state parties undertake to secure to everyone within their jurisdiction the rights and freedoms recognized in those treaties. The ICCPR spells out this obligation of states in its article 2 (2):

> Where not already provided for by existing legislative or other measures, each State Party … undertakes to take the necessary steps … to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.[170]

State parties have the positive obligation to adopt laws or measures likely to guarantee the rights as set forth in those conventions. Thus, *a contrario*, state parties have the obligation not to adopt any law or measure which would jeopardise those rights. However, according to the conventions themselves, some rights may be limited by states, under specific circumstances. As mentioned above, under both the ICCPR and the ECHR, the right to freedom of expression can be restricted. According to both treaties, limitations placed by states must fulfil a number of criteria which can be synthesised as follows: firstly, any restriction must be provided by law, secondly, it must be necessary, and thirdly, it must serve at least one of the legitimate purposes expressly enumerated by those treaties.[171] The treaty bodies established under the International Covenant and the European Convention to monitor their implementation can thus assess the legitimacy of state restrictions on freedom of expression, pursuant to the mentioned three-part test.

The European Commission of Human Rights (ECoHR), the European Court of Human Rights (ECtHR) and the Human Rights Committee all received complaints from individuals punished in national courts for denying the occurrence of a genocide. In all instances, as the following survey and analysis of the relevant decisions will illustrate, they viewed the sanction of negationism as a restriction to freedom of expression compatible with the treaty they monitor.

A. European Convention on Human Rights

The European Commission of Human Rights and the European Court of Human Rights have produced extensive case law on the right to freedom of expression whose regime under the European Convention on Human Rights is therefore well defined. A survey of pertinent case law will illustrate how

[170] CEDH article 1 on the obligation of state parties to respect human rights more broadly states: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."
[171] ICCPR, article 19(3) and ECHR, article 10(2).

European instances assess sanctions imposed by States on negationist authors within this general framework.

1. General regime of the right to freedom of expression

Under the ECHR, the right to freedom of expression is set forth in Article 10 (1) as follows:

> 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.

Freedom of expression accordingly has three components: freedom to hold opinion, to receive and impart information.

As mentioned above, the ECHR (and the ICCPR alike) give the possibility for States to restrict the exercise of the right to freedom of expression in limited circumstances. Under ECHR, Article 10 (2) formulates these circumstances as follows:

> 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.

The European Commission of Human Rights in particular, as well as the European Court of Human Rights, have laid down the limits of the right to freedom of expression by analysing, in light of the above criteria, the restrictive measures and decisions taken by States, pursuant to their domestic legislation. Before studying cases in which the Commission and the Court specifically dealt with the issue of the proscription of negationism, it is necessary to refer to earlier case law, where the principles of European human rights law were defined.

In the 1976 *Handyside* case,[172] the ECtHR underscored the importance of freedom of expression in democracy:

[172] ECtHR, *Handyside v. the United Kingdom*, judgement of 7 December 1976, *Publications of the European Court of Human Rights*, Series A. no. 24.

> Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man.[173]

A "democratic society", as construed by the Court, is pluralist, tolerant and broadminded. Therefore, the Court states that "subject to paragraph 2 of Article 10", the protective scope of the right to freedom of expression should be as broad as to encompass all information or ideas, even those that offend, shock, or disturb the State or any sector of the population.[174] Through the reference to the second paragraph of Article 10, the Court stresses that freedom of expression is not absolute. In fact, the Court, pursuant to Article 10 (2) confirms that if States have the obligation to protect the right enshrined in Article 10 (1), on the other hand, individuals exercising their freedom of expression undertake "duties and responsibilities."[175] Freedom of expression is, and should indeed be, a great power, and as such, it is balanced by a certain responsibility. Therefore, some measures can legitimately be taken by States, restricting the right to freedom of expression in order to safeguard certain interests or values.

The Court enshrined the principle of a broad protection of the right to freedom of expression, with possible limitations under strictly defined circumstances. It is in line of this interpretation of Article 10 that both the ECoHR and the ECtHR have dealt with complaints submitted by negationist authors sanctioned under their domestic law, invoking a violation of their right to freedom of expression. In the *Handyside* case, the "protection of morals" was the purpose legitimately invoked that could indeed justify certain restrictions of freedom of expression.[176] It is however not the only legitimate purpose which can justify that freedom of expression be limited by States. Article 10 paragraph 2 thus mentions, among others, "the prevention of disorder or crime" and "the protection of the reputation or rights of others." Those are the legitimate purposes, to which both the Commission and the Court referred in cases concerning the sanction of negationist work.

2. The compatibility of restrictions to negationists' right to freedom of expression with Article 10

Since 1982 (*X v. F.R.G.*), the Commission repeatedly found in such cases that complaints of negationist authors invoking a violation of their right to

[173] ECtHR, *Handyside v. the United Kingdom*, judgement of 7 December 1976, *Publications of the European Court of Human Rights*, Series A. no. 24, § 49.
[174] Ibid, *Handyside* case, § 49.
[175] *Handyside* case, § 49.
[176] Ibid.

freedom of expression were ill-founded, and subsequently declared their applications inadmissible. Until recently (*Hans-Jürgen Witzsch v. Germany*, 1999), the European Court had not had to rule on cases concerning negationism. It has now done so in two instances, where it followed the path in which the Commission had engaged.

Within the framework established by the ECtHR in the *Handyside* case, the European Commission on Human Rights decided in 1982, in *X v. F.R.G.* on the admissibility of an application made against the then Federal Republic of Germany.[177] The applicant complained of a violation of his right to freedom of expression after he was sanctioned for publishing a pamphlet describing the Holocaust as a lie.[178] The Commission concurred with the German court in finding that stating that the Holocaust was a lie invented by the Jews was indeed not only a distortion of historical facts but also a defamatory attack against the reputation of Jewish people, individually and as a community.[179] The reputation of others thus is clearly identified by the Commission as being the legitimate purpose of the impugned restriction.
To assert that the restriction was moreover necessary in a democratic society, the Commission refers to the principles of tolerance and broadmindedness, which characterise a democratic society, and argues that the complainant's defamatory assertions against the Jewish population were undermining those principles. Defending those principles is, according to the Commission, of utmost importance "*vis-à-vis* groups which have historically suffered from discrimination." The Commission therefore concludes that the prohibition of pamphlets denying the Holocaust and describing Jews as liars was a measure necessary in a democratic society, and declares the application inadmissible.

In the same case, the Commission also had to appreciate whether the principle of fair hearing had been violated by the German courts. The complainant indeed contended that the courts had failed to take into account the evidence he had submitted, on the historical facts at issue (i.e. the Holocaust.) The Commission answered by acknowledging the occurrence of the Holocaust:

> This historical fact [the assassination of millions of Jews] is … common knowledge established beyond any doubt by overwhelming evidence of all kinds.

The Commission answered to the complainant's argument by taking judicial notice of the Holocaust. Subsequently, the Commission as well as the

[177] *X v. F.R.G.*, Decision of 16 July 1982 (Application. No.: 9235/81.)
[178] The complainant was sanctioned in Germany for defamation under Penal Code Article 185.
[179] *X. v. F.R.G.*, Decision of 16 July 1982 (Application. No.: 9235/81), 5.

ECtHR in fact consistently repeated the unquestionable character of the historical fact of the Holocaust and the evidence establishing it.[180]

A year later, in *T. v. Belgium*, the condemnation of negationism by the Commission is again clear. The complainant was invoking a violation of her right to freedom of expression after she had been condemned in Belgium for her participation, as co-author, in the publication of a pamphlet despite the fact that the negationist author, Léon Degrelle, had been deprived of his right to public. The Commission finds that a book, which attempts to rehabilitate the Nazi regime by minimising and justifying their crimes, is "likely to offend a considerable section of the population because of its particularly odious contents."[181] The Commission also stresses that families of survivors of Auschwitz concentration camp are entitled to the protection of their relatives' memory, and observes the recurrence of anti-democratic events in Europe. Taking those elements into consideration, the Commission thus concludes that the restriction was necessary and proportionate to the legitimate purpose of preventing disorder.

As mentioned in the precedent section, Austria amended its 1947 legislation on the prohibition of National Socialism (*Verbotzgesetz*) so that the negation of the Holocaust be expressly sanctioned by the law. This amendment was a response to the difficulties that courts were facing to sanction negationist authors under the prohibition of National Socialism. The following case is an illustration of the difficulties faced by Austrian courts. In 1989, in *BH, MW, HP and GK v. Austria*, the ECoHR received a complaint from an individual invoking a violation of ECHR Article 7. The complainant indeed argued that the Austrian law prohibiting National Socialism was not in compliance with the requirements set out in ECHR Article 7; according to him, the said law was not precise enough in that prohibiting "acts inspired by National Socialist ideas"[182] was too vague a notion. The Commission replied that if the expression was vague indeed, it was however justified since the legislator in fact intended to outlaw "any kind of National Socialist activities."[183] As to the precision of the law, the Commission found that "National Socialism" was a "sufficiently precise concept", designating a historical ideology frequently referred to, which allowed "distinctions to be drawn from other types of nationalist thinking."[184] The Commission further found the law to be sufficiently accessible and foreseeable, in view of the criteria developed in Austrian case law and doctrine. For all these reasons, the Commission therefore found no violation of ECHR Article 7. The applicant also submitted that his right to freedom of expression had been breached by the Austrian court decision. The Commission however found

[180] The ECtHR did so for instance in *Lehideux and Isorni v. France,* 23 September 1998, Reports of Judgement and Decisions 1998-VII, §53 and *Hans-Jürgen Witzsch v. Germany*, 20 April 1999 (Application No. 41448/98.)
[181] T. v. Belgium, Decision of 14 July 1983 (Application No.: 9777/82.)
[182] *See* Verbotzgesetz, Article 3g.
[183] *BH, MW, HP and GK v. Austria*, 12 October 1989 (Application No. 12774/87), 2.
[184] Ibid.

that the infringement was compatible with Article 10 (2) and in order to do so, referred to Austria's national history:

> The prohibition against activities involving expression of National Socialist ideas is both lawful in Austria and, in view of the historical past forming the immediate background of the Convention itself, can be justified as being necessary in a democratic society in the interests of national security and territorial integrity as well as for the prevention of crime.[185]

Accordingly, to appreciate and conclude to the lawfulness of the sanction of negationism, it is necessary to replace it in the country historical context. The Commission thus validates the contextual justification (referred to in Section 1) of a criminalisation of negationism. Moreover, this decision reveals that the Commission, along with the Council of Europe globally, clearly condemn National Socialism as a "totalitarian doctrine incompatible with democracy and human rights," those two values being the foundation of the ECHR. The reference made to the "immediate background of the Convention" recalls that the Convention was adopted in the aftermath of the Second World War, as a response to those events. In its later case law, this argument was further developed by the Commission and the Court which found that negationist theories, in that they aim at rehabilitating National Socialism, ran counter the basic ideas of the ECHR as stated in its Preamble: Justice and Peace.[186] National Socialist ideology being incompatible with human rights, it prevents its followers to invoke their right to freedom of expression in order to develop such ideology. The Commission thus finds that ECHR Article 17 which provides that nothing in the Convention shall be interpreted as implying for any group or person any right to engage in any activity aimed at the destruction of the Convention rights, prevented the negationist author to invoke his right to freedom of expression in order to deny the Holocaust.[187]

The Commission had already made use, in its earlier case law, of a reference to Article 17 to interpret the scope of Article 10 and appreciate the necessity of a interference with the freedom of expression[188]; this reasoning was consistently adopted by both the ECoHR[189] and the ECtHR[190]. In *Marais v. France*, in 1996, the Commission reiterated this reference to Article 17. In fact, the decision against France, about a sanction adopted against Pierre Marais for denying the Holocaust and the use of gas chambers, summarises in a way the previous decisions of the Commission. There, the Commission indeed found that the prohibition of negationism under the Gayssot Act

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[185] *BH, MW, HP and GK v. Austria*, 12 October 1989 (Application No. 12774/87), 2.
[186] As stated for example by the ECoHR in *Pierre Marais v. France*, 24 June 1996 (Application No. 31159/96.), and by the ECtHR in *Garaudy v. France*, 24 June 2003 (Application No. 65831/01.)
[187] *BH, MW, HP and GK v. Austria*, 12 October 1989 (Application No. 12774/87), 2.
[188] *Kühnen v. F. R. G.*, 12 May 1988 (Application No. 12194/86.)
[189] *Udo Walendy v. Germany*, 23 September 1992 (Application No. 21128/92.); *Remer v. Germany*, 6 September 1995 (Application No. 25096/94.)
[190] *See* for example: *Garaudy v. France*, 24 June 2003 (Application No. 65831/01.)

aimed at preserving peace within the French population. In view of this objective, the Commission referred to Article 17 and found that the negationist statements of the complainant ran counter the ECHR values of Justice and Peace. Therefore, the complainant attempted to deflect Article 10 from its real purpose and to use his freedom of expression in a way which was "contrary to the text and spirit of the Convention." Admitting such use of the right to freedom of expression would, according to the Commission, contribute to the destruction of the rights and freedoms guaranteed by the ECHR.[191]

As mentioned, the same approach was adopted by the European Court of Human Rights. In its most recent decision concerning negationism, *Garaudy v. France*[192], the ECtHR in fact articulates the previous findings of the ECoHR as well as its own, and thus formulates a very clear condemnation of negationism. The Court starts by underscoring the principle that freedom of expression, albeit of an overriding and essential nature, may be restricted. In that respect, and in direct line with the condemnation of National-Socialism by the ECoHR, the Court states that the justification of a pro-Nazi policy is a remark directed against the underlying values of the ECHR.[193] The Court further elaborates on the possible restrictions of freedom of expression and reiterates that the Holocaust belongs to the "category of clearly established historical facts … whose negation or revision would be removed from the protection of Article 10 by Article 17."[194]

The relevant part of the decision concerns Roger Garaudy's contention that French national courts had based their decision "on an acceptable assessment of the relevant facts."[195] In response, the ECtHR first examined whether French courts had sufficiently established that the book had a negationist content and secondly, the Court appreciated whether negationism, could be protected under ECHR Article 10.

In his application, Roger Garaudy contended that French courts, in sanctioning him under Freedom of the Press Act Article 24Bis, had misunderstood the thrust of his book. The complainant argued that he never denied the Nazi crimes or their scale, but that his book was "a political work challenging Zionism and criticising the State of Israel's colonialist policy." The Court however considers that French courts did show, "on the basis of a methodical analysis and detailed findings", that the applicant actually subscribed to the revisionists theories he pretended to study, and "in fact systematically denied the crimes against humanity perpetrated by the Nazis against the Jewish community." The ECtHR subsequently examines whether the author, him being negationist, could enjoy the protection of freedom of expression. As mentioned, the ECtHR views the Holocaust as a

[191] *Pierre Marais v. France*, 24 June 1996 (Application No. 31159/96.)
[192] *Garaudy v. France*, 24 June 2003 (Application No. 65831/01.)
[193] The ECtHR had already stated so in *Lehideux and Isorni* v. France, judgement of 23 September 1998, Reports of Judgement and Decisions 1998-VII, §§ 47 and 53.
[194] Ibid.
[195] The ECtHR here refers to *Incal v. Turkey*, 9 June 1998, Reports 1998-IV, § 48.

clearly established historical fact. The European Court thus crystallises the history of the Holocaust in declaring that it can not be the subject of debate between historians. Whereas for Johan Stuart Mill and American Constitutional doctrine it is necessary to extensively protect freedom of expression for the interest of truth, the ECtHR actually distinguishes between those utterances which can contribute to the truth and as such deserve to be protected, and those which do not. The Court indeed states that denying the reality of clearly established historical facts, such as the Holocaust, "does not constitute historical research akin to a quest for the truth." Instead the "real purpose" of negationism would be to rehabilitate the National-Socialist regime, and, as a consequence, accuse the victims themselves of falsifying history. The Court adds that:

> [d]enying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement to hatred of them.[196]

The condemnation of negationism by the ECtHR appears even more clearly in the following:

> The denial or rewriting of such historical facts 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.[197]

The prevention of disorder and the protection of the rights of others are legitimate purposes which, according to the Court, can justify the sanction of negationism. Lastly, the Court reaffirms that negationism runs counter to the fundamental values of Justice and Peace[198], both enshrined in the Preamble of the Convention.

Considering the nature and aims of negationism, the Court concludes that negationist authors – including Holocaust deniers such as Garaudy – in fact abuse their right to freedom of expression:

> The applicant attempts to deflect Article 10 of the Convention from its real purposes by using their right to freedom of expression for ends which are contrary to the text and spirit of the Convention. Such ends, if admitted, would contribute to the destruction of the rights and freedom guaranteed by the Convention.[199]

Using the rights set forth in the Convention in order to or in a way likely to contribute to the destruction of the rights and freedoms of others is not

[196] *Garaudy v. France*, 24 June 2003 (Application No. 65831/01.)
[197] Ibid.
[198] *Pierre Marais v. France*, 24 June 1996 (Application No. 31159/96.)
[199] *Garaudy v. France*, 24 June 2003 (Application No. 65831/01.)

compatible with the Convention since it violates ECHR Article 17. The European Court therefore refers to Article 17 to interpret Article 10 and define the scope of the right to freedom of expression. This protective scope, the Court finds, does not encompass the utterance of negationist theories. Therefore the Court, sitting in chamber, unanimously declares the application inadmissible.

Under European human rights law, it is clear from the decisions of both the European Commission of Human Rights and the European Court of Human Rights that restrictions placed on the freedom of expression of authors, on ground of the negationist content of their work, not only pursue a legitimate purpose but also are necessary in a democratic society.

B. International Covenant on Civil and Political Rights

As mentioned in the first section, comparative law reveals that the prohibition of negationism does not have the same scope in all countries. More specifically, whereas some countries only protect the historical truth of the Holocaust, some also protect that of communist crimes or, generally, of any genocide or crime against humanity. The majority of European States which criminalised negationism however chose to limit it to the denial of crimes committed during the Second World War, and all the complaints which the ECoHR and the ECtHR examined in fact concerned such legislation. Therefore, it is in fact Holocaust denial specifically that the ECoHR and the ECtHR have condemned. This condemnation issued by European instances can be viewed as a reflection of the impact the Second World War has had on European countries. The above-cited case law would in fact mirror the views of a region. The United Nations Human Rights Committee on the other hand is a treaty body of universal jurisdiction. As formulated by Gérard Cohen-Jonathan, its composition is very diversified and the question therefore arises whether, on issues related to the Second World War, its members would have the same memory and sensibility as European institutions.[200] It is in that respect particularly interesting to examine the conclusion of the Committee on the question of whether or not to sanction negationism.

The HRC has had – so far – only one occasion to rule on the issue of the criminalisation of negationism, in 1996.[201] The HRC had received a communication by Robert Faurisson claiming to be a victim of violations of his human rights in France. The author had been sanctioned under the

[200] Gérard Cohen-Jonathan, "Négationnisme et droits de l'homme: Droit européen et international (la sentence du Comité des droits de l'homme – Faurisson c. France)", *Rev. trim. dr. h.*, 1997, p. 591.

[201] HRC, *Robert Faurisson v. France* (Communication no.550/1993), views adopted on 8 November 1996, and individual opinions appended thereto, UN Doc. CCPR/C/58/D/550/1993, §§ 9.5.

Gayssot Act for having questioned the use of gas chamber by the Nazis. The decision of the HRC can be presented briefly since it is very similar to European case law.[202] The critical assessment of the Committee decision, in particular by judges expressing individual opinions, eventually participates in the formulation of doubts as to the compatibility of laws criminalising negationism with international human rights law.

1. *Faurisson v. France*: compatibility of the impugned restriction with Article 19

The Human Rights Committee examined the complaint pursuant to the three-past test mentioned above. A restriction to the right to freedom of expression can be compatible within Article 19 of the ICCPR provided it is prescribed by law, aims to ensure the respect of the rights or reputations of others, or for the protection of national security, public order, public health or public morals and is necessary for the achievement of this legitimate aim.[203]

The Committee first observed that the restriction on the complainant's right to freedom of expression was provided by law – i.e. the Gayssot Act (1881 Freedom of the Press Act, Article 24bis) – and that the law itself was in compliance with the ICCPR in that it did not provided for too broad a restriction of the right to freedom of expression. French courts indeed convicted Faurisson under the Gayssot Act, not in order to restrict Faurisson's freedom of expression in general, but only to limit it inasmuch as the exercise of this freedom encroached on the rights and reputation of others.[204]

The Committee subsequently found that the restriction did pursue one of the legitimate purposes stated in Article 19 (3): the rights and reputations of others. In order to do so, the Committee first mentioned that those rights which ought to be protected were not only those of individuals but also of a community as a whole.[205] The HRC then stressed the dangerous nature of negationism and drew from it the compatibility of a restriction to disseminate negationist ideas with ICCPR Article 19:

> Since the statements made by the author, read in their full context, were of a nature as to raise or strengthen anti-Semitic

[202] Moreover, G. Cohen-Jonathan highlights that the decision of the Human Rights Committee is not as dense ("*ne présente pas la même densité*") as the ruling of the European Commission of Human Rights. Gérard Cohen-Jonathan, "Négationnisme et droits de l'homme: Droit européen et international (la sentence du Comité des droits de l'homme – Faurisson c. France)", *Rev. trim. dr. h.*, 1997, p. 593.
[203] ICCPR, Article 19 (3.)
[204] HRC, *Robert Faurisson v. France* (Communication no.550/1993), views adopted on 8 November 1996, 9.5.
[205] Ibid., 9.6.

> feelings, the restriction served the respect of the Jewish community to live free from fear of an atmosphere of anti-Semitism.[206]

Whereas the European decisions referred to "the quest for truth"[207] and condemned negationism partly in that it is the contestation of "clearly established historical facts", the Committee instead justifies the compatibility of a sanction of negationism with the ICCPR by the sole reference to the racist nature of negationism. The right of the Jewish community to live free from an atmosphere of anti Semitism is in fact the legitimate aim which justifies that negationism be sanctioned. The Committee thus concluded that the impugned restriction was permissible under Article 19 (3) of the Covenant. The same reference to the struggle against racism and anti-Semitism, invoked by France, also served the Committee to find the restriction was necessary. The HRC thus quotes the then Ministry of Justice (M. Arpaillange) who had characterized the denial of the existence of the Holocaust as "the principle vehicle for anti-Semitism."[208] The Committee consequently concludes that the restriction on Faurisson's right to freedom of expression did not violate Article 19 of the ICCPR. Apart from Judge Thomas Buergenthal who, as a survivor of concentration camps whose family has been greatly affected by the Holocaust, recused himself from participating to the decision of the case, the HRC unanimously concluded that France did not violate Article 19 paragraph 3. All members of the HRC indeed reached the same conclusion; seven of them communicated their individual opinions, and, although those were all concurring with the HRC decision, it is interesting to consider which aspects of the Committee decision they depart from.

2. A critical assessment of the Committee decision

However clear the decision of the HRC is, two remarks command attention. The first one concerns the choice of the Committee to examine the complaint under Article 19 of the Covenant, and the second relates to the powers of the Committee.

In his communication to the HRC, Faurisson contended he was a victim of a violation of his human rights but did not invoke any right specifically.[209] The Committee admissibility decision identifies the relevant provision of the ICCPR as being Article 19 since the author had been sanctioned for one

[206] HRC, *Robert Faurisson v. France* (Communication no.550/1993), views adopted on 8 November 1996, 9.6.
[207] *Garaudy v. France*, 24 June 2003 (Application No. 65831/01.)
[208] HRC, *Robert Faurisson v. France* (Communication no.550/1993), views adopted on 8 November 1996, 9.6.
[209] Ibid., 1.

of his publications. As highlighted by Rajsoomer Lallah[210] in his individual opinion, Article 20 paragraph 2 could have been used by the Committee to reach the same conclusion. Article 20 paragraph 2 imposes on State the obligation to proscribe certain racist utterances:

> Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

The author justifies that Article 20 (2) was relevant by referring to the conclusions of the French courts. The courts indeed found that Faurisson's negationist statements aimed at reviving Nazi doctrine and the policy of racial discrimination and were of a nature as to raise or strengthen anti-Semitic tendencies.[211] R. Lallah therefore stated:

> It is beyond doubt that, on the basis of the findings of the French Courts, the statements of the author amounted to the advocacy of racial or religious hatred constituting incitement, at the very least, to hostility and discrimination towards people of the Jewish faith.[212]

Examining the restriction at stake under Article 20 (2) of the ICCPR would lead to the same conclusion that the restriction did not violate the Covenant. R. Lallah indeed finds that, given the nature of negationism, France is entitled to proscribe it under Article 20 (2).[213] Such approach would nevertheless be preferable. R. Lallah denounces the provision of the Gayssot Act in that "it would seem to prohibit publication of *bona fide* research connected with principles and matters decided by the Nuremberg Tribunal."[214] The absolute liability it creates is not linked neither to the intent of the author nor to the prejudice that it causes to others. Those are however the criteria which are examined under Article 19 of the Covenant. Article 20 (2) on the other hand prohibits a certain expression but regardless of the adverse effects that expression would have on other interests, such as the protection or reputation of others. The Gayssot Act proscribes, in an absolute manner, utterances of a certain content (denial of the Holocaust.) In that sense, restrictive measures adopted pursuant to this act are objective: statements denying the Holocaust are sanctioned as such, and regardless of their likely effects. For those reasons, R. Lallah concludes that the creation by France of the offence of Holocaust denial falls more appropriately within the powers France has under Article 20 paragraph 2. The author concludes that, had Faurisson communication been considered with regard to Article

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[210] HRC, *Robert Faurisson v. France* (Communication no.550/1993), views adopted on 8 November 1996, and individual opinions appended thereto, UN Doc. CCPR/C/58/D/550/1993, Individual opinion by Rajsoomer Lallah (*concurring*).
[211] HRC, *Robert Faurisson v. France*, Individual opinion by Rajsoomer Lallah (*concurring*), 9.
[212] Ibid.
[213] Ibid.
[214] Ibid., 6.

20, the Committee should likewise have found that there had been no violation by France under the Covenant.[215]

The Human Rights Committee clearly found that France did not violate ICCPR Article 19 in restricting Faurisson right to freedom of expression. According to Rajsoomer Lallah, the ICCPR would as well have reached the conclusion of a non-violation by France of the ICCPR if it had chosen to invoke Article 20 in place of Article 19. Yet, regardless of the Covenant provision invoked, it is not possible to infer from the Committee decision that the Gayssot Act itself would compatible with the Covenant. In fact, the Human Rights Committee as well as the European Commission for Human Rights and the European Court for Human Rights recalled that it was not for them to rule on the constituent elements of offences under national law[216], nor to criticize in the abstract laws enacted by States.[217] They are instead called upon only to ascertain whether, in the issue brought before them, the impugned restrictions were lawful. In the cases brought before them, the HRC and both the European Commission and Court thus considered the restrictions placed by the states on the complainant's freedom of expression to be lawful because prescribed by law and necessary for the achievement of a legitimate purpose: the protection of the rights and reputation of others.[218] The Committee however conceded in the case of *Faurisson v. France* that the application of the Gayssot Act might lead, under different conditions, to decisions or measures incompatible with the ICCPR. [219] Those "different conditions", in which the prohibition of negationism might lead to a violation of international law, were nevertheless not specified by the HRC. Some of the individual opinions of Committee members however provide valuable input for that matter.

Elizabeth Evatt, David Kretzmer and Eckart Klein underscore that the Covenant requires that restrictions to the right to freedom of expression be necessary to protect one of the values mentioned in Article 19, paragraph 3. Accordingly, this criterion of necessity implies an element of proportionality.[220] On the one hand, the three Committee members find that the restrictions placed on Faurisson freedom of expression are necessary in order to protect the rights of others and do meet the proportionality test.[221] On the other hand, and although they stress they are not concerned with the Gayssot Act *in abstracto*, they contend that the act itself, which legitimately

[215] HRC, *Robert Faurisson v. France*, Individual opinion by Rajsoomer Lallah (*concurring*), 11. It should be borne in mind that, as mentioned, when submitting his communication, Faurisson did not specify any particular article. According to R. Lallah, the Committee therefore had the possibility to choose to invoke Article 20.
[216] ECtHR: *Garaudy* c. France, p.23 and HRC: *Faurisson* c. France, § 9.3.
[217] HRC, *Faurisson* c. France, § 9.3.
[218] Such are the criteria restrictions to the freedom of expression must fulfil in European and international law. *See* ICCPR art.19 and ECHR art.10.
[219] HRC, *Faurisson* c. France, § 9.3.
[220] HRC, *Robert Faurisson v. France*, Individual opinion by Elizabeth Evatt and David Kretzmer, co-signed by Eckart Klein (*concurring*), 8.
[221] Ibid., 10.

aims to protect the rights of others, does not meet the said proportionality test.[222]

> The Gayssot Act is phrased in the widest language and would seem to prohibit publication of bona fide research connected with matters decided by the Nuremberg Tribunal.[223]

The prohibition of Holocaust denial would thus be too broad, due to the imprecision of terms chosen by the legislator. This would cause too great an infringement on the freedom to research and furthermore, it would be tantamount to turning "historical truths and experiences into legislative dogma."[224] A way of remedying the criticised lack of proportionality of the law can be inferred from the individual opinion:

> [The restrictions imposed] do not link liability to the intent of the author, nor to the tendency of the publication to incite to anti-Semitism.[225]

A contrario, it can be deduced that legislation which would actually link liability of the author to his intent, or to the tendency of the publication to incite to racism, could be deemed to meet the proportionality test. Such preconditions to the imposition of restrictions on authors' rights to freedom of expression would be a means of narrowing the controversial broad scope of the criminalisation of negationism, and ensure the fundamental right to freedom of expression is restricted only when necessary. As mentioned in the first section, French courts have in fact partly remedied the imprecision of the Gayssot Act and concomitant risk of broad infringement upon the right to freedom of expression by loosely interpreting the law and establishing that the author's intent was a constitutive element of the offence of negationism.[226]

Nisuke Ando also expresses his concerns as to the scope of the Gayssot Act.[227] The imprecision of the wording is again viewed as a threat: it leaves a broad margin of interpretation to courts and might lead to drastic restrictions to the right to freedom of expression. The concerns expressed by Nisuke Ando relate to the term "negation" – as a translation of the French "*contestation*." In fact, the French term is even broader than its English

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[222] HRC, *Robert Faurisson v. France*, Individual opinion by Elizabeth Evatt and David Kretzmer, co-signed by Eckart Klein (*concurring*), 9.
[223] Ibid., 9.
[224] HRC, *Robert Faurisson v. France*, Individual opinion by Elizabeth Evatt and David Kretzmer, co-signed by Eckart Klein (*concurring*), 9.
[225] Ibid., 9.
[226] Chronology can be pointed out. The HRC decision was issued in December 1996. It is then in June 1997 that the French Court of Cassation identified the intent of the author as a constitutive element of the offence of negationism (Cass. Crim., 17 juin 1997, *Dalloz* 1998, *jurisprudence*, p.50.) Therefore, at the time the Committee members wrote their individual opinion, they could legitimately express their concerns as to the broad scope of the prohibition of Holocaust denial under French law.
[227] HRC, *Robert Faurisson v. France*, Individual opinion by Nisuke Ando.

approximate translation and Nisuke Ando's argument is thus all the more accurate.[228] His apprehension was confirmed by French case law: as mentioned, the Court of Cassation interpreted the provision whereby it is prohibited to contest the Holocaust as including the prohibition to belittle the Holocaust or grossly minimise the number of victims.[229] The requirement that those conduct be dictated by the author's bad faith however counterbalances the loose interpretation given by the court.[230] As an alternative to the establishment of a specific offence of negationism, whose wording and scope are likely to lead to sever encroachments on the right to freedom of expression, "which constitutes an indispensable prerequisite for the proper functioning of a democratic society"[231], Nisuke Ando instead advocates for the adoption of appropriate legislation against racism in the following terms:

> [I]t would probably be better to replace the Act with a specific legislation prohibiting well-defined acts of anti-Semitism or with a provision of the criminal code protecting the rights or reputations of others in general.[232]

Instead of establishing negationism as an offence *per se*, criminal law could sanction it as a form of expression of racism, under a general provision proscribing a series of well-defined racist acts. Alternatively, the prohibition of negationism allegedly aiming at protecting the rights and reputations of others, a criminal law provision could prohibit attempts on or violations of those rights.

It is in fact intriguing that, whereas the bill proposed by Jean-Claude Gayssot overtly aimed at repressing every racist, xenophobic or anti-Semitic conduct[233], the French prohibition of Holocaust denial does not include any reference to anti-Semitism. A possible explanation to this lacuna is that, in the minds of the members of parliament discussing on the text, negationism was inherently anti-Semitic[234]. Requiring evidence of the racist motives of the author was therefore unnecessary. Another reason could be that the drafters knew of the subtlety of negationist work whose authors had learnt how to dissimulate their racist motives and to give to their writings the appearance of a scientific research.[235] Omitting to require evidence of the

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[228] In English similarly, 'to contest' encompasses a spectrum of nuances in the argumentation that is lacking in 'to negate.' This is evident from the respective definitions of the terms: the definition of the former is "to argue about the rightness of something" whereas the definition of the latter is "to declare untrue" (Longman, *Dictionary of English, Languages and Culture* (Harlow: Longman Dictionaries, 1992.)

[229] Cass. Crim., 17 juin 1997, *Dalloz* 1998, *jurisprudence*, p.50. *See* Section 1 above.

[230] Cass. Crim., 17 juin 1997, *Dalloz* 1998, *jurisprudence*, p.50. *See* Section 1 above.

[231] HRC, *Robert Faurisson v. France*, Individual opinion by Nisuke Ando.

[232] Ibid.

[233] *Proposition de loi n°43 tendant à réprimer tout acte raciste, antisémite ou xénophobe.*

[234] See the above-cited statement by Minister of Justice Pierre Arpaillange labelling Holocaust denial an expression of racism, main vehicle of anti-Semitism (*supra* note 19.)

[235] Several commentators have observed that negationists could hardly be sanctioned under ordinary criminal and civil law due to the difficulty prosecutors and courts had to evidence the racist motives underlying negationist writings. *See* for instance François Asensi, "Contexte d'élaboration de la loi du 13 juillet 1990", in *La lutte contre le négationisme,*

author's racist motives could thus have been a means of avoiding procedural difficulties and of securing the convictions of negationists.

The criticisms raised in both the above-cited individual opinions of Committee members are some of the many arguments raised by opponents to the adoption of legislation proscribing negationism. The following section further elaborates on the various arguments raised, both in favour and against the criminalisation of negationism.

Bilan et perspective de la loi du 13 juillet 1990 (Paris: La documentation française, 2002), p.46-47.

III. Discussing the criminalisation of negationism

Discussing the prohibition of negationism leads to arguing on two main points. A number of general arguments are formulated either in favour or against the criminalisation of negationism, mostly from a freedom of expression perspective. However, the debate also concerns another more specific aspect of the issue. As shown, legislation proscribing negationism has been adopted in a number of countries. Those criminal provisions either prohibit the denial of certain crimes, precisely identified, or instead broadly sanction the denial of any genocide or crime against humanity. This feature of the legislation is the second aspect of the debate; the suitability and legality of event-specific laws is indeed questioned. Discussions on those two questions will be presented successively.

A. General discussion on the prohibition of negationism

The general discussion on the criminalisation of negationism is articulated on four main points. Those in favour of the prohibition mainly refer to the necessity to establish negationism as a specific offence in order to ensure that such outrageous assertions are punishable. They further invoke the importance of remembering the past in order to prevent its dramatic repetition. Critics of the controversial laws reply principally by denouncing the infringement on the fundamental right to freedom of expression, and stress that it is not for judges to define history.

To oppose the adoption of specific legislation sanctioning negationism some argue it is possible and preferable that a negationist author, whose work causes damage to others in that it is defamatory, racist or both, be prosecuted for defamation, incitement to racial hatred, or racial defamation for example.[236] In view of the civil and criminal proceedings initiated against alleged negationists in the selected countries before the adoption of anti-negationism legislation, it seems that law as it stood then indeed already contained efficient remedies: cases, both civil and criminal, have been brought before national courts against Holocaust deniers. In particular, negationists have been convicted of wrongful act (civil liability)[237], apologia of crimes[238], and racial defamation[239].

[236] Agnès Callamard for example argues: "where instances of Holocaust or genocide denial do wilfully incite to racial hatred, general hate speech laws can be used to prosecute the perpetrators." Agnès Callamard, "Debate: Can we say what we want?", *Le Monde Diplomatique*, April 2007.

[237] The leader of the French *Front National*, Jean-Marie Le Pen stated in a radio interview that the use of gas chambers were a "point of detail" ("*point de détail*") in the history of the Second World War. J.-M. Le Pen appealed of his conviction. The Court of Cassation

Beside being possible, prosecuting Holocaust denial under ordinary civil law (e.g. for moral wrong) or penal law (e.g. for defamation or insult) also appears to be preferable to the creation of a specific crime since some commentators, opposed to the enactment of a specific law, have argued that the prohibition of negationism specifically and excessively affected historians. If historical work is framed by ordinary law, historians are free to research and publish their findings, provided they are not in breach of ordinary legal rules of responsibility and liability. Finding an historian liable or responsible for the damages he caused to others through his writings would then not amount to censorship – which memorial laws are often said to constitute.
Lastly, this sanction of negationism under ordinary law would avoid discussing whether negationism is merely a statement of facts, or the expression of an opinion. The impugned negationist statement would be sanctioned inasmuch as it causes damage to others, but regardless of whether it is an opinion or a factual assertion. Only 'damageable negationism', *i.e.* implying moral wrong, libel, incitement to racial hatred or vindication of genocide for instance, could be sanctioned, whereas "simple negationism"[240] would not.

If negationist authors have indeed been sanctioned prior to the adoption of specific legislation proscribing negationism, they however soon learnt how to formulate their theories so that they would not fall within the scope of existing law.[241] Typically, negationists would avoid prosecutions for racial defamation by carefully refraining from accusing any specific person or

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eventually found that the impugned statement did not constitute incitement to racial discrimination, hatred or violence, but was shocking and intolerable in that it belittled the persecutions and sufferings endured by minorities during the war. The court therefore found the allegation was a wrongful act causing non-pecuniary damage to others. Cour de cassation, Chambre civile 2, 18 December 1995, pourvoi n° 91-14785.

[238] French negationist Maurice Bardèche was convicted for apologia for war crimes. As argued by Nicolas Bernard, the conformity of the court reasoning with the principle of strict interpretation of criminal law is questionable (the Court assimilated war crimes to murders in order to sanction their apologia.) The decisions illustrate the difficulty for courts to identify a pertinent criminal provision to sanction negationism. Cour d'Appel de Paris, 11ème chambre, 19 March 1952, D.1952, *jurisprudence*, p. 694-696, cited by Nicolas Bernard, "Un délit d'opinion au service des droits de l'homme", *La "loi Gayssot" et la Constitution*, available at: <http://www.phdn.org/negation/bernard2002/I1.html>.

[239] For example, French Holocaust denier Robert Faurisson was sanctioned for referring to the Holocaust as a "so-called genocide" and to the "gigantic politico-financial swindle resulting from this historical lie." The Court found those assertions targeted the Jewish community, and therefore was constitutive of racial defamation. Cass. crim, 28 June 1983, *M. Faurisson*, N°Lexbase: A5737C8Y.

[240] Beate Rudolf, "Le droit allemand face au discours raciste et aux partis racistes", in RTDH (2001), numéro spécial.

[241] This ability of negationist authors is observed by many commentators, including Gilles Karmasyn in "La loi Gayssot et ses critiques de bonne foi: Ignorance de la nature du négationnisme", available at: <http://www.phdn.org/negation/gayssot/citiques.html>; Nicolas Bernard, "Un délit d'opinion au service des droits de l'homme", *La "loi Gayssot" et la Constitution*; Jean-Louis Nadal, in *La lutte contre le négationisme, Bilan et perspective de la loi du 13 juillet 1990* (Paris: La documentation française, 2002), p.10.

group of persons of fabricating and abusing a certain "myth"[242] of the Holocaust.[243] The prudence of negationist authors made it difficult for prosecuting authorities to secure a conviction, despite their obvious anti-Semitism.[244] The adoption of specific and explicit legal measures against negationism thus allegedly served the purpose of filling in the gaps of an insufficient existing law, to avoid that negationism, as a form of anti-Semitism, remains unpunished.[245]
In that sense, Stephen Roth underscores that, if denial statements read in their political context are obviously anti-Semitic, strong circumstantial evidence do not always clearly indicate the denier's anti-Semitic motives. According to the author, these situations, where negationism anti-Semitic motives are not tangible, justify the need for a criminalisation of negationism:

> In such situations, the decision on whether to prosecute or convict will depend on the correct assessment by the prosecution authorities or judges of the denier's arrière-pensée. Since this is too feeble a legal basis for the suppression of the dangerous evil of Holocaust denial, some states have adopted specific and explicit legal measures against it.[246]

The adoption of specific legislation proscribing negationism provides prosecutors and judges with efficient tools to combat negationism, as a hidden and dangerous form of racism.

Domestic case law and commentators show that convicting negationists under ordinary criminal and civil law is an uneasy task for courts. Undoubtedly, the enactment of a specific law is indeed an effective means of ensuring that negationism is sanctioned. Yet, the question of the actual necessity and opportunity of sanctioning negationism remains unsolved. The protection of freedom of expression, the role of history in preventing the revival of dangerous ideologies, and the arguments raised against judicially written history are the principle elements of the answer.

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[242] Accusing Holocaust victims of having fabricated the Holocaust is a common element of negationist theories. Ernst Zündel for example stated that the Holocaust was a myth fabricated by the Jewish-Zionist conspiracy (*see R. v. Zündel*, [1992] 2 S.C.R. 731, p.58.)
[243] *See*, for instance, Jean-Louis Nadal, in *La lutte contre le négationisme, Bilan et perspective de la loi du 13 juillet 1990* (Paris: La documentation française, 2002), p.11.
[244] *See* François Asensi, "Contexte d'élaboration de la loi du 13 juillet 1990", in *La lutte contre le négationisme, Bilan et perspective de la loi du 13 juillet 1990* (Paris: La documentation française, 2002), p.46-47.
[245] Jeremy Jones for instance views Holocaust denial as a form of racism with "a specific role in furthering agendas of hatred" and stresses the responsibility of governments "to provide citizens with recourse when they are subjected to racial vilification and against those who incite to violence, discrimination or persecution." Jeremy Jones, "Holocaust Denial: "Clear and Present" Racial Vilification", *Australian Journal of Human Rights*, AJHR 10, 1994.
[246] Stephen Roth, *Denial of the Holocaust: An Issue of Law*, presented to the World Jewish Congress Governing Board Meeting, 7-9 February, 1994, cited by Jeremy Jones, in "Holocaust Denial: "Clear and Present" Racial Vilification", *Australian Journal of Human Rights*, AJHR 10, 1994.

As mentioned in section 1, the United States are in favour of a libertarian and absolutist conception of the freedom of expression whereas, schematically, Europe (Scandinavia and the United Kingdom excepted) adopt a liberal-democrat and balanced conception of the freedom. The previous comparison between constitutional doctrine however seems to illustrate a common thread between the two approaches. U.S. courts[247] as well as German[248] courts indeed have accepted the legality of limitations to the right to freedom of expression when the falsehood of the statement of facts can be proven together with the author's knowledge of this falsehood or reckless disregard to verify the veracity of the statement. This observation could lead – and has lead – to the conclusion that Holocaust denial would be equally 'criminalisable' under both approaches. The Holocaust being a well-established fact, denying its occurrence would indeed correspond to the above-mentioned situation: a statement of false facts, with knowledge of the falsehood of these facts. As such, it could not enjoy the protection of freedom of expression.

Nevertheless, if one could hardly argue that both the US and the mentioned European jurisdictions, as upholders of two 'opposite' or, to say the least, divergent approaches, might be wrong in accepting such limitations to the freedom and thus, might be wrong in their interpretation of the law, it seems however possible to question the opportunity of actually restricting freedom of expression in such cases.

A reserve as to the appropriateness of the criminalisation of negationism relates to its grounding in the perception of negationism as a statement of facts. The distinction between opinions and statement of facts might indeed be fragile and inadequate in certain circumstances. Asserting that Holocaust denial can be merely factual indeed seems too simplistic. Precisely because the Holocaust is a well-established and proven fact, denying it, and questioning its constitutive elements are intrinsically motivated by anti-Semitism. As such, whether it consists in the denial of the Holocaust, in the minimisation of the number of victims, in the falsification of the reason behind the use of gas chambers, or in the attempt to prove the Shoah is a myth fabricated by the Jews, negationism is the expression of an opinion, and not merely a statement of fact. Undoubtedly, belittling the crime, which is sanctioned under the proscription of negationism, implies a certain subjectivity which is lacking in pure statements of facts. Negationism, as the formulation of an opinion, should therefore enjoy the protection of freedom of expression. Nonetheless, this freedom does admit restrictions. Commentators are divided on the question whether negationism constitutes one of those exceptional cases in which freedom of expression can be limited.

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[247] Supreme Court of the United States: *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). (The case concerned specifically emotional distress intentionally inflicted on public figures and public officials.)

[248] *See* for instance: BVerfG, decision of 13 April 1994 (1 BvR 23/94, BVerfGE 90, 241-254), 247-248.

According to libertarians, freedom of expression is the precondition of all freedoms and the distinctive feature of democracies.[249] John Stuart Mill among others contends that free debate of ideas is necessary for the discovery of truth. All theories, ideas and opinions being available, the well-informed public will eventually be able to sort them out and single out the truth. This libertarian conception is however defeated by some commentators who denounce its flaw. In that sense, Michel Troper states:

> The essential weakness of this conception (…) is that it presupposes absolute confidence in the public capacity to discern true theories and neglects the fact that the public can lead its judgements in an irrational way.[250]

It would thus be naïve or utopian to believe that the public, confronted to a large variety of theories, could eventually be able to identify the truth. This libertarian faith in public opinion is further challenged by the observation that some of the theories expressed are given credit thanks to the scientific rigour they achieve to feign. Michel Troper subsequently stresses that the very fact that some limitations to the right to freedom of expression are legally admitted proves the libertarian approach is neither sustainable nor sustained. The author refers in particular to the legal prohibition or regulation of defamation and advertisement for tobacco or alcohol. According to M. Troper, defamatory speeches and advertisement of the kind mentioned are proscribed or restricted because they are likely to deceive the public[251] and lure it into harmful conducts. Negationism, like racial defamation, being a form of racism, its sanction could be justified in like manner. Additionally, some commentators justify the criminalisation of negationism by underscoring it is insulting or likely to incite to hatred.[252]

Apart from the scientific appearance that negationist authors often manage to give to their works, another main assess of negationist theories is their power of seduction. For various reasons indeed, people are well prepared to believe in such theories. Firstly, as evidenced by the context of the adoption of legislation proscribing negationism, the growth of negationist theories and their criminalisation have occurred at a time when the responsibility of governments and populations in the Second World War was being unveiled. To free themselves of their guilt, people were thus tempted to believe the crimes they – or their countries – allegedly contributed to actually never

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[249] *See* for instance J. Robert, J. Duffar, *Droits de l'homme et libertés fondamentales*, 7th ed. (Paris : Montchrestien, 1999), p.264.

[250] Michel Troper, "Droit et négationnisme: la loi Gayssot et la Constitution", Annales, HSS, 54 (6), November-December 1999, p.1245.

[251] Ibid.

[252] Winfried Brugger for example states: "[i]t must be a concern about individual and collective insult and incitement to hatred that justifies this infringement of free speech." Winfried Brugger, "The Treatment of Hate Speech in German Constitutional Law (Part II)", *German Law Journal*, Vol. 4, No. 1 (Jan. 1, 2003): 68.

took place, or in lesser proportions.[253] Secondly, negationist speech consists in contradicting a widely accepted version of history. Negationists therefore lead their readers to questioning the soundness of their own convictions. People are incited to think that it is only due to social pressure or to a lack of reflection on their part that they consented to believe in a certain version of history.[254] Negationists thus present people with a choice, and the alternative version they offer, as a nonconformist opinion, seduces.[255] It is no secret after all that scandal is selling.

The free debate of ideas, although it exposes people to false theories and interpretations of history, might nevertheless be more advisable than criminalisation. Opinions which have not been successfully refuted, even though they could be freely contradicted or combated, benefit from their exposure to criticisms and grow in convincing strength. A theory, which could be freely attacked by anyone, but which has not been proven false, is likely to be presumed true. For that reason, truth would benefit from being confronted to lies.[256]
Furthermore, it is the very essence of the right to freedom of expression to protect all opinions, including those that offend, shock, or disturb.[257] Protecting the opinion of the majority in fact does not appear as necessary as protecting offending or disturbing opinions; heterodox views are indeed more likely to be subjected to criticisms and refutations. Legislators argue they proscribe negationism in order to protect individuals against a dangerous expression, motivated by racism. Libertarians however contend that individuals are responsible beings, able to decide for themselves, and

[253] In the context of Spain, the attractiveness of negationist theories is described by José L. Rodríguez Jiménez in the following terms: "[w]e must remember that blaming a Jewish-Masonic-Communist alliance for the ills of Spain and the world relieves some the sense of culpability from those who sympathized with fascism, and among ultr-conservative Catholics. This is particularly true in a country that was under dictatorship for forty years, and was alled with the Axis powers." José L. Rodriguez Jiménez, "Antisemitism and the Extreme Right in Spain (1962-1997)", *ACTA NO.1 5, Analysis of Current Trends in Antisemitism*, 1999 (The Hebrew University of Jerusalem.) *See* also Nadine Fresco, "Nouveaux visages du vieil antisémitisme", in *La lutte contre le négationisme, Bilan et perspective de la loi du 13 juillet 1990* (Paris: La documentation française, 2002), p.31.
[254] *See* Parice Loraux, "Consentir", in *Le genre humain*, n°22, Autumn 1990 ("*[Les négationnistes] n'ont qu'un objectif : faire vaciller en vous l'expérience du consentir, vous faire vaciller quant au consentement que, par irréflexion ou pression sociale, vous auriez accordé trop vite.*")
[255] Ibid. Patrice Loraux argues that, when being presented two different arguments, people are more likely to be impressed by that which contradicts the being ("*l'être*") than by that which confirms it. Similarly, Michel Hannoun recalls that anything which is prohibited becomes *a priori* intriguing and interesting. The author nevertheless refused to consider this postulate as a sufficient reason for criminalising negationism. Michel Hannoun, "L'homme est l'espérance de l'homme. Rapport sur le racisme et la discrimination en France au secrétaire d'Etat auprès du Premier ministre chargé des droits de l'homme", *Documentation française*, 1987, p.113-115.
[256] In that sense, Paul Valéry found that the definition of truth is dependant on it being contrasted with lie: "*[l]a vérité a besoin du mensonge – car comment la définir sans contraste ?*", Paul Valéry, *Mélanges*.
[257] ECtHR, *Handyside v. the United Kingdom*, judgement of 7 December 1976, *Publications of the European Court of Human Rights*, Series A. no. 24.

should be treated as such by states[258]; intelligence and "critical spirit" (*esprit critique*) should not be put under the tutelage of the judicial authority.[259] People should be free to choose what to believe in, be it compatible with the opinion of the majority, or improper and shocking.[260] As a matter of fact, in democracy, whereas the right to freedom of expression can admit restrictions, it is impossible to interfere with people's right to hold opinions.[261] People must be able to access all information so that they can formulate and hold their own personal opinions, regardless of the opinion of others, including the state.

Beside freedom of expression, opponents of a criminalisation of negationism also invoke a specific right to freedom to research. Historians mainly thus contend that memorial laws infringe on their freedom to conduct historical research. Robert Faurisson thus invoked before the Human Rights Committee his right to freedom of opinion and right to doubt, as well as freedom of academic research.[262] In his claim before the Committee, Faurisson conceded that the right to freedom of expression could be restricted in certain circumstances but contended that the freedom of academic research could not "by its very nature, be subjected to limitations."[263] Nevertheless, as underscored by commentators, Faurisson does not identify any legal instrument which could be construed as protecting such a right to academic research.[264]

Moreover, it is argued that negationists are not historians but "pseudo-historians"[265] who try to give their work the protective legitimacy of scientific research.[266] On the other hand, the work of serious historians is

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[258] For example, in 1881 in France, during the parliamentary debates before the adoption of the Freedom of the Press Act, Eugène Pelletan states that expressing an opinion is not synonymous with imposing it; one is always free to accept or reject it. JO, July 1881, *documents parlementaires, Sénat, rapport fait au nom de la commission chargée d'examiner la proposition de loi adoptée par la Chambre des députés, sur la liberté de la presse*, p.461.

[259] Anne-Marie Le Pourhiet, "L'esprit critique menacé", *Le Monde*, 3 December 2005.

[260] Emmanuelle Duverger and Robert Ménard, *La censure des bien-pensants* (Paris: Albin Michel, 2003), p.159-161. The authors also find that sanctioning the expression of certain opinions in fact reflects the impotence of public authorities to efficiently deal with the actual issues, and regret that words and ideas have become the scapegoat ("*bouc émissaire*") of our impotence to solve concrete problems – such as the status of immigrants and women. They stress that the louder dissenting and heterodox ideas are denounced, the greater the helplessness of authorities actually is.

[261] American Convention on Human Rights Article 13(1), ECHR Article 10(1), ICCPR Article 19(1) illustrate this approach.

[262] HRC, *Robert Faurisson v. France* (Communication no.550/1993), views adopted on 8 November 1996, UN Doc. CCPR/C/58/D/550/1993, §§ 3.1 and 5.3.

[263] Ibid, § 5.3.

[264] Martin Imbleau, *La négation du génocide nazi: liberté d'expression ou crime raciste ?* (Paris: L'Harmattan, 2003), p.111; Xavier Tracol, " L'affaire Faurisson devant le comité des droits de l'homme des Nations Unies", *Légipresse*, LP n° 141, May 1997, p.59.

[265] In 1990, the French Minister of Justice contended that authors of "pseudo-historical" works had learnt all the subtleties of the Freedom of the Press Act and how to avoid prosecution under the Act. *JO*, 28 June 1990, Débats parlementaires, Assemblée nationale.

[266] In France, prior to the adoption of the Gayssot Act, courts sought to sanction negationist authors after assessing the method they used. Civil courts analysed whether the research

not hindered.[267] Only racist authors making use of negationist theories to incite to discrimination or hatred, or to directly attack others, are targeted by the legislation. Negationist authors, unlike historians and other scientists, exploit facts and evidence in order to support their theories. Through a somewhat reverse process, instead of shaping opinions on the basis of available evidence, negationists deform pieces of evidence in order for them to coincide with their pre-existing interpretation of history. Because of this biased interpretation of facts, negationism is not valued as scientific work.

To illustrate the compatibility of such interpretation with existing law or case law, the example of Germany can be mentioned. In cases involving incitement to racial hatred, defendants have tried to invoke Article 130(5) of the Criminal Code.[268] This article provides that:

> In cases under subsection (2), also in conjunction with subsection (4), and in cases of subsection (3), Section 86 subsection (3)[269] shall apply correspondingly.

In other words: the publication, distribution, expression, etc. of material inciting to racial hatred, or of defamatory, insulting or negationist documents or speeches is not punishable where the said documents or speeches are dedicated to civic education, art, science or research. This provision thus appears to be likely to protect writers, historians and journalists from prosecutions under the proscription of negationism or defamation; defendants would merely have to argue their conducts formed part of their activities as artist, scientist or researcher. This is however not the interpretation given by the Constitutional Court. The Court has indeed consistently interpreted the term "science" as encompassing only serious attempts to establish the truth: a work cannot be recognised any scientific character if its author has systematically ignored facts, sources, opinions or findings of other scientists which would be in contradiction with the point of

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had been conducted with prudence, objective circumspection and intellectual neutrality. If not, the author, 'pseudo-historian', could be sanctioned. *See* for instance: TGI de Paris, 8 July 1981, *D*. 1982. In a criminal case, a court sanctioned a negationist for defamation after observing that his biased speculative reasoning was not characteristic of historical research. Cour d'appel de Rennes, 13 July 1993, *unpublished*, upheld by Crim. 16 May 1995, *B*. n°175. Similarly in England, the High Court appreciated the method used by David Irving to appreciate whether the author could lawfully be labelled "negationist." *Irving v. Penguin Books Limited and Lipstadt*, High Court of Justice, Queen's bench division, N°11996-I-1113, 11 April 2000. For a comprehensive study of the interaction between judges, history and historians, *see* Bernard Edelman, "L'office du juge et l'histoire", *Droit et Société* 38-1998, pp.47-58.

[267] Claude Lanzmann argues that the Gayssot Act is not a restriction of the freedom of historians but a consequence of the rigour that is characteristic of historical research. Claude Lanzmann, "Universalité des victimes", available at: <http://www.droitshumains.org/hist-mem/debat12.htm>.

[268] *See* Beate Rudolf, Beate Rudolf, "Le droit allemand face au discours raciste et aux partis racistes", *Rev. trim. dr. h.*, numéro spécial (46), 2001, p.291.

[269] Section 86 subsection (3) provides:

view he defends.[270] Beate Rudolf, analysing how German law combats racist speeches and parties, argues that, given the legal precedent set by the German Constitutional Court, it seems impossible that speeches or publications inciting to hatred, defaming or insulting segments of the population would be found to fulfil the requirements of Section 130(5), i.e. could qualify as work of scientific or artistic character.[271] By analogy, it can be argued that Holocaust denial would likewise be deprived of the protection granted to scientific work: the Holocaust belonging to the category of "clearly established historical facts"[272], arguing it did not exist would necessarily imply ignoring adverse evidence and theories. Negationist speeches and writings would then not be deemed scientific work; their authors could thus not be immune from prosecution under Section 130(3). This confirms that the prohibition of negationism only sanctions 'pseudo-historians' since negationism does not fall within the scope of protected historical work.

Although the distinction between historians and negationists appears clear in theory, especially where the denied facts are largely recognised, it is reasonable to believe that it might be uneasy to apply in practice, in particular when the historical events at stake are still controversial. In France, after the adoption by the National Assembly of a text aiming at proscribing the denial of the Armenian genocide, a group of lawyers have called for the abrogation of memorial laws. While admitting the legitimacy of the aims pursued by the legislator in adopting such laws, including those proscribing negationism, lawyers denounced a disproportionate infringement on the above-discusses freedom of expression and freedom to research. They argued that historians' freedom to research was drastically reduced, notably in controversial and complex fields (such as colonisation) where a thorough and unbiased analysis was needed. Incidentally, they warned of the adverse political effect of memorial laws: in restricting freedom of expression, those laws might actually go against their aims. The latter argument has been developed by various commentators who have specifically invoked the counterproductiveness of memorial laws; it will be further discussed in the second sub-section.

Another argument invoked in the general discussion on the criminalisation of negationism by advocates of such legislation is the necessary preservation of a collective memory of traumatic historical events[273], as a

[270] BVerfG of 11 January 1994, *BVerfGE*, vol.90, pp. 1-21 (12-13), cited by Beate Rudolf, "Le droit allemand face au discours raciste et aux partis racistes", *Rev. trim. dr. h.*, numéro spécial (46), 2001, p.291.
[271] Ibid.
[272] *Supra* note 180, ECtHR, *Lehideux and Isorni v. France*, judgement of 23 September 1998, *Reports of Judgments and Decisions* 1998-VII, § 47.
[273] « plus le temps s'écoule et plus la mémoire risque de s'effacer … Vient le temps de la protection de la mémoire… [La loi Gayssot] a surtout voulu répondre à la prise de conscience de la montée du négationnisme, favorisée par l'écoulement du temps et l'effritement de la mémoire collective. » Alain Bacquet, allocation de clôture, *La lutte contre le négationisme, Bilan et perspective de la loi du 13 juillet 1990* (La documentation française), p.110.

deterrent for the reiteration of like crimes. Michel Doucin stated that commemoration was a means of sharing a common memory from which lessons can be drawn.[274] By proscribing genocide denial, lawmakers aim to safeguard a collective memory of those crimes and of their historical background, in order to thwart the revival of dangerous ideologies. At the time the French legislator decided to establish May 8th as a holiday, in celebration of the 1945 armistice, M. Hautecoeur, rapporteur in the National Assembly, declared that the commemoration was intended especially for future generations, as well as for those who refuse to remember. The rapporteur argued it is necessary to remind everyone that lessons can be learnt from the past, and to consistently oppose the revival of like ideologies:

> …too often, oblivion has become the alibi of present time…[275]

Incidentally, the arguments raised in the Parliament at the time of the discussion of this commemorative bill were precursors of the justifications invoked for the adoption of the Gayssot Act. The necessity to remember the past was in fact correlated with the contemporary declarations of Louis Darquier[276], former member of the Vichy Government whose negationist assertions had been recently published in a newspaper. Commemorating the armistice of the Second World War was thus a means of honouring the memory of victims and of combating the recurrence of Nazism.[277] Commentators argue that the need for legislative protection of history is of utmost importance given that, in time, the number of witnesses of past crimes decreases, together with memories of those crimes and consciousness of their scale.[278] In that sense, Jeremy Jones states:

> …as fewer and fewer eye-witnesses remain alive and as deconstructionist philosophies encourage a cynicism concerning the existence of "facts", anti-Semites have seen new possibilities for rewriting the past in a manner which both whitewashes Nazi crimes and vilifies Jews.[279]

The alleged risk of negationism is that it succeeds in convincing people that National-Socialism and like ideologies are not responsible for the crimes

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[274] Michel Doucin, speech held during the Official launch of the UNESCO's commemoration of the 60th anniversary of the Universal Declaration of Human Rights, UNESCO, 10 December 2007.

[275] M. Hautecoeur, *JO*, Débats parlementaires, Assemblée nationale, 23 September 1981, p. 1265. M. Hautecoeur added that it is not possible to build the future while forgetting the past ("*l'oubli est trop souvent devenu l'alibi du présent: rappeler sans cesse qu'on ne construit jamais l'avenir sur l'oubli du passé.*")

[276] *See supra* note 131.

[277] *JO*, Débats parlementaires, Sénat, 16 May 1979, report by M. Touzet, p. 1284.

[278] Bertrand de Lamy, La liberté d'opinion et le droit pénal, Bibliothèque des sciences criminelles, Tome 34 (LGDJ), 574; George Wellers, "Les chambres à gaz ont existé", in Alain Finkielkraut, *La mémoire vaine: Du crime contre l'humanité* (Paris: Gallimard, 1989), p.82.

[279] Jeremy Jones, "Holocaust Denial: "Clear and Present" Racial Vilification", *Australian Journal of Human Rights*, AJHR 10, 1994.

committed during the Second World War. Should National-Socialism be viewed as a banal ideology, no obstacle would prevent its revival. Commentators in fact argue that negating a crime against humanity leads to re-actualizing conditions in which the occurrence of the crime is possible. Accordingly, lawmakers cannot but intervene in such circumstances.[280] Beside making way for the repetition of crimes against humanity, negationists are accused of assassinating the memory of victims of past crimes.[281] Refusing negationism would be a protective legal measure aimed at protecting victims and their honour; additionally, it can be viewed as a guaranty that those responsible for the crimes will not be unpunished.[282]

A last general argument raised in the discussion on the opportunity of criminalising negationism questions the competence of judges to intervene in the historical field. As recalled above, some argue that negationism can be sanctioned as an allegation of false facts. Two main difficulties arise from this approach: firstly, drawing the line between opinions and factual assertions has proven to be a highly difficult task for courts. Secondly, it brings up the question of the role of judges towards history. Sanctioning negationism as an intentional statement of false facts would indeed require the court establishes that the statement is actually false. Therefore, although they have been consistently reluctant to do so,[283] courts would eventually have to establish what historical truth is.[284] Judges and commentators agree that it is not for courts to write history.[285] This argument aims to oppose the sanction of negationism. In fact, it evidences that ordinary civil and criminal laws are inappropriate to sanction negationist authors. Incidentally, the

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[280] Denis Salas: "*Comment [le droit] pourrait-il rester inactif face à la réactualisation des conditions de possibilité du crime contre l'humanité qu'est sa négation?*" Denis Salas, "Le droit peut-il contribuer au travail de mémoire?", in *La lutte contre le négationisme, Bilan et perspective de la loi du 13 juillet 1990* (La documentation française), p.44.

[281] Yves Ternon: "*Celui qui nie le génocide assassine la mémoire des victimes et prépare la répétition du meurtre collectif.*" Yves Ternon, *Du négationnisme*, Mémoire et tabou (Desclée de Brouwer, 1999), p.14.

[282] According to Gregory H. Stanton, denial is the eighth stage of genocide, which always follows classification, symbolization, dehumanization, organization, polarization, identification and extermination. According to the President of Genocide Watch, sanctioning those responsible for genocides is the best response to denial, and "may deter future potential genocidists who can never again share Hitler's expectation of impunity when he sneered, "Who, after all, remembers the Armenians?" Gregory H. Stanton, The Eight Stages of Genocide", 1998, available at: <http://www.genocidewatch.org/eightstages.htm>.

[283] Tribunal de Grande Instance de Paris, 6 May 1983, *Dalloz* 1984, 14; Tribunal de Grande Instance de Paris, 25 May 1987, *Gazette du Palais* 1987.1.369; Tribunal de Grande Instance de Paris, 14 February 1990, *Gazette du Palais* 1991.2.452.

[284] In the above mentioned *Irving case*, judges of the British High Court had to determine whether D. Lipstadt affirmation that Irving was a negationist was defamatory. Judges first recalled that it was not for them to write history but eventually issued a "historiographic conclusion" when stating that Irving was indeed a negationist given that there were sufficient evidence that Hitler knew and approved of gas chambers. *See* the analysis of the case by Martin Imbleau. Martin Imbleau, *La négation du génocide nazi: liberté d'expression ou crime raciste ?* (Paris: L'Harmattan, 2003), pp.119-129.

[285] *See* for instance case law referred to above, and the petition signed by nineteen distinguished historians calling for the abrogation of memorial laws: Pierre Vidal-Naquet et al., "Liberté pour l'histoire", *Libération*, 13 December 2005.

argument operates in favour of the establishment of negationism as an offence *per se* and of the adoption of event-specific legislation.

B. As to the suitability and legality of event-specific legislation

A number of criticisms are formulated against the adoption of event-specific legislation. Firstly, such laws would be motivated by political considerations and constitute electioneering. Secondly, although they might be preferable to ordinary criminal and civil law to sanction negationism, they would be counterproductive. Lastly, existing criminal laws proscribing negationism are accused of being discriminatory.

One of the accusations phrased against the adoption of laws criminalising negationism (and against other 'memorial laws') is that such legislation would only be motivated by electoral considerations or by the political benefit expected to be gained from its adoption.[286] For instance, the legislator criminalising Holocaust denial would in fact seek to gain the support of the Jewish community. In other word, the criminalisation of negationism is denounced as a form of emotional blackmail by States.[287] Moreover, the State is accused of being blinded by the pursued political benefit while overlooking other aspects.[288] To point at only one example, the discussions around the possible adoption by France, in 2007, of a law criminalising the denial of the Armenian genocide revealed that lawmakers might have been blinded by electioneering, a few months before presidential elections, and ignored the repercussions such law could have on Franco-Turkish relationships for instance.

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[286] Jacques Robert observes that most memorial laws have been adopted in France in a certain apparent indifference: for obvious political reason ("who would dare alienating the Jewish or Armenian electors or former colonised people?"), none of the Constitutional procedures the President and members of Parliament dispose of, to postpone the adoption of a law or question its constitutionality, has indeed been used. "*Aucune des deux procédures (Constitution, Article 10) ne semblent avoir officiellement et pratiquement été utilisées, pour des raisons électoralistes évidentes (qui allait s'aliéner l'électorat juif, arménien ou les anciens colonisés, harkis compris ?)*" Jacques Robert, "L'Histoire, la repentance et la loi", *Revue de Droit Public*, n°2 (01 March 2006), p.279.

[287] *See* for example the lobbyist argument raised in 2006-2007, during the debates on the potential adoption by France of a law criminalising denial of the Armenian genocide (the Preface elaborates on the debate.)

[288] In a different context, Benjamin van Rooij stated that political considerations can play an important role in the elaboration of laws and policies and sometimes lead to ignoring other relevant aspects of the subject matter: "the political rationale to show willingness to change prevailed instead of a rationale in which the full complexity of the issue at hand could be weighed…" Benjamin van Rooij, "Regulating Land and Pollution in China: Lawmaking, Compliance, and Enforcement; Theory and Cases" (Doctoral thesis, Leiden University, 2006.)

The accusation of 'penal populism'[289] however seems abusive: if the pursuit of catching votes by adopting electorally-attractive measures can indeed play a role in the enactment of laws against negationism, the other justifications invoked seem to be of utmost importance. For example, the invocation of the necessity to preserve the memory of the Shoah in order to warn of the dangers of racist ideologies and avoid the recurrence of genocide looks like a sincere argument. Should this reason be taxed with hypocrisy, the argument that the prohibition of negationism must be adopted so that the country legislation can be in conformity with international law[290] is however objective. All things considered, criticisms raised in the name of the inopportunity of penal populism would not be valid in the present case. If it is reasonable to believe that vote-catching and the perspective of seducing electors comes into play in the adoption of anti-racist legislation, this reason however appears to be only one among other important and valid justifications. Furthermore, the fact that a law does constitute a response to the expectations and wishes of the population (or parts of it) shall not be systematically stigmatised as mere electioneering. It is actually not only logical that elected government and parliaments aim to keep their electors and seduce the others, but it is also desirable in order to ensure the effective implementation of the adopted legislation.[291] In consequence, the attempt to invalidate laws against negationism by invoking their 'political rationale' fails to succeed. Other criticisms can nevertheless be raised. It is worth mentioning the most sustainable of them.

As mentioned, commentators agree that it is not and should not be for judges to write history. Michel Troper concedes this point and in fact uses it as an argument to support the adoption of laws against negationism. According to the author, legislation proscribing Holocaust denial, in that it presumes the occurrence of the Holocaust, through an objective reference to the Nuremberg Trial for instance, frees courts from the obligation to assess historical evidence. The legislator establishes a presumption and the role of the judge is therefore not to establish whether the Holocaust did take place[292], but to establish whether the defendant indeed negated the occurrence of legally recognised historical fact.

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[289] 'Penal Populism' is defined as follows: "[i]n our view, policies are populist if they are advanced to win votes without much regard for their effects. *Penal populists allow the electoral advantage of a policy to take precedence over its penal effectiveness.* In short, penal populism consists of the pursuit of a set of penal policies to win votes rather than to reduce crime rates or to promote justice." Julian V. Roberts, Loretta J. Stalans, David Indermaur, Mike Hough, *Penal Populism and Public Opinion: Lessons From Five Countries* (Oxford: Oxford University Press, 2003), p.5.

[290] As mentioned, a number of States argued that, in adopting a law against negationism, they were implementing CERD Article 4 (*See* section III above.)

[291] In this sense, *see* Julian V. Roberts, Loretta J. Stalans, David Indermaur, Mike Hough, *Penal Populism and Public Opinion: Lessons From Five Countries* (Oxford: Oxford University Press, 2003), p.5: "If responsiveness to public opinion is not, of itself undesirable, it would be equally unreasonable to attack a politician for pursuing popular policies. Indeed, it would be a cause for some concern if elected political parties failed consistently to have broad based support for their policies."

[292] Michel Troper, "La loi Gayssot et la Constitution", in *Droit et négationisme*, Annales HSS, n°6, November-December 1999, p.1251-1252.

Incidentally, referring back to the German Constitutional Court, the above interpretation could actually help justify the otherwise surprising *Auschwitzlüge* decision[293]. As we know, the German Court deemed negationism not to be an opinion, but a mere statement of false fact; a convincing argumentation for such understanding of negationism was lacking in the decision. Michel Troper's theory could provide a plausible explanation. In view of exiting evidence, of general public opinion and of theories of specialists, the Court appreciated the Holocaust as an established, unquestionable historical fact. In doing so, the Court 'crystallised' the issue: further discussions on the occurrence of the Holocaust and its *modus operandi* were neither desirable nor necessary. Therefore, the German Constitutional Court in a way disqualified negationism by taking the Holocaust out of the domain of freedom of expression: no opinion could possibly be phrased anymore on the topic. In that sense, the German Court decision to sanction negationism as a statement of false facts can be explained and, to some extent, justified.

As mentioned, Michel Troper theory can legitimate the adoption of a legal proscription of negationism, as a means of avoiding that judges be responsible for writing history. But is it the role of the legislator to write history? Is it his role to punish ignorance or absurdity? Where one would not be punished for asserting that the Earth is not spherical, should the law punish the denial of the Holocaust, it being another just as well-established fact? or should the legislator ignore such statements and leave it for the society and community of historians to solve the issue?

According to Adolf Hitler, "the grossly impudent lie always leaves traces behind it, even after it has been nailed down, a fact which is known to all expert liars in this world and to all who conspire together in the art of lying."[294] The fact is obviously also known to negationists, who have gone so far as stating that gas chambers in concentration camps were used for sanitation only, or that Jews who allegedly died during the Second World War actually emigrated to the United States where they changed names. The criminalisation of negationism has thus been adopted as a means to an end: lawmakers intended to prevent that such "grossly impudent lies", albeit eventually proven wrong, leave doubts in people's minds. The chosen means might however be detrimental to the – legitimate – aim pursued.

In a society where everyone is free to express any views, negationist falsifications of history can be discussed and proven wrong. On the other hand, the proscription of negationism does not permit of a disqualification of negationist theories. The preference legislators give to the judicial response is in fact two-sided and can be construed in two converse ways. Those in favour of a criminalisation of negationism argue that negationist theories are so valueless that they do not deserve to be discussed and proven

[293] *See* Section 1 above.
[294] Adolf Hitler, "Chapter 10: Why the Second Reich Collapsed", in *Mein Kampf*, translated into English by James Murphy (Hurst And Blackett Ltd., 1939), 131.

wrong by historians. They further warn that accepting to debate with history deniers would give negationist theories an undue credit.[295] Critics of the controversial legislation instead fear that the legislator choosing to judicially sanction negationism might be perceived as indirectly confessing the incapacity of state authorities to prove negationist theories wrong. Libertarians indeed argue that in legislating on history, through the official recognition of certain specific historical events and proscription of their denial, lawmakers can give the impression that they aim to protect an official version of history. Simone Veil underscored such legislation might be perceived as evidence of State authorities' will to thwart the disclosure of certain elements which could support negationist theories.[296] Similarly, Michel Troper refers to an "embarrassing truth", which the criminalisation of negationism could be construed as protecting.[297] In consequence, the criminalisation of negationism might incidentally lead to increasing the credibility of negationist authors, who claim they are being censored. For that reason, establishing negationism as an offence appears counterproductive. Holocaust deniers contend that the history of the Second World War is dogmatic, and that states prohibit historians from conducting objective research on the topic. The proscription of negationism seems to validate this theory and thus allows negationists to present themselves as martyrs of official history.[298]

The constitutionality of the intervention of the legislator in the historical field has moreover been questioned. Among other historians and commentators, Françoise Chandernagor underscores that writing history is not one of the powers or duties French Constitution entrusts the legislator with.[299] The legislator, in adopting memorial laws, would thus abuse his legislative power and violate the Constitution. Furthermore, laws should be normative, and not merely declarative – non-normative laws are in fact sanctioned by the Constitutional Council.[300] Law is a normative instrument, which for instance proscribes certain conducts, but it is not the instrument of truth[301], especially not of historical truth. Not only is the legislator not entitled, constitutionally, to tell history, he is also not knowledgeable enough to do so. Françoise Chandernagor indeed argues that memorial

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[295] *See* Michel Troper, "Droit et négationnisme: la loi Gayssot et la Constitution", Annales, HSS, 54 (6), November-December 1999, p.1250.
[296] Simone Veil, *Annales*, May-June 1993, p.700.
[297] Michel Troper, "Droit et négationnisme: la loi Gayssot et la Constitution", Annales, HSS, 54 (6), November-December 1999, p.1240.
[298] *See* Michel Hannoun, "L'homme est l'espérance de l'homme. Rapport sur le racisme et la discrimination en France au secrétaire d'Etat auprès du Premier ministre chargé des droits de l'homme", *Documentation française*, 1987; and Madeleine Rebérioux, "Contre la loi Gayssot", *Le Monde*, 21 May 1996.
[299] Françoise Chandernagor, "Historiens, changez de métier!", *L'histoire*, N°317, February 2007, p.55.
[300] Yves Gaudemet et al., "Appel des juristes contre les lois mémorielles", text of the petition, signed by more than fifty lawyers, available at: <http://www.liberonslhistoire.com>.
[301] Madeleine Rebérioux, "Le génocide, le juge et l'historien", *L'histoire*, N°318, March 2007, pp.92-94.

legislation, which violates law, also sometimes violates history[302] and concludes that:

> If historians are to be dragged before tribunals, it should at least be pursuant to historically well-drafted laws – since, from now one, those laws, albeit approximate, determine the sole field in which research can still be conducted.[303]

History is a scientific field and as such, it requires experience, knowledge and methods legislators do not necessarily have. Moreover, those who denounce the political motives of lawmakers, in legislating on history, underscore that the writing of history should not be dependant on politics.[304]
In the context of Holocaust denial, the legislator seems to have attempted to avoid the difficulty of identifying the historical truth of the Second World War by referring to the authority of a third party. Luxembourg and France law therefore refer to rulings by the Nuremberg Tribunal or other domestic or international jurisdictions. Reference to *res judicata* could have contributed to legitimise the intervention of the legislator in history: the legislator would not establish any historical truth but merely take judicial notice of the past. However, such reference is itself problematic: which unquestionable truth can serve as basis for the definition of negationism? The choice of European legislators for a reference to the Nuremberg Military Tribunal could thus appear biased.[305]
For the above reasons, although the enactment of a proscription of negationism could be welcome as a means to avoid the judicial determination of historical truth, legally-written history can be deemed unsuitable: it is inappropriate, counterproductive, unconstitutional, and, to some extent, inaccurate.

Lastly, the criminalisation of negationism, by means of the adoption of event-specific legislation must be scrutinised from the perspective of the right to equality and non-discrimination.

France and all the relevant European countries have ratified the Convention on the Elimination of Racial Discrimination (CERD.) This Convention states, in its Preamble:

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[302] Françoise Chandernagor, "Historiens, changez de métier!", *L'histoire*, N°317, February 2007, p.57.
[303] Ibid.
[304] Jacques Robert states that History does not benefit from legislators polluting it with initiatives of outbidding political tactics ("*L'Histoire n'a que faire de législateurs qui la polluent par des initiatives qui relèvent de leurs surenchères politiques*.") Jacques Robert, "L'Histoire, la repentance et la loi", *Revue de Droit Public*, n°2 (01 March 2006), p.279.
[305] Jacques Robert thus asks: "which unquestionable historical truth would serve as basis for the establishment of the negation of this very truth as an offence? on that which was proclaimed, after the war, by a tribunal of victors?" Jacques Robert, "L'Histoire, la repentance et la loi", *Revue de Droit Public*, n°2 (01 March 2006), p.279 (*"Mais sur quelle vérité historique indiscutable allait-on se baser pour ériger en délit la négation même de cette vérité ? Sur celle proclamée, après la guerre, par un tribunal de vainqueurs ?"*)

> …all human beings are equal before the law and are entitled to equal protection of the law against any discrimination...

This Principle, on which the Convention is based, has a number of implications, one of which is laid down in Article 1, defining State measures constitutive of positive discrimination and circumstances in which they can be legal under the CERD:

> … [They] shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups…

Bearing this definition in mind, one could analyse the prohibition of negationism as a special measure adopted by States to specifically protect the Jewish community from negationist attacks targeting them, as Jews. To that extent, the legal prohibition of Holocaust denial could amount to positive discrimination of the Jews, who would need a special protection, in order for them to enjoy their right to be free from negationism as a form of anti-Semitism and as such, of racial discrimination. However justified such protective measure may be, questions can be raised: what about victims of other genocides? Should Rwandan victims and families not be protected against attempts to deny the Rwandan genocide? Should the denial of the Armenian genocide not be as well prohibited? Laws against Holocaust denial seem, in that respect, to be conducive to maintaining a separate right for a specific ethnic group and as such, to be constitutive of racial discrimination[306]. Such recognition of rights to a specific ethnic group is thus denounced as "a manifestation of communitarian logic"[307], as "an arbitrary breach of the equality of all citizens before the law."[308] It is actually an interesting feature of the law in France, where, pursuant to constitutional doctrine, the Republic being indivisible[309], minorities cannot be recognised any collective rights.[310] It should here be borne in mind that the constitutionality of memorial laws, including the Gayssot Act, has not been questioned during the legislative process. It is therefore uncertain, yet doubtful, whether those laws are in fact compatible with French constitutional law.[311]

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[306] Racial discrimination being defined in Article 1 of the CERD as encompassing not only discrimination based on race but also on ethnic origin for instance: "the term "racial discrimination" shall mean any distinction, exclusion or preference based on race, colour, descent, or national or ethnic origin…"

[307] Appel des juristes contre les lois mémorielles, available at : <http://www.liberonslhistoire.com/Appel-des-juristes-contre-les-lois-memorielles_a21.html>.

[308] Anne-Marie Le Pourhiet, "L'esprit critique menacé", *Le Monde*, 3 December 2005.

[309] Constitutional Council Decision No. 91-290 DC, 9 May 1991.

[310] The Constitutional Council found that it was impossible, under the French Constitution, to recognise collective rights to any group, defined by the common origin, culture, language or belief of its members ("*[la Constitution] s'oppose à ce que soient reconnus des droits collectives à quelques groupes que ce soit, définis par une communauté d'origine, de culture, de langue ou de croyance.*") Decision No. 99-412 DC, 15 June 1999.

[311] Jacques Robert condemns memorial laws in that they are dictated by "categorial" interests and electioneering, in total disregard of public interest and law, including

According to the CERD convention, States Parties are bound to eliminate all forms of racial discrimination. Article 2 elaborates on this obligation and refers to the various duties States have to this end, in particular:

> (c) Each State Party shall take effective measures to … amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.

As a consequence, should the scope of the proscription of Holocaust denial be found to amount to racial discrimination, State Parties where such legal prohibition exists would have the obligation, under CERD to "amend, rescind or nullify" the relevant law. If such is the obligation of States, it must however be borne in mind that those three options left for the State to choose among have very different consequences in practice. In the conclusion, we will aim at identifying which solution would be the most appropriate in this context.

The recognition of certain crimes, and their protection from denial, is problematic and dangerous as it risks stimulating a certain, somewhat macabre, 'competition between victims' ("*concurrence des victimes*."[312]) Some argue that the uniqueness of the Shoah justifies the adoption of an event-specific legislation, proscribing negationism of this genocide only. Arguing that a given genocide is unique, of an "extraordinary importance"[313] is however a slippery slope. Protecting the memory of certain genocides exclusively can be interpreted as a classification of genocides in categories: those which deserve be remembered and the others. It could eventually be construed as the determination of a hierarchy of the severity of sufferings endured by victims of different crimes against humanity.[314] For example, the protection of the Holocaust exclusively would be viewed as the reflection of the utmost consideration and importance given by state authorities to the Jewish community, and the correlative disregard of the said authorities for the Armenian community. Instead of asserting the uniqueness of the Holocaust, some other commentators instead contend the specificity of Holocaust denial. They

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constitutional law ("*[t]outes ces dérives ne trouvent aucune justification dans la considération d'un quelconque intérêt général. Elles sont dictées par la seule défense d'intérêts catégoriels et de préoccupations purement électoralistes qui semblent aujourd'hui primer sur les règles constitutionnelles et le respect du droit.*") Jacques Robert, "L'Histoire, la repentance et la loi", *Revue de Droit Public*, n°2 (01 March 2006), p.279.

[312] Paul Thibaud, intervention prononcée le 21 janvier 2006 lors de la table ronde organisée par l'association Pollens de l'Ecole Normale Supérieure ; Eric Keslassy et Alexis Rosenbaum, *Pourquoi les communautés instrumentalisent l'Histoire* (Bourin, 2007.)

[313] Martin Imbleau, *La négation du génocide nazi: liberté d'expression ou crime raciste ?* (Paris: L'Harmattan, 2003), p.333

[314] Pierre Mairat denounces the event-specificity of laws criminalising negationism – of the Gayssot Act specifically – which contradicts the philosophical postulate of the unity of the human race. Sufferings of all victims and families must be regarded in like manner. Pierre Mairat, allocution transcribed in *La lutte contre le négationisme, Bilan et perspective de la loi du 13 juillet 1990* (La documentation française), Roundtable, p.100-101.

argue that unlike negationism of other genocides, Holocaust denial is dictated by racism – anti-Semitism – and concomitant with incitement to hatred against the Jewish community.[315] Nicolas Bernard on the other hand expresses concerns as to the appropriateness of multiplying special laws.[316] According to the author, the negation of genocide is the continuation of the genocide itself.[317] Following this postulate, the author states:

> All crimes against humanity, all genocides are sanctioned: all their negations should be subjected to the same regime. Human dignity is indivisible.[318]

Criminal legislation cannot be event-specific and preserve the memory of certain given crimes against humanity, as this would be tantamount to recognising a different value to the human dignity of different peoples.

Following the same line of argumentation, critics further denounce that event-specific law would be dictated by lobbies, the most powerful of which would have the means to influence states in the process of lawmaking. Lobbies are thus labelled "oppression groups", defending a narcissist tendency to defend the specificity and rights of certain communities.[319] This feared *communautarisme* ('communitarism') could incidentally be detrimental to the right to the readability of the law and to equality before the law. Indeed, in constantly yielding under the pressure of certain groups, or lobbies, the legislator appears to substantiate their assertions that they are being discriminated against. Granting a right to the sole Jewish community to receive compensation, when negationists deny the Holocaust, reaffirms the uniqueness of Jewish people and of their past sufferings, and consequently risks reinforcing the identification of the community as a differentiable group. For that reason, the adoption of event-specific law, as a response to the expectations of specific groups within the population – or electorate – can contribute to forging discrimination.

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[315] Michel Troper, "Droit et négationnisme: la loi Gayssot et la Constitution", Annales, HSS, 54 (6), November-December 1999, p.1255.

[316] Nicolas Bernard, "La "loi Gayssot" et la Constitution", Conclusion. Available at: <http://www.phdn.org/negation/bernard2002/conclusion.html>. Similarly, René Rémond regrets that, regardless of the principle that law should aim to be universal, the proliferation of category-specific laws leads to the fragmentation of the law. ("*Contrevenant au principe que la loi se veut aussi universelle que possible, la prolifération incontrôlée de lois adoptées pour des catégories particulières sous la pression entraîne la fragmentation de la législation.*") René RÉMOND, "Contre les vérités officielles", Débat, *L'Histoire*, n° 306, February 2006.

[317] Nicolas Bernard, "La "loi Gayssot" et la Constitution", Conclusion. Available at: <http://www.phdn.org/negation/bernard2002/conclusion.html>. *See* also supra note 282.

[318] Ibid.

[319] Anne-Marie Le Pourhiet further warns of the dangers of this narcissist 'communitarism.' Anne-Marie Le Pourhiet, "L'esprit critique menacé", *Le Monde*, 3 December 2005 ("*Ces lobbies, que l'écrivain Philippe Muray qualifie à juste titre de "groupes d'oppression", défendent le plus souvent un communautarisme narcissique dégénérant en paranoïa identitaire et victimaire et prétendent détecter des atteintes à leur dignité à tous les coins de rue*.")

Commentators acknowledge certain of the imperfections of the judicial treatment of negationism. Not only proceedings, albeit short, can benefit from media coverage and thus give an unnecessary platform to negationists appearing as martyrs of state censorship. Some therefore argue that, in order to avoid that legislation paradoxically contributes to spreading the negationist theories it specifically intended to silence, it is necessary that other actors be involved.[320] This alternative to a criminalisation of negationism can in fact be advisable; it is however not the only solution which can be contemplated in view of ensuring that the sanction of negationism be compatible with its alleged aim of safeguarding human rights. A survey of the mechanisms available at the regional and global levels indicate how the criminalisation of negationism can be conciliated with obligations states have under instruments of international human rights law.

[320] Denis Salas, "Le droit peut-il contribuer au travail de mémoire?", in *La lutte contre le négationisme, Bilan et perspective de la loi du 13 juillet 1990* (La documentation française), p.44.

IV. Available mechanisms at the regional and global levels

A 2006 joint declaration of the UN, the OSCE, the OAS and the ACHPR Special Rapporteurs on freedom of expression elaborates on the relation between freedom of expression and cultural and religious tensions.[321] The declaration does not assert the preponderance of the right to freedom of expression but highlights its crucial role in combating racism and intolerance. It distinguishes between incitement to hatred, which ought to be prohibited, and merely offensive speech, which instead should be free. The Special Rapporteurs unanimously observe that most countries "already have excessive or at least sufficient 'hate speech' legislation", and underscore the importance of protecting all ideas, including non-traditional, dissenting and critical ones. The declaration thus states:

> [R]esolution of tensions based on genuine cultural or religious differences cannot be achieved by suppressing the expression of differences but rather by debating them openly. Free speech is therefore a requirement for, and not an impediment to, tolerance.

The Special Rapporteurs on freedom of expression of the United Nations and of three continents (Africa, Americas, Europe) jointly stress the importance of freedom of expression as a requirement for tolerance and thus a means of combating racism. Concurrently, the UN Special Rapporteur on contemporary forms of racism[322] finds that the fight against racism must be built around a dual strategy: a political and legal strategy based on the political determination to combat racism, and an ethical, intellectual and cultural strategy aimed at eradicating "the deep roots of the racist and xenophobic culture and mentality." The latter strategy would be based on education, information media, systems of value, and on condemning racist and xenophobic literature. The Special Rapporteur seems to advocate for a moral and intellectual fight against negationism, rather than for its legal sanction. Lawmakers, at the global and regional levels, do however not systematically embrace the Special Rapporteurs libertarian approach.

At both the regional and global levels, several mechanisms are likely to be available to sanction negationist statements, whether directly (negationism constitutes an offence *per se*) or not (e.g. negationism as a form of defamation.) However, dissentions observed among commentators,

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[321] Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur of Freedom of Expression, 19 December 2006.

[322] Doudou Diène, "Political platforms which promote or incite racial discrimination", updated study by the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diène, ECR, 13 January 2006, E/CN.4/2006/54, para. 20.

lawmakers, jurists, and historians are reflected in the lack of consensus similarly existing, not only within international institutions, but also among them. Thus, whereas some institutions address negationism directly, some others do not; some condemn it whereas some others privilege the principle of freedom of expression and free debate of ideas. Beyond the law of treaties, and of their monitoring bodies if any, it is important to consider international custom as it also is a main source of international law.

Several international instruments and bodies expressly advocate for the penalisation of negationism, namely: at the global level, the CERD Committee and the Council of Europe, and at the regional level, the European Union. An overview of binding law together with the soft law issued by treaty bodies, at the global level first and at the regional level then, enables us to determine whether the State obligation to criminalise negationism exists under international law (including customary law), and, if it exists, how mandatory it is.

A. Pertinent treaty law

The Convention on the Elimination of all forms of Racial Discrimination together with its interpretation by the CERD Committee provide for the most extensive discussions on the prohibition of negationism at the global level. At the regional level, the Council of Europe has adopted the Additional Protocol to the Convention on Cybercrime, which specifically addresses the sanction of negationism as an offence per se. Its scope and binding force are however limited. The same observation can be made of the relevant provision of European Union law.

1. Convention on the Elimination of all forms of Racial Discrimination and subsequent interpretation

As mentioned, negationism is often viewed as a form of racism and its prohibition consequently forms part of a broader legal provision against discrimination. The adoption of the relevant provision in Switzerland illustrates the relatedness of the two notions. In 1992, the Swiss Federal Council submitted two proposals to the Parliament: a decree proposal for the adhesion of the federation to CERD together with a law proposal for the revision of Swiss penal law. The proposed Penal Code Article 261Bis[323] entitled "racial discrimination", prohibited incitement to racial hatred and the dissemination of racist ideology as well as negationism. This amendment, the Federal Council argued, aimed at completing the law which

[323] The law proposal similarly provided for the insertion of Article 171c in the Swiss Military Penal Code. The two articles are identical, except for one additional provision in Article 171c providing for disciplinary sanctions for less severe offences.

then failed to fulfil the requirements of the Convention.[324] In other words, the Federal Council interpreted the Convention on the Elimination of Racial Discrimination, and in particular its Article 4(a), as carrying the obligation for State parties to prohibit negationism. The Parliament adopted both the decree and the law and, as abovementioned in Section 2, Article 261Bis is now part of Swiss penal law.[325]

It is worth analysing whether CERD Article 4(a) could indeed be construed as forcing State Parties to criminalise negationism, by reference, in particular, to its interpretation given by the CERD Committee, in its General Recommendations and responses to State Parties reports.
Article 4(a) states:

> [State Parties] shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as 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 financial thereof;

Accordingly, States are bound to penalise acts of racial violence, dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination or violence, and provision of assistance such activities. Genocide denial is thus not explicitly mentioned.

One could however argue that in 1965, at the time the Convention was adopted, negationism had not occurred yet, or at least, did not have the prevalence it nowadays has. As a matter of fact, a survey of the history of negationist publications in Europe and the United States tend to indicate that Holocaust deniers only started to attract public attention from the 1970s.[326]

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[324] *See* the arguments raised in the Swiss Federal Council submission to the Parliament: *supra* note 124, s.611: "*les lois de notre pays ne répondent pas, ou seulement de façon incomplète, aux exigences de la Convention*."

[325] Since 1992 and the adhesion of Switzerland to the CERD, Article 261Bis has however been amended. Originally, the sanction of negationism was to be found in the prohibition of statements dishonouring the memory of a deceased person on ground of his or her race, ethnicity or religion (*see* Message issued by the Swiss Federal Council, *supra* note 124, s.636.2.) The prohibition was however rephrased in 1995 to explicitly address 'denial, gross minimisation or attempt to justify a genocide or other crimes against humanity' (*see* Section 2 above.)

[326] For example, American famous negationist Arthur Butz published The Hoax of the Twentieth Century in 1977, and Wilhelm Stäglich (German), Der Auschwitz Mythos, in 1978. Robert Faurisson's infamous article "Le problème des chambres à gaz" appeared in the French widely-read newspaper *Le Monde* late 1978 (together with refutations of Faurisson's theories.) In Spain, in the 1980s, the then existing Círculo Español de Amigos de Europas (Spanish Circle of Friends of Europe – CEDADE) specialised in circulating neo-Nazi denial of the Holocaust (source: José L. Rodriguez Jiménez, "Antisemitism and the Extreme Right in Spain (1962-1997)", ACTA NO.1 5, *Analysis of Current Trends in Antisemitism,* 1999 (The Hebrew University of Jerusalem.) An eminent actor of negationism was also born in 1978 in Los Angeles: the Institute for Historical Review, gathering some of the above-mentioned writers and many others, such as Ernst Zündel and David Irving, and publishing the *Journal for Historical Review*.

In any case, it seems unlikely that the inclusion of a prohibition of negationism in the text of an international convention could have occurred (or could occur) given the disparities in the approaches of the UN member States as regards freedom of expression existing. A consensus would indeed unlikely be achieved. International human rights treaties can yet be seen as an evolving body of rules – provided one does not adopt a strictly positivist approach of international law – and in that respect, it is appropriate to refer to the General Recommendations and Concluding Observations of the CERD Committee to appreciate the scope of the provisions of the Convention, and thus of State obligations under the Convention. It can indeed be argued – and is argued here – that treaty bodies general comments, concluding observations and decisions 'shape' the provisions of the treaties they monitor by interpreting them. States parties, if they are not immediately bound by those so called 'non-binding' instruments of international law, nevertheless tend to adapt their actions and laws to those instruments, to avoid further negative critical comments by the committees for instance, these comments being publicly available. If the States Parties to a treaty eventually all abide by the general comments and concluding observations issued by the relevant monitoring body, state practice arises, together with customary international law. This development aims to justify the following reference to the CERD Committee General Recommendations and, especially, Concluding Observations, to interpret the scope of Article 4 of the Convention.

The CERD Committee repeatedly urged States to include in their national legislation the provisions envisaged in Article 4 (a) and (b) – the latter concerns the obligation of States to declare illegal and prohibit organisations which promote and incite racial discrimination.[327] The "mandatory character"[328] of the provisions of Article 4 being consistently underscored by the Committee manifests the importance given to this article. The Committee explained its determination to see those provisions implemented in the following words:

> When the International Convention on the Elimination of All Forms of Racial Discrimination was being adopted, article 4 was regarded as central to the struggle against racial discrimination. At that time, there was a widespread fear of the revival of authoritarian ideologies. The proscription of the dissemination of ideas of racial superiority, and of organized activity likely to incite persons to racial violence, was properly regarded as crucial. [329]

And the Committee continued:

[327] Cf. General Recommendation I (1972), General Recommendation VII (1985), and General Recommendation XV (1993.)
[328] General Recommendation VII (1985), 1.
[329] CERD, General Recommendation XV (1993), 1.

> Since that time, the Committee has received evidence of organized violence based on ethnic origin and the political exploitation of ethnic difference. As a result, implementation of article 4 is now of increased importance.[330]

Prohibiting the dissemination of ideas of racial superiority would be essential in order to combat racial discrimination and, eventually, authoritarian ideologies. Article 4 would accordingly have a crucial role to play in this context, even more nowadays given the increase in racial discrimination and violence observed by the Committee during the last thirty years. But would strengthening the proscription of the dissemination of racist ideas not jeopardise the right to freedom of expression? The CERD Committee answers negatively:

> In the opinion of the Committee, the prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression.[331]

The Committee, referring to international human rights standards (UDHR, ICCPR, and CERD), considers that the prohibition of racist ideas does not infringe upon the right to freedom of expression. State legislation has subsequently and progressively evolved accordingly, to be in conformity with the requirements of the Convention.

Bearing in mind the Committee's understanding of freedom of expression and perception of what limitations must necessarily frame the exercise of this freedom, a brief survey of its concluding observations follows. It illustrates how the adoption, by State parties, of legal provisions proscribing negationism was perceived by the Committee.

The CERD Committee welcomed the prohibition of negationism by States as a measure adopted to implement Article 4. The criminalisation of the denial of crimes against humanity is indeed consistently considered as a "positive aspect"[332], a "welcome development in terms of Article 4 of the Convention."[333] The Committee went one step further in considering that the introduction in criminal law of such a proscription was tantamount to "filling a gap in the law."[334] In other words, national law lacking a provision whereby negationism is punished would be incomplete. In saying so, the Committee is only a small step away from formulating the obligation for State Parties to criminalise negationism in order for their legislation to be

[330] CERD, General Recommendation XV (1993), 1.
[331] Ibid, 4.
[332] *See* for instance the following Concluding Observations of the CERD Committee: France, 01/03/1994 (A/49/18., §142); Switzerland, 30/03/1998 (CERD/C/304/Add.44., §4); Luxembourg, 18/04/2005 (CERD/C/LUX/CO/13., §5.)
[333] Summary record of the 1248th meeting: Switzerland, 06/03/1998 (CERD/C/SR.1248., §48.)
[334] Concluding Observations of the CERD Committee: Belgium, 23/04/1997 (CERD/C/304/Add.26., §8.)

'complete' and fully implement CERD Article 4. However, this wording is not to be found in any other Concluding Observations and despite the Committee enthusiasm regarding the prohibition of negationism, no General Recommendation has (yet?) required States to adopt such legal provision. Besides, the Committee's positive appreciation was nuanced in certain circumstances. If the Committee unconditionally commended the Swiss provision, criminalising denial of any crime against humanity,[335] and even advocated for its more systematic application,[336] it expressed its concerns about legislation addressing exclusively Holocaust denial. Finding the scope of the prohibition too restricted in that it does not refer to all types of genocides,[337] the CERD Committee considers that it should be extended to include war crimes and crimes against humanity, as defined in the Statute of the International Criminal Court[338].

All things considered, *de lege lata*, the prohibition of negationism, which is intended to give effect to Article 4, does not however assume the "mandatory character" of Article 4. Nevertheless, should the CERD Committee interpreting Article 4 of the Convention ever phrase the obligation of State Parties to legally proscribe negationism, this proscription should not be narrowed to the denial of crimes committed during the Second World War only; it should instead address negationism at large, concerning any crime against humanity.

2. Council of Europe Additional Protocol to the International Convention on Cybercrime

The Council of Europe, unlike the CERD Committee has taken a stand on the question of negationism in the specific context of computer networks. States have different legislation regarding freedom of expression, but, as underscored by the Council of Europe, new technologies call for a co-ordinated approach since "borders are no longer boundaries" to the flow of information and communications:[339]

> …domestic laws are generally confined to a specific territory. Thus solutions to the problem posed must be addressed by

[335] Concluding Observations of the CERD Committee: Switzerland, 30/03/1998 (CERD/C/304/Add.44., §4.)

[336] Summary record of the 1249th meeting: Switzerland, 06/03/98 (CERD/C/SR.1249, §57): "les membres du Comité souhaiteraient que les dispositions du Code pénal suisse, et en particulier l'article 261 bis, soient plus systématiquement appliquées pour condamner les actes visant à nier, minimiser ou justifier le génocide ou d'autres crimes contre l'humanité."

[337] Concluding Observations of the CERD Committee: Belgium, 23/04/1997 (CERD/C/304/Add.26., §8.)

[338] Concluding Observations of the CERD Committee: France, 19/04/2000 (CERD/C/304/Add.91., §6) and 18/04/2005 (CERD/C/FRA/CO/16., §20.)

[339] *See* Explanatory Report to the International Convention on Cybercrime, adopted by the Committee of Ministers of the Council of Europe at its 109th session, 08/11/2001 (ETS No.185), para.6.

> international law, necessitating the adoption of adequate international law instruments.[340]

As a result, the Council of Europe adopted, in November 2001, the International Convention on Cybercrime.[341] This treaty has since then been signed by 43 countries - from Europe, Africa, America and Asia - and ratified or accessed to by 21 in total. The large number of signatures can be explained by the consensus reached within the Committee of Ministers during the drafting process: delegations from the various Member States agreed the Convention should foster international prosecution of both child pornography and infringements of copyrights. By contrast, when the discussion entered upon the addition of a possible third content-related offence, namely the proscription of hate speech and incitement to racial violence, the proposal faced the resistance of the United States delegation.[342] The incompatibility of such provisions with the First Amendment of the US Constitution would allegedly prevent the United States from signing the text of the Convention. As a consequence of the strong concerns expressed by some delegations, lead by the US, and despite the significant support in favour of the criminalisation of negationism as a form of racist propaganda, the final text of the Convention does not include any provision designed to sanction hate speech on/in computer networks.[343]

Given the fact that many of its Member States have criminalised certain acts of racist or xenophobic content, the Council of Europe found it still necessary to adopt a "co-ordinated approach which [would enable] an effective domestic and international response."[344] It was thus decided that, as a compromise, an additional protocol would be drawn up, supplementing the Convention on Cybercrime and defining content-related offences, such as the distribution of racist propaganda through computer systems. The Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts or racist and xenophobic nature committed through computer systems ("Additional Protocol") was subsequently adopted in January 2003 and entered into force in March 2006.[345]

The Preamble of the Additional Protocol, on the one hand, recognises and stresses the importance of freedom of expression as one of the essential foundations of a democratic society,[346] and on the other hand, underscores

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[340] Explanatory Report to the International Convention on Cybercrime, adopted by the Committee of Ministers of the Council of Europe at its 109th session, 08/11/2001 (ETS No.185), para.6.
[341] International Convention on Cybercrimes, 08/11/2001 (ETS No.185.)
[342] *See* Sean D. Murphy, "Hate-speech Protocol to Cybercrime Convention", *The American Journal of International Law*, Vol.96, No.4 (October 2002): p.973.
[343] *See* the Explanatory Report to the Convention on Cybercrime (ETS No.185), 109th session, 08/11/2001, para.35.
[344] *See* the summary of the Additional Protocol to the Convention on Cybercrime, available at: <http://conventions.coe.int/Treaty/en/Summaries/Html/189.htm>.
[345] Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts or racist and xenophobic nature committed through computer systems, 28/01/2003 (ETS No.189.)
[346] Additional Protocol to the Convention on Cybercrime, Preamble, paras.10 and 13.

the principle of equality and non-discrimination,[347] and highlights the existing and necessary legal instruments sanctioning acts of a racist and xenophobic nature.[348] The drafting Member States awareness of the existence of two apparently conflicting interests – i.e. the fight against the dissemination of racist ideology versus the right to freedom of expression – is clearly perceptible:

> Mindful of the need to ensure a proper balance between freedom of expression and an effective fight against acts of a racist and xenophobic nature...[349]

If the fight against racism requires that a certain type of speech be not protected by the right to freedom of expression, on grounds of its racist or xenophobic character, the drafters however sought not to infringe on the freedom of expression beyond necessary.

Among the content-related offences the Additional Protocol established, Article 6(1) provides for the criminalisation of negationism:

> Each Party 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 minimises, approves or justifies acts constituting genocide or crimes against humanity, as defined by international law and recognised as such by final and binding decisions of the International Military Tribunal, established by the London Agreement of 8 August 1945, or of any other international court established by relevant international instruments and whose jurisdiction is recognised by that Party.[350]

State Parties to the Additional Protocol are bound to criminalise negationism. The prohibition should be prescribed by law, and sanction the intentional denial, gross minimisation, approval or justification of any genocide or crime against humanity, the terms being defined pursuant to international law. Article 6(1) proscribes, not merely the negation of those crimes perpetrated during the Second World War only, but of any acts qualified as genocide or crime against humanity by any international court established by an international convention (e.g. the International Criminal Tribunals for Yugoslavia and Rwanda)[351], and whose jurisdiction is recognised by the State Party concerned.

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[347] Additional Protocol to the Convention on Cybercrime, Preamble, paras.3 and 4.
[348] Ibid, Preamble, paras.5, 6, 7, 11, 14 and 15.
[349] Ibid, Preamble, para.12.
[350] Ibid, Article 6, para 1.
[351] *See* the Explanatory Report to the Additional Protocol, 28/01/2003 (ETS No.189.), Commentary on Article 6.

The State obligation to criminalise negationism thus explicitly exists in an international treaty. The impact of such obligation must yet be nuanced on several accounts. Firstly, one should not forget that the Convention and its Additional Protocol are constitutive of a specialised law (*lex specialis*): their scope is limited to cybercrimes. As a consequence, States are only obliged to sanction those negationists who disseminate their theories through computer systems; no general obligation of States to criminalise negationism in all its forms can be deduced. In other words, it could so happen that, under his national criminal law, a negationist author is proscribed to publish his writings on the Internet but free to distribute them through a newspaper or the radio for instance. This double standard tends to undermine the impact of the condemnation of negationism under Additional Protocol Article 6.

Secondly, the wording indicates that the mandatory character of the obligation is only limited. Whereas the announced aim of both the Convention and its Additional Protocol was, for the Council of Europe, to adopt a "co-ordinated approach"[352], to "achieve a greater unity between its members"[353], the margin of appreciation left to the Member States appear to be broad, to the detriment of the force of the obligation. The content of the offence may for instance vary, from one State to the other: the requirement that the negationist statement be motivated by the intent to incite to racial hatred, discrimination or violence, which is found in German law for instance, is indeed not a compulsory feature of the prohibition of negationism; it is for the States to decide whether to provide for it or not:

> A Party may … require that the denial or the gross minimisation … is committed with the intent to incite hatred, discrimination or violence against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors, or otherwise…[354]

States are further free to decide to only partly implement Article 6(1), or even, not to implement it at all:

> A Party may … reserve the right not to apply, in whole or in part, paragraph 1 of this article.[355]

Accordingly, Denmark for example made a reservation to the Additional Protocol where it stated that it would not apply Article 6 and thus not establish negationism as a criminal offence under its national law. The freedom left for State Parties to decide whether to criminalise negationism

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[352] *See* the summary of the Additional Protocol to the Convention on Cybercrime, available at: <http://conventions.coe.int/Treaty/en/Summaries/Html/189.htm>.
[353] International Convention on Cybercrimes, 08/11/2001 (ETS No.185), Preamble, para.2.
[354] Additional Protocol, Article 6, para.2a.
[355] Ibid, Article 6, para.2b.

or not, and, if they do, to define the scope of the prohibition undermines the binding force of the treaty provision.

The limited scope of the Additional Protocol together with the large margin of appreciation left to States regarding the criminalisation of negationism leads to the conclusion that under the law of the Council of Europe, States are not bound to establish negationism as a punishable offence. Before pursuing the survey of the mechanisms available at the regional level by discussing those elaborated within the European Union, it is worth mentioning a pertinent resolution of the Parliamentary Assembly of the Council of Europe.

The said resolution, Resolution 1577 (2007)[356], is entitled "Towards decriminalisation of defamation." It warns against abuses of freedom of expression and firmly condemns hate speech, and, in particular, negationism:

> As recently acknowledged in a framework decision applicable to member countries of the European Union, it must be possible to prosecute those who incite violence, promote negationism or racial hatred, conduct inimical to the values of pluralism, tolerance and open-mindedness which the Council of Europe and the European Convention on Human Rights promote.[357]

The resolution does not address the question as to the appropriate means of criminalising negationism, but specifically deals with the applicable sanction. The regime, which the resolution seeks to establish, is questionable and raises concerns as to the appropriateness of criminal law to sanction hate speech. The resolution aims at the abolition of prison sentences for defamation, and urges States to provide persons pursued for defamation with appropriate means of defending themselves, in particular means based on establishing the truth of their assertions. France is expressly criticised for making exceptions to this rule in cases where the alleged facts are more than ten year old, concern private life, or correspond to a crime for which the person was granted amnesty.[358] France also prevents the defendant from proving his assertions in cases of racial defamation[359] but the Parliamentary Assembly phrases no criticism against this specific provision. In fact, the Parliamentary Assembly appears to treat racial defamation and hate speech with more severity than 'simple' defamation. The resolution indeed sets out a noteworthy exception to the decriminalisation of defamation:

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[356] Resolution 1577 (2007), Towards Decriminalisation of Defamation, *Assembly debate* on 4 October 2007 (34th Sitting) (*see* Doc. 11305, report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Bartumeu Cassany). *Text adopted by the Assembly* on 4 October 2007 (34th Sitting.)
[357] Ibid., para. 15.
[358] 1881 Freedom of the Press Act, Article 35.
[359] 1881 Freedom of the Press Act, Article 32.

> … make only incitement to violence, hate speech and promotion of negationism punishable by imprisonment.[360]

This 'special treatment' of hate speech and negationism might seem contradictory with the overall aim of the resolution. Indeed, from the perspective of journalistic freedom for instance, the resolution calls on the Member States of the Council of Europe to set reasonable and proportionate maxima for awards for damages and interest in defamation cases so that the viability of a defendant media organ is not placed at risk.[361] Such provision seems to acknowledge the particular importance of the freedom of the press in a democratic society in that it aims at safeguarding the existence of media organs. However, the provision whereby States have the possibility to punish racial defamation, hate speech and negationism by imprisonment does not exclude journalists from its scope. Therefore, on the one hand, journalists and media organs cannot be imposed to pay too high damages and interests, but on the other hand, journalists are likely to be punished by the extremely stringent sanction of imprisonment. The will to guarantee the financial viability of media organs contrasts with the possibility to punish by imprisonment that eventually reduces journalists to silence.[362]

Concerning negationism specifically, the possible effects of the Parliamentary Assembly resolution – a non-binding act – are only limited since, as mentioned earlier, States are not bound to criminalise negationism under the law of the Council of Europe. As will be illustrated below, the same conclusion can be reached about European Union law which does address negationism, but without making it mandatory for states to criminalise it.

3. European Union Framework Decision on Combating Racism and Xenophobia

The European Union has attempted for several years to reach a consensus on an effective and coordinated criminalisation of racism and xenophobia in all Member States. A first step in that direction was made by the EU Council adopting, on 15 July 1996, a Joint Action concerning action to combat racism and xenophobia.[363] A 1998 report on its implementation however shed light on its shortcomings. The implementation of the Joint Action was found to be far from uniform among Member States, and a number of fields still lacked a comprehensive and clear legislation in many Member States.[364] The European Parliament requested in 2000 that a Framework Decision replace the Joint Action.[365]

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[360] Resolution 1577 (2007), para 17.5.
[361] Ibid., para 17.8.
[362] Ref. to RSF?
[363] OJ L 185, 24.7.1996, p.5.
[364] Among the fields where Member States should adopt comprehensive and clear legislation, the 1998 report on the implementation of the 1996 Joint Action identified mutual legal assistance and consideration of racist motivation as an aggravating factor

In 2001, EU Commission, with the involvement of the European Parliament, drew up the first proposal for a Framework Decision on Combating Racism and Xenophobia;[366] it aimed "at approximating the laws and regulations of the Member States regarding racist and xenophobic offences."[367] Its purpose was described by the Commission as being "twofold", its two objectives being the achievement of an effective, proportionate and dissuasive criminalisation of racism and xenophobia in all Member States, and the promotion and facilitation of judicial cooperation between States.[368] The Commission stressed that the Framework Decision could not be interpreted as affecting the international legal obligations of State to respect and guarantee human rights and fundamental freedoms.[369] In particular, the Commission stated that the exercise of, among others, freedom of expression "has to be balanced with the prevention of disorder or crime and the protection of the reputation or rights of others."[370] Article 4 of the Framework Decision listed the behaviours Member States would be bound to establish as criminal offences; among them was the public denial or trivialisation of crimes defined by the Tribunal of Nuremberg in a manner liable to disturb the public peace.[371] This 2001 proposal was however not adopted. Negotiations, which have been underway since then, finally lead to the achievement of an informal political agreement by the Justice and Home Affairs Council (the Council) in April 2007.[372] It was subsequently amended by the EU Justice Ministers and transmitted to the European Parliament who, on 21 June 2007, addressed recommendations to the Council. To date, the latest version of the proposal for the Framework Decision is of 19 July 2007. The procedure of adoption is still pending. It is

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when imposing the penalty for ordinary offences. For an overview of international and EU activities regarding the fight against racism and xenophobia prior to 2001, see the Explanatory Memorandum to the Proposal for a Council Framework Decision on Combating Racism and Xenophobia, COM(2001) 664 final, 28/11/2001.

[365] European Parliament resolution of 21 September 2000, OJ C 146 of 17/05/2001, p.110.

[366] Proposal for a Council Framework Decision on Combating Racism and Xenophobia, COM(2001) 664 final, 28/11/2001.

[367] Ibid, 4.

[368] Proposal for a Council Framework Decision on Combating Racism and Xenophobia, COM(2001) 664 final, 28/11/2001, 4.

[369] Ibid.

[370] Ibid.

[371] 2001 Proposal for a Council Framework Decision on Combating Racism and Xenophobia, Article 4(d). As underscored by the European Commission in its comments on the articles, this provision is largely inspired by German Law whose relevant provision is as follows: "whoever publicly or in a meeting approves of, denies or renders harmless an act committed under the rule of National Socialism of the type indicated in Section 220a subsection (1), in a manner capable of disturbing the public peace shall be punished with imprisonment for not more than five years or a fine." (German Criminal Code, Section 130(3).)

[372] The text of the proposed Framework Decision on which the Council reached a general approach on 19 April 2007 has since been modified, but barely on its substantive content: the modification mainly affected the numbering of articles and paragraphs (doc 8704/07 DROIPEN 36, 25/04/2007, ANNEX I, amended by doc 11522/07 DROIPEN 68, 19/07/2007, ANNEX.) In the following, reference to provisions of the proposed Framework Decision will be made pursuant to the numbering of the latest version available of the text (i.e. that of 19/07/2007.)

yet worth elaborating briefly on this possible future instrument of European law.

Discussions on the adoption of a Framework Decision on Combating Racism and Xenophobia had been blocked for a number of years until the German Presidency of the EU took the initiative of submitting to the Council a new compromise proposal for discussion. The reason behind was phrased by Mr Hellmann, talking on behalf of the German Presidency, who stated that the adoption of the Framework Decision constituted one of the priorities of the German Presidency, given a particular responsibility placed on Germany by its historical experience to combat any manifestation of racism and xenophobia.[373] He further stressed the importance of such act for the future of Europe, and in particular, for ensuring to every person the possibility to live in security and dignity in the European society.[374]

To these ends, the text of the proposed Framework Decision, on which the Council reached a general approach, addresses five main points. It first establishes that public incitement to racial violence or hatred as well as negationism is to be punishable in all EU Member States. Secondly, racist and xenophobic motivations should be taken into account by national courts as aggravating factors in imposing penalties. Thirdly, the Framework Decision states the liability of legal persons for conducts constitutive of offences concerning racism and xenophobia. Fourthly, as the Commission already had done in 2001, the proposed text underscores the importance Member States obligation to respect human rights and fundamental freedoms, and the necessary balance between freedom of expression and the condemnation of racist and xenophobic conducts. The fifth element is a procedural aspect and specifies the initiative of prosecutions: investigations must be initiated *ex officio* by the criminal authorities; neither investigation nor prosecution is dependent on the injured party making a report or accusation. The first and fourth points are the ones we will subsequently and successively focus on.

Conducts which should be constitutive of illegal negationism are defined in two similar paragraphs (Article 1(1) paragraphs c and d), the first one addressing the negation of any crime against humanity and the second one referring specifically to the Constitution of the Nuremberg Tribunal – and thus to the Holocaust. The first of those two paragraphs reads as follows:

> 1. Each Member State shall take the measures necessary to ensure that the following intentional conduct is punishable:
> … publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in Article 6, 7 and 8 of the Statute of the International Criminal Court, directed against a group of persons or a member of such

[373] Cited in: Committee on Civil Liberties, Justice and Home Affaires (LIBE) of the European Parliament, Public Hearing: The Framework Decision on Combating Racism and Xenophobia, 19 March 2007 (doc 7885/07 PE 88 DROIPEN 26.)
[374] Ibid.

> 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 group.[375]

The second relevant paragraph (paragraph d) is identical to the first one except for the legal instrument in reference to which the crimes are defined: the reference to the Statute of the International Criminal Court (ICC) is replaced with a reference to the Constitution of the Nuremberg Tribunal.[376] This second provision seems superfluous in that the reference made in the first paragraph to crimes of genocide, crimes against humanity and war crimes as defined in the Statute of the ICC is not event-specific and can consequently encompass the Holocaust and other crimes committed under the rule of National Socialism. *(why the emphasis? symbolic/political? procedural?)* Member States, pursuant to the Framework Decision would thus have to criminalise, not merely Holocaust denial, but the negation of any crime against humanity or war crime. Any Member State has the possibility to identify more precisely crimes which cannot be denied by setting the requirement that those crimes be previously established by a final decision of one of its national courts and/or of an international court.[377]

The scope of the provision, apparently broad in that it is not limited to any specific historical event, is however narrowed by the requirement that the conduct be likely to incite to racist or xenophobic violence or hatred. To that extent, paragraphs c and d on the prohibition of negationism appear to be superfluous since paragraph a indeed already spelled out the obligation for States to adopt measures necessary to ensure that public incitement to racial violence or hatred in general is punishable. Member States may choose to further restrict the scope of the proscription of negationism:

> …Member States may choose to punish only conduct which is either carried out in a manner likely to disturb public order or which is threatening, abusive or insulting.[378]

All in all, negationism would be punishable, in any case, provided it is likely to incite to violence or hatred, and, if States so decide, provided it either is likely to disturb public order, or amounts to threats, defamation or

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[375] Council Framework Decision on Combating Certain Forms and Expressions or Racism and Xenophobia by Means of Criminal Law (doc 11522/07 DROIPEN 68, 19/07/2007, ANNEX), Article 1(1)(c). Hereinafter cited as 'Council framework Decision.'

[376] Ibid, Article 1(1)(d).

[377] Ibid, Article 1(2).

[378] Council Framework Decision, Article 1(1)(e). The resemblance with German Criminal Law (Criminal Code Section 130(3)), already highlighted by the Commission in its 2001 proposal, is again obvious in this compromise proposal – submitted by the German Presidency: the restriction of the proscription to conducts carried out "in a manner likely to disturb public order" recalls the relevant German provision whereby negationism is punished provided it is carried out "in a manner capable of disturbing public peace." The fact that the notion of public peace has been criticised in German doctrine, on ground of its lack of definition, might explain the drafters opted for the widely used notion of "public order."

insult. Those conducts ordinarily constitute offences in domestic criminal laws.

The need for a specific offence of negationism thus appears to be questionable. Criticisms that have been and still are formulated at the national level can indeed be addressed to the European legislator: could negationism not be sanctioned under the proscriptions of incitement to hatred or violence, agitation of the people, threat, or insult? Negationism being understood as a form of racism, or, in the specific case of the Holocaust, of anti-Semitism, the racial motivation of such conduct could then be taken into account by courts, in the determination of penalties. In that sense precisely, the Framework Decision actually establishes the obligation for States to ensure that racist and xenophobic motivation is considered an aggravating factor when imposing penalties for ordinary offences.[379]

In conclusion, although the Framework Decision on Combating Racism and Xenophobia explicitly addresses the issue of negationism, the only State obligation it clearly spells out is to adopt measures necessary to ensure that public incitement to racial violence or hatred is punishable, at least when it can potentially disturb public order or if it is threatening, abusive or insulting.

All things considered, it can be concluded that the prohibition of negationism is not firmly established under international human rights treaty law, neither at the global nor at the regional level. Legislation criminalising negationism has however been adopted in a number of countries and several treaty bodies and instances have expressed some support to such laws. Therefore, it is worth assessing whether the prohibition of negationism could in fact be identified under customary international law.

B. Customary international law

International custom is a source of international law "as evidence of a general practice accepted as law"[380]; in the words of the International Court of Justice (ICJ), it is constituted by the objective "general practice" and subjective "*opinio juris*."[381] As discussed in Section 2, within the international community of States, a minority only has adopted a legal proscription of negationism. Nevertheless, if the actual practice of States provides the main evidence of customary law[382], treaties or resolutions of the United Nations General Assembly (UNGA) constitute other recognised

[379] Ibid, Article 4.
[380] Article 38(1)(b) of the Statute of the International Court of Justice.
[381] *See* among others *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* Case): *Nicaragua v. United States*, ICJ Reports 1986, p.14, at 97.
[382] *See* for instance Peter Malanczuk, *Akerhurst's Modern Introduction to International Law,* 7th edition (London: Routledge, 1997), p.39.

means of proving the existence of a rule of customary law. A treaty can in particular codify a rule of customary law. In a *North Sea Continental Shelf* case, the ICJ has specifically identified two criteria to be met for a custom to be crystallised: the sufficient normative character of the treaty provision (no reservation possible)[383] and the large participation to the said treaty.[384] As said, the only convention explicitly stating the obligation of States to criminalise negationism is the Additional Protocol to the Council of Europe Convention on Cybercrimes. As aforementioned, the Protocol relevant provision (Article 6) is one of those in respect of which reservations may be made by States. Consequently, in view of the first criterion identified by the ICJ in the *North Sea Continental Shelf* case, it can be deduced that this provision would not be of sufficient normative value to be seen as reflecting a rule of customary law. As regards the second criterion, it should be noted that the Additional Protocol only received a small number of ratifications; the impact of its provisions is thus very limited: out of the 31 States which have signed the treaty (as of November 10th, 2007), only 11 have ratified it. None of the two criteria set by the ICJ thus seem to be fulfilled by Additional Protocol and its Article 6. Accordingly, Article 6 could not be seen as a crystallisation of an existing prohibition of negationism under international customary law.

Regarding acts of international organizations, it can be argued that, because they reflect the views of voting states, they can be evidence of customary law. As stated by the ICJ in its 1996 *Advisory Opinion on the Legality of the Threat or Used of Nuclear Weapons*:

> General Assembly resolutions, even if they are not binding as such, may have normative value… To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may indeed show the gradual evolution of the *opinio juris* required for the establishment of a new rule.[385]

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[383] The ICJ found that a provision in respect of which States may make reservations is not of a sufficient normative character and thus does not crystallise a rule of customary law: "it is to be expected that when… rules or obligations of [general or customary law] are embodied, or are intended to be reflected in certain provisions of a convention, such provisions will figure amongst those in respect of which a right of unilateral reservation is not conferred, or is excluded" (*Federal Republic of Germany v. Denmark*, ICJ Reports 1969, p.3, at. 62.)

[384] The ICJ accepted that the time-element requirement – necessary for the occurrence of a consistent State practice – may be reduced where a number of States expressed their approval to the rule by adhering to or ratifying the convention: "with respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself" (*Federal Republic of Germany v. Denmark*, ICJ Reports 1969, p.3, at 73.)

[385] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p.226, at 70.

Incidentally, the United Nations General Assembly adopted, January 26th 2007, a resolution condemning Holocaust denial:

> *The General Assembly* … (1) *Condemns without any reservation* any denial of the Holocaust; (2) *Urges* all Member States unreservedly to reject any denial of the Holocaust as a historical event, either in full or in part, or any activities to this end.

This resolution, adopted by consensus, recalls one of 1995 where the General Assembly designated 27 January as the International Day of Commemoration in memory of the victims of the Holocaust and already rejected any Holocaust denial.[386] The present resolution however adds to the previous one in that it urges States to reject Holocaust denial. If the adoption of a series of resolution may constitute evidence of an emerging rule of customary law, a series of two however seems to fall short of constituting sufficient evidence.

Conversely, a series of two surely is a short series and it seems reasonable to believe that the ICJ for example, given the position it adopted in the above-quoted 1996 Advisory Opinion, would not see it as evidence of an existing rule of customary international law. But on the hand, could those two resolutions not simply be the first two of a longer series and thus be given more credit? An argument in favour of such an interpretation could be the consensus through which the 2007 resolution was adopted, and both texts' numerous sponsors (more than a hundred States[387].) It is moreover interesting to observe that the United States strongly supported the adoption of both resolutions and, more importantly, that they introduced the text of the 2007 resolution. As said, there is a divide between States on the issue of legal limitations to the right to freedom of expression. Traditionally, the United States embody the libertarian, absolutist conception[388] pursuant to which limitations to the right to freedom of expression are only exceptions to the general rule of absolute protection of the right; in principle, hate speech is not one of those exceptions and is protected under the right to freedom of expression. In that respect, the United States delegation proposing a text whereby the UNGA urges States to reject Holocaust denial appears to go against the United States long-established approach. It would however not be the first restriction the United States eventually place on the right to freedom of expression: breaches to the principle have indeed occurred since 11 September in the name of the war against terror (e.g. measures taken instituting a certain surveillance of the Internet.[389])

One can therefore wonder whether the position of the United States delegation within the UNGA could be seen as the precursor to a new

[386] UN General Assembly: GA Res. 60/7, 1 November 2005 (A/RES/60/7), at 1 and 3.
[387] 104 States sponsored the 2005 resolution, and 103 sponsored the 2007 resolution.
[388] *See* Kevin Boyle and Cherian George, *supra* note 27.
[389] *See* Emmanuelle Duverger and Robert Ménard, *supra* note 260.

interpretation of the First Amendment by US courts, allowing for further limitations to the right to freedom of expression, regarding hate speech or Holocaust denial in particular only. With the United States backtracking from their previous traditional conception of an unlimited freedom of expression, the libertarian approach to freedom of expression is loosing its spearhead. The 'balanced conception' of freedom of expression would then gain ground until, perhaps, the criminalisation of Holocaust denial becomes a general practice of States, convinced they will help, by safeguarding the memory of the genocide, "avoiding future disasters."[390]

These are however only speculations and, considering the law as it stands, it can be concluded that there exists no customary obligation for state to criminalise negationism.

If the obligation of States to adopt measures against racial discrimination and hate speech can be established in international law, international human rights standards however do not condemn negationism *per se*. As mentioned, neither conventional nor customary international law spell out the obligation for States to establish negationism as an offence. Among the above mentioned instruments of international human rights law, the CERD convention and subsequent elaborations made on it by the CERD Committee appear, for several reasons, as the most authoritative tool likely to best regulate the issue of a criminalisation of negationism by States. The CERD convention is a binding instrument of international law that has received a large number of ratifications. Moreover, its article 4, relevant in the discussion on negationism, is general in scope: unlike the Council of Europe Additional Protocol for instance, it is not limited to cybercrimes. The conclusion of this research will in fact resemble and, to some extent, draw on the comments, recommendations and interpretations made by the CERD Committee.

[390] Alejandro Daniel Wolff, United States delegate within the UN General Assembly justifying the US position, affirmed the condemnation by States of any form of Holocaust denial was not infringing on free speech, but aiming at avoiding the reoccurrence of genocides: "the resolution was not about countering free speech or intellectual thought: it was about avoiding future disasters." *See* "General Assembly Adopts Resolution Condemning Any Denial of Holocaust", Explanations of Positions, 26 January 2007 (GA/10569.)

Conclusion

Criminal laws sanctioning negationism have been adopted in a number of European countries as well as in Israel. They either criminalise the denial of genocides (and possibly crimes against humanity and war crimes too) in general, or denial of precisely identified historical events, such as the Holocaust and Communist crimes. Negationist authors have been sanctioned by domestic courts and those sanctions have been found compatible with the European Convention of Human Rights and the International Covenant on Civil and Political Rights by competent international instances, at the regional level (ECtHR and ECoHR) and global level (HRC) respectively. However, the ECtHR and ECoHR, and the HRC all underscored that they were not competent for assessing the conventionality of domestic laws. Their role is not indeed to criticise national laws in the abstract, but to appreciate whether a given measure, adopted by States pursuant to their own domestic legislation, is in fact compatible with the rights protected by the treaty they monitor. Nevertheless, the Human Rights Committee especially made it clear that the French act proscribing Holocaust denial was likely to lead, under different conditions than the facts of the *Faurisson* case, to decisions or measures incompatible with the ICCPR.

These explicit concerns of the Committee and of its members as to the legality of the French criminalisation of Holocaust denial give rise to doubts as to the legality, in general, of the criminalisation of negationism. Contemporary discussions among commentators – be it public opinion, lawyers, politicians or historians – and the recent decision of Spain Constitutional Tribunal reinforce those doubts. Spanish constitutional judges indeed found, in November 2007, that the Spanish penal code provision sanctioning the denial of any genocide was incompatible with the Constitution as it violated the fundamental right to freedom of expression. The Constitutional Tribunal recalled, citing European case law, that it is precisely the role and characteristic of freedom of expression to protect all information and ideas, including those that offend, shock, or disturb the State or part of the population.[391] This libertarian conception of freedom of expression is also defended by a number of commentators. At the same time however, the Swiss Federal Supreme Court upheld the decision of a lower court sanctioning Turkish politician Doğu Perincek for denial of the Armenian genocide. Anti-negationism law in Switzerland is not event-specific. Similarly to the henceforth abrogated Spanish provision, Swiss criminal law makes it an offence to deny any genocide, including the Holocaust and, as recently confirmed, the Armenian genocide.

The contrast observed between the two judicial decisions is but one illustration of the absence of consensus on the issue of the criminalisation of

[391] El Pleno del Tribunal Constitucional, 8 November 2007, cuestión de inconstitucionalidad núm.5152-2000, 4. The decision refers to ECtHR, *De Haes and Gijsels v. Belgium*, 24 February 1997, Reports 1997-I, §49.

negationism. The question is extensively discussed and gives rise to a variety of arguments, either advocating for or opposing the sanction of negationism. Concerns of commentators mainly depend on the latter's approach to freedom of expression. Absolutist libertarians argue that negationist theories, as expressions of opinions, should not be sanctioned at all. More 'moderate' commentators do not object to the sanction of negationist authors on principle, but are against the creation, to this repressive end, of a specific offence of negationism. The opposite points of view are of course formulated too, and for instance consist in advocating for the sanction of negationism, as a form of hate speech.

If literature is instructive and provides us with various lines of argumentations, it is nonetheless little but helpful in reality as it mainly serves to establish that the criminalisation of negationism is an unsettled and highly controversial question. The contribution of international law is unfortunately modest too. The survey of pertinent international law illustrates that neither regional nor global human rights standards have specifically and efficiently addressed the issue of negationism. The imprecision, non-specificity and lack of mandatory character of relevant international law, together with the apparent unwillingness of international lawmakers to take a stand on the issue, are further evidence of the impossibility for or inability of the international community to reach a consensus on the sensitive issue of the criminalisation of negationism. Eventually, the absence of any clear-cut solution to the issue does help formulating a conclusion.

According to Gilles Manceron, discussing 'memorial laws':

> …each of them … was an answer to legitimate claims and fulfilled essential functions. Isn't the wisest solution to both refuse to add new such laws to the existing ones and to aim at abolishing and modifying them?[392]

I would partly agree with the above proposal: refusing to adopt new such laws and modifying the existing ones might indeed appear to be the wisest solution, on both moral and legal points of view. However, abolishing them might not be the most appropriate of decisions.

Given the absence of any definite conclusion in international law on the issue of the criminalisation of negationism, it might be advisable that countries where negationism has not been criminalised yet keep a legal *status quo*, and sanction negationist statements under ordinary civil law, if they are constitutive of a wrongful act causing emotional damage to others for instance, or under ordinary criminal law, if they amount to racial defamation or insult.

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[392] "*[chaque loi mémorielle] a … répondu à des demandes légitimes et rempli des fonctions essentielles. Le plus sage n'est-il pas à la fois de refuser qu'on leur en ajoute d'autres et qu'on cherche à les abolir et les modifier ?* ", Gilles Manceron, "Ne jouons pas avec les mémoires ! ", article published in *Libération*, 25 May 2006.

In countries where legislation already prohibits negationism, abolishing such legislation might be inappropriate. The abolition or nullification of the legal prohibition of Holocaust denial would deprive the Jewish community and possibly, associations of victims and families, from their right to initiate proceedings against negationists. As a consequence, Holocaust victims, like victims of other genocides, could only complain under ordinary civil and criminal law, respectively for wrongful act causing emotional damage, or racial defamation or insult for example. In that respect, the discrimination resulting from the prohibition of Holocaust denial would no longer exist. One can however wonder whether any politician or Member of Parliament would ever take the step of making such proposal. Just as the adoption of memorial laws is often motivated by political considerations, their nullification would be highly politically connoted.[393] In a country like France where the Jewish Diaspora is important, and thus constitutes an electoral target, proposing the abolition of the prohibition of Holocaust denial would certainly be politically unwise and risky.

Since it seems unlikely that States would nullify their existing legal prohibition of negationism[394], it would be preferable from a human rights law perspective to amend them, so that the prohibition fulfils a number of criteria. Firstly, in view of the right to non-discrimination and to equality before the law, the criminalisation should encompass the denial, not of the Holocaust or of Communist crimes only, but of any genocide or crime against humanity. The sanction of negationism allegedly serves the fight against racism. For that reason, it seems contradictory or paradoxical that the law itself be discriminatory and risk promoting discriminations by implicitly establishing a hierarchy between crimes against humanity, between those memories which ought to be preserved and those which do not deserve such protection. The event-specificity of laws is undoubtedly discriminatory, but on the other hand, it has one asset: it establishes a legal presumption that the historical event at stake did take place. Judges therefore do not have the difficult task of establishing historical truths. The general reference to "any genocide or crime against humanity", on the other hand, leaves it for tribunals to assess, in each specific case, whether the allegedly negated crime did occur. Therefore, it would be necessary that evidence of past crimes against humanity be established independently, by historians and, possibly, by states, on the basis of the works of historians. If evidence exists, courts then can refer to the common understanding and

[393] Henry Rousso, who, at the time of the adoption of the Gayssot Act, expressed his doubts as to the opportunity of a criminalisation of Holocaust denial, stated in 2005 that the political act of nullifying the law would be even more inopportune: "*l'abolir aujourd'hui constituerait un acte politique plus inopportune encore*." Henry Rousso, "Mémoires abusives", *Le Monde*, Dec. 24, 2005.

[394] The Spanish Constitutional Tribunal however did abrogate the provision of Spanish Criminal Code criminalising negationism. This provision criminalised the denial of any genocide. Therefore, it was not protective of the rights of any community in particular. For that reason, it could be said that, to some extent, the abrogation of the provision was not as politically risky as it can be in countries where the offence of negationism is event-specific.

knowledge of history and presume that the historical events at stake cannot be negated in good faith.

The plain proscription of the denial of crimes against humanity would however lead to too severe restrictions on the right to freedom of expression. Additional requirements can thus be envisaged to narrow the scope of the prohibition of negationism. Pasted on the criteria set by the ECHR and the ICCPR, it could be added that the impugned negationist declarations or publications are likely to disturb public order, or to affect the rights or reputations of others. The law would thus not sanction the expression of mere theories or statements of facts, albeit false, but of utterances which jeopardise public order or cause damage to others. The racist content of such utterances could then provide the justification for the sanction. Alternatively or cumulatively, it can be required that the negationist work was dictated by racist motives. Since negationism is sanctioned as a form of racism, the provision proscribing it could indeed integrate this notion. In place of a specific offence of negationism, the legislator could otherwise adopt a law aiming to combat racism at large, wherein negationism would be sanctioned among other well-defined acts of racism. The approach adopted by the legislator in Portugal might thus be a good example as it combines both elements: the sanction of negationism is integrated in the provision prohibiting racial defamation and insult, and is applicable provided the negationist author intended to incite to racial or religious discrimination. In like manner, if international law, at the regional and global levels, is to evolve and establish the obligation for states to criminalise negationism, it seems appropriate that the prohibition integrate such criteria in order to ensure its compatibility with existing obligations of states under international law.

In conclusion, it should be borne in mind that legislation, if it can be an effective means of addressing racism, including negationism, is not the sole instrument available for states. To best thwart the development of negationist theories it is necessary that a variety of actors be involved. Historians should of course be involved but historians only cannot solve the problem of the increase of racism. "Education and pedagogy are the two principle weapons the legislator can use against the opinions it wishes to combat"[395]; those indeed contribute to ensuring that the population, well informed, is not likely to be easily convinced by negationist theories, based on forged evidence. Initiatives such as the opening, in November 2007, of the Second World War archives[396] or the creation of joint commissions of historians and researchers from various countries, entrusted to study and

[395] Bertrand de Lamy, La liberté d'opinion et le droit pénal, Bibliothèque des sciences criminelles, Tome 34 (LGDJ.) ("*l'éducation et la pédagogie, qui sont les deux principales armes que le législateur devrait utiliser contre les opinions qu'il veut combattre*.")

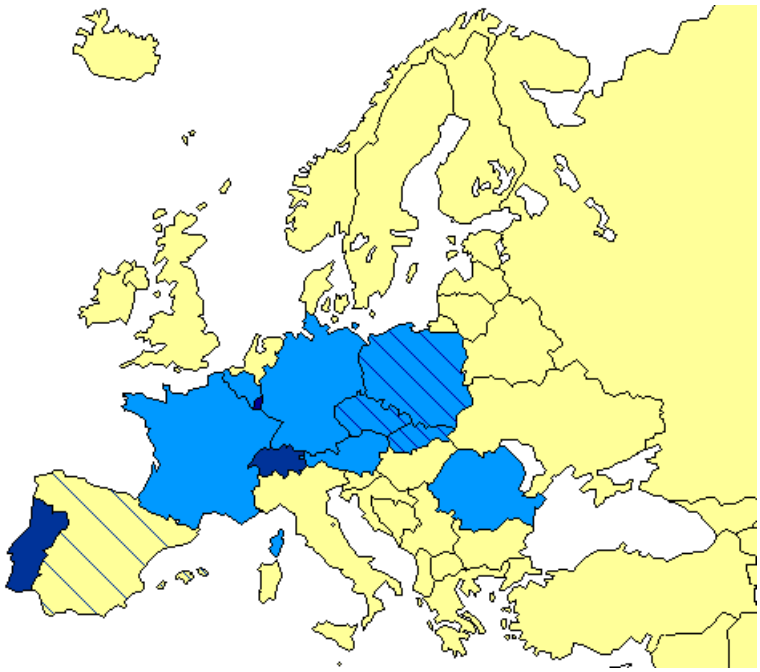
[396] The archives from Second World War concentration camps became public November 28, 2007, sixty years after the end of the war. They are accessible in Bad Arolsen, Germany, at the 'international service for research.' F. Vincent, "Une mémoire vraiment collective", *20 Minutes*, 30 November 2007.

reach a consensual interpretation of a given historical event[397], appear to be positive initiatives likely to contribute to informing the population, and developing a mutual understanding and, eventually, a sensible conscience against racism.

[397] Several commentators have advocated for the creation of such commissions. Similarly, during a visit to Alger, Nicolas Sarkozy declared: "it is now time to entrust some Algerian and French historians with the task of writing together a troubled page of history, so that future generations on both sides of the Mediterranean can have the same take on our past, and build, on this basis, a future of understanding and cooperation." D.H., "Sarkozy dénonce un colonialisme profondément "injuste"", LCI.fr, 3 December 2007.

Supplement A

The criminalisation of negationism in Europe:



	Negationism is not criminalised
Negationism is criminalised, and the legislation concerns:	
	National socialist crimes only[398]
	National socialist and communist crimes[399]
	Any crime[400]
	In Spain, as of 8 November 2007, negationism is not criminalised [401]

[398] Genocide and/or crimes against humanity and/or war crime (*See* Supplement B, table 1.)
[399] Ibid.
[400] Ibid.
[401] El Pleno del Tribunal Constitucional, 8 November 2007, cuestión de inconstitucionalidad núm.5152-2000.

Supplement B

This supplement contains two tables. The first table indicates the scope of each relevant legal provision (included in the second table) as to the historical events at stake. The second table provides information on the countries where negationism is criminalised, including general information on the relevant legislation (name and year of adoption), elements of procedure (initiative of proceedings and sanction), as well as data on the Jewish population in the country.

Table 1

	Historical facts at stake								
	Genocide			**Crimes v. Hum.**			**War crimes**		
	Nat. Soc. (Holocaust)	Communism	any	Nat. Soc. (Holocaust)	Communism	any	Nat. Soc. (Holocaust)	Communism	any
Austria	X			X					
Belgium	X			X					
Czeck Rep.	X	X		X	X		X	X	
France	X			X					
Germany	X			X					
Luxemburg			X	X		X			X
Poland[1]	1939-1989			1939-1989			1939-1989		
Portugal			X			X			X
Romania	X								
Spain			X						
Switzerland			X			X			

[1] In Poland, the prohibition of negationism concerns crimes perpetrated against Polish nationals or Polish citizens (regardless of their ethnicities or nationalities).

Table 2

	Year of adoption	Legal Act	Relevant provision	Historical facts at stake			Jewish population[1] (# - ‰ of total pop.)	Est. # of Holocaust victims[2]	Initiative of public proceedings	Sanction
				Holocaust	Comm unism	Any				
Austria	1995	02/1995	Prohibition Act 1947[3], art. 1 § 3h	X			9,000 (1,1)	50,000	public prosecutor	1 to 10 or 20 years[4]
Belgium	1995	Loi du 23/03/1995[5]		X			31,200 (3.0)	28,900	public prosecutor victims associations	8days to 1year and fine
Czech Republic[6]	2001	Act No. 485/2001[7]	Penal Code, Art. 261a	X	X		4,000 (0.4)	68,000-71,000	n/a	6months to 3 years
France	1990	Loi Gayssot 13/07/1990	1881 Freedom of the Press Act, Art. 24bis	X			491,500 (8.1)	77,320	public prosecutor victims associations	1 year and/or € 45.000 fine
Germany	1994	1994	Criminal Code, Section 130	X			118,000 (1.4)	134,500-141,500	public prosecutor	≤ 5 years or fine
Luxem-bourg	1997	Loi du 19/07/1997	Penal Code, Art. 457-3			X	600 (1.2)	1,950	public prosecutor	8 days to 6 m. and € 251 to € 25.000 fine

[1] *American Jewish Year Book*, 2006, (New York: American Jewish Committee, 2006.)
[2] Encyclopaedia of the Holocaust.
[3] Austrian Federal Law on the Prohibition of National Socialist activities (*Verbotsgesetz.*)
[4] The 1947 Act, in which the prohibition of negationism was incorporated, aimed at prohibiting National Socialist activities and, to this end, it allowed for severe prison sentences of up to ten years or up to twenty years in cases where the conduct or the offender is particularly dangerous.
[5] Belgique: Loi du 23 mars 1995, *Loi tendant à réprimer la négation, la minimisation, la justification ou l'approbation du génocide commis par le régime national-socialiste allemand pendant la seconde guerre mondiale*.
[6] The same provision was simultaneously adopted in Czech Republic and Slovakia in 2001. It proscribed Holocaust denial only but was extended in Czech Republic, in December 2005, to the denial of communist crimes. Slovakia modified its Criminal Code in May 2005 but Holocaust denial remained a criminal offence (*see*: "Parliament Approves New Penal Code", *Radio Slovakia International*, 23 May 2005, article available at: <http://www.slovensko.com/news/2205>.)
[7] Act No. 485/2001, Law Against Support and Dissemination of Movements Oppressing Human Rights and Freedoms.

Poland	1998	Act of 18/12/1998,[8] Art.55		X	X	[39-89]	3,500 (0.08)	2,9M-3,0M	n/a	Fine or ≤ 3 years
Portugal	1998	Lei n° 65/98	Penal Code, Art. 240			X	500 (0.05)	n/a	n/a	6months to 5years
Romania	2002	2002 Emergency Ordinance no.31, Art. 4		X			10,100 (0.5)	271,000-284,000	n/a	≤ 5 years
Spain[9]	1995	Ley Orgánica 10/1995 de 23/11	Penal Code, Art. 607			X	12,000 (0.28)	n/a	public prosecutor	1 to 2 years
Switzerland	1995	Loi fédérale du 18/06/93[10],Art.1	Penal Code, Art. 261bis			X	17,900 (2.4)	n/a	public prosecutor	Fine or ≤ 3 years

[8] Act of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation (*USTAWA z dnia 18 grudnia 1998 r. o Instytucie Pamięci Narodowej - Komisji Ścigania Zbrodni przeciwko Narodowi Polskiemu*.)

[9] Spain abrogated its legal prohibition of negationism in November 2007, after the Constitutional Tribunal found the prohibition to deny genocides to be incompatible with the constitutional protection of the right to freedom of expression. El Pleno del Tribunal Constitucional, 8 November 2007, cuestión de inconstitucionalidad núm.5152-2000.

[10] Entered into force January 1, 1995.

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