

Speech and Harm:

Genocide Denial, Hate Speech and Freedom of Expression

Abstract

This article expounds upon the issue of genocide denial, especially its particular relations to freedom of expression and hate speech. It proceeds from the twin view that the gravity of the act of denial is such that anti-denial legislations are not irreconcilable with democratic standards and the principle of freedom of expression, and that what is required in the wake of recent high-profile rulings favouring freedom of expression is not an abandonment of attempts to develop a workable framework for criminalising denial, but rather renewed investment in thinking through operable approaches that are more finely-attuned to the characteristics of denial and its consequences. The aim of the contribution is thus to offer a re-examination of the relations between genocide denial, freedom of expression and hate speech, and, on this basis, to venture new possibilities for confronting denial via reference to the current framework(s) of hate speech.

Keywords

Genocide denial – freedom of expression – hate speech – European Court of Human Rights – International Covenant on Civil and Political Rights – Human Rights Committee – Convention on the Elimination of all Forms of Racial Discrimination.

1. Introduction

Genocide denial is, it hardly needs stating, a troubling and troublesome issue. The question of whether – and if so, how – denial can be criminalised continues to provoke controversy, debate and discussion.¹ Doubtless, this has much to do with the haziness, in legal terms at least, of the concept itself: unlike the act of genocide, denial is defined neither in the Genocide Convention,² nor in the Rome Statute.³ The resultant absence of definitional clarity means that fundamental questions as to what genocide denial entails, how strategies of denial operate, and what particular effects they exert remain open to question. This reflects in the current case law of relevant bodies, which evinces a general lack of consensus. It also finds expression, moreover, in ongoing disputes between those who consider genocide denial a phenomenon so harmful to warrant criminalisation, and those who maintain that criminalisation represents an illegitimate violation of the fundamental right to freedom of expression.

The present article stands unabashedly on the former side of this divide. It proceeds from the twin view that (i) the gravity of the act of denial is such that anti-denial legislations are not irreconcilable with democratic standards and the principle of freedom of expression, and (ii) that what is required in the wake of recent high-profile rulings favouring freedom of expression – notably in the *Perinçek* case before the European Court of Human Rights (ECtHR) – is not an abandonment of attempts to develop a workable framework for criminalising denial, but rather renewed investment in thinking through operable approaches

¹ For a recent overview see Paul Behrens, Nicholas Terry and Olaf Jensen (eds.), *Holocaust and Genocide Denial: A Contextual Perspective* (Routledge, Abingdon, 2017).

² Convention for the Prevention and Punishment of the Crime of Genocide, United Nations, 1948, approved and proposed for signature, ratification or accession by the General Assembly of the United Nations, Resolution 260 A (III) of 9 December 1948 (entry into force 12 January 1951).

³ Rome Statute of the International Criminal Court adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998 UN Doc. A/CONF.183/9 (1998).

that are more finely-attuned to the characteristics of denial and its consequences. One such set of approaches might, so the leading proposition here, become available via reassessment of the relations between genocide denial and hate speech. That a connection exists between the two has, as shall be illustrated and discussed below, been acknowledged in scholarship and case law. Yet there nonetheless remains a lack of thorough analysis as to potential legal implications. The aim of the present contribution is thus to help close this gap by offering a re-examination of the relations between genocide denial, freedom of expression and hate speech, and, on this basis, to venture new possibilities for confronting denial via reference to the current framework(s) of hate speech.

To this end, the article will proceed in six parts. Beginning with *Perinçek*, we will first consider the present case law and legislation on denial in the European context, and sketch in certain major trends and countertrends in the academic literature (Part 2). In Part 3, a substantiating argument will be offered for the twin claims noted above (on the legitimacy of anti-denial legislation and the need for new, more robust, approaches) via reconsideration of both the gravity of the act as a serious legal and moral problem, and the current case law on permissible limitations to freedom of expression. Following this, the discussion will turn to the main issue of exploring the relevance of hate speech for denial, focusing, first, on the relationship between hate speech and freedom of expression, and the possible applicability of present hate speech provisions to instances of denial (Part 4); and second, on the extent to which, and ways in which, interpretive approaches to hate speech, and particularly the factors included in the Convention on the Elimination of Racial Discrimination's General Recommendation 35, might provide useful guidance in permitting us to overcome current limitations (as exemplified in *Perinçek*) and develop more coherent strategies for tackling denial in and through law (Part 5). Part 6 will then offer some brief concluding remarks on the possibilities and perspectives outlined.

2. Genocide Denial and the Law: Current Perspectives

To start we might briefly recap the facts of the *Perinçek* case. While on a lecture tour in Switzerland in 2005, Doğu Perinçek, leader of the Turkish Workers' Party, made several public declarations to the effect that the Armenian genocide of 1915 was no more than an 'international lie'.⁴ In response, the association *Suisse-Arménie* submitted a criminal complaint, which led the Lausanne *tribunal de police* to convict Perinçek of racial discrimination. After unsuccessfully appealing the verdict in Switzerland, Perinçek brought his case to the European Court of Human Rights, claiming a breach of his freedom of expression as protected by Article 10 ECHR. In December 2013, the Strasbourg Court ruled in his favour, confirming the Swiss criminal measure as a violation of the claimant's right to freedom of speech.⁵ In a judgment of 15 October 2015, the Grand Chamber confirmed the finding of a violation of Article 10 ECHR.⁶

The terms of the 2015 Grand Chamber judgment will be looked at more closely at a later stage in the article. A first point of relevance here, however, lies at a more general level in the manner that it continues a current trend in Europe by which the right to freedom of expression is privileged over demands to prohibit denial. Notable examples include the French *Conseil constitutionnel*'s decision from February 2012 ruling a proposed bill to criminalise denial of the Armenian genocide unconstitutional on the grounds that it would limit the fundamental

⁴ *Perinçek v. Switzerland*, 17 December 2013, European Court of Human Rights, no. 27510/08, ECHR 2013, paras. 7, 13, 51, 63 and 71, <hudoc.echr.coe.int/eng?i=001-139724>, accessed 15 February 2017. For further details on the case, see Caroline Fournet and Clotilde Pégrier, 'Combating Genocide Denial via Law: État des Lieux of Anti-Denial Legislation', in Behrens, Terry and Jensen (eds.), *supra* note 1, pp. 211-229, *esp.* pp. 222-223.

⁵ *Perinçek v. Switzerland*, *ibid.*, para. 129.

⁶ *Perinçek v. Switzerland* [GC], 15 October 2015, European Court of Human Rights, no. 27510/08, ECHR 2015, paras. 114 and 115, <hudoc.echr.coe.int/eng?i=001-158235>, accessed 15 February 2017.

right to freedom of expression and communication,⁷ and the judgment of the Constitutional Court of Spain, from November 2007, which held that the criminalisation of ‘mere’ denial was not compatible with the right to freedom of speech.⁸ Of course this is not to claim the absence of different interpretative positions: indeed, through to the turn of the century, the ECtHR consistently found, across a number of cases, the complaints of Holocaust deniers’ concerning limitations of freedom of expression to be inadmissible.⁹ The UN Human Rights Committee (HRC) has likewise upheld the legitimacy of restrictions on freedom of speech, most famously in the case *Faurisson v. France*, via reference to its General Comment No. 10, which explicitly grounds such limitations in the need to protect the interests of other persons and specific groups as a whole.¹⁰ Clearly, the matter is far from settled and Europe is yet to reach a consistent understanding. The three examples cited at the head of the paragraph may, however, be seen as indicative of a current leaning in the European context to grant greater weight to the protection of freedom of expression than to the need to penalise denial.

⁷ Conseil constitutionnel, 28 February 2012, Decision no. 2012-647-DC, para. 6, <www.conseil-constitutionnel.fr/conseil-constitutionnel/english/case-law/decision/decision-no-2012-647-dc-of-28-february-2012.114637.html>, accessed 17 February 2017.

⁸ Genocide denial was illegal in Spain until the Constitutional Court of Spain ruled that the words “deny or justify” were unconstitutional in its judgment 235/2007 of 7 November 2007. Consequently Holocaust denial is legal in Spain, although justifying the Holocaust or any other genocide is an offence punishable by imprisonment in accordance with the constitution. See Sentencia 235/2007 from 7 November 2007, <hj.tribunalconstitucional.es/en/Resolucion/Show/6202>, accessed 19 June 2017. Unofficial translation of the judgment <<https://www.tribunalconstitucional.es/ResolucionesTraducidas/235-2007,%20of%20November%207.pdf>>, accessed 19 June 2017.

⁹ E.g., *T. v. Belgium (dec.)*, 14 July 1983, European Commission of Human Rights, no. 9777/82, para. omitted, <hudoc.echr.coe.int/eng?i=001-74661>, accessed 17 September 2017; *F. P. v. Germany (dec.)*, 29 March 1993, European Commission of Human Rights, no. 19459/92, (1993), para. omitted, <hudoc.echr.coe.int/eng?i=001-1549>, accessed 17 September 2017; *Honsik v. Austria (dec.)*, European Commission of Human Rights, 27 February 1997, no. 25062/94, para. omitted, <hudoc.echr.coe.int/eng?i=001-3494>, accessed 17 September 2017; *Remer v. Germany (dec.)*, European Commission of Human Rights, 6 September 1995, no. 25096/94, para. omitted, <hudoc.echr.coe.int/eng?i=001-2294>, accessed 15 September 2017; *Nachtmann v. Austria (dec.)*, European Commission of Human Rights, 89 September 1998, no. 36773/97, para. omitted, <hudoc.echr.coe.int/eng?i=001-4399>, accessed 17 September 2017; and *Witzsch v. Germany (dec.)*, European Commission of Human Rights, 20 April 1999, no. 41448/98, para. omitted, <hudoc.echr.coe.int/eng?i=001-4868>, accessed 17 September 2017. That these cases apply to the specific context of the Holocaust is a point to which will be returned later.

¹⁰ *Faurisson v. France*, Human Rights Committee, 19 July 1995, Communication no. 50/1993, UN Doc. CCPR/C/58/D/550/1993 (1996), para. 9.6, <hrlibrary.umn.edu/undocs/html/VWS55058.htm>, accessed 15 February 2017.

The vexed nature of this core dilemma – that of attempting to square the punishment of denial with the right to freedom of expression – finds expression in the academic literature on the matter, too. There is no space here for a full survey of positions within the debate but we can mark a few general fault lines. At one end of the spectrum, we find those who take the view that no genocide denial law should be regarded as consistent with the right to freedom of expression – a classic example here would be Noam Chomsky’s essay that appeared as a preface to Faurisson’s *Mémoire en Défense* from 1980, in which he defended the right to freely express ideas, no matter how objectionable – indeed it is, he declares, ‘exactly the right to express the most dreadful ideas freely that must be defended most rigorously’.¹¹ Others uphold similar outlooks, particularly in the US: John C. Knechtle, for instance, suggests that banning hateful speech represents only a ‘superficial attempt to address the deeper problem of respecting one’s own and another’s human dignity’ and argues that if the objective is to ‘address the deeper problems of racism and ethnic and religious prejudice, more speech rather than less speech is needed’.¹² Frederick Schauer, meanwhile, frames an argument in terms of a potentially dangerous ‘slippery slope’: denying protection of freedom of speech, even to Nazis, might, he tunders, ‘start us on a slippery slope, at the bottom of which would be the denial of protection even to those who should, in theory, be protected’.¹³ Henry C. Theriault, for his part, turns this around and considers how objections to the criminalisation of denial on the basis of free speech considerations may be met by a ‘slippery slope argument in the reverse direction’: permitting genocide denial despite its dangers would, he argues, ‘not only reinforce[...] deniers in their destructive activities but also open[...] an ethical loophole that will

¹¹ Noam Chomsky, ‘Preface’, in Robert Faurisson, *Mémoire en défense contre ceux qui m’accusent de falsifier l’histoire* (La Vieille Taupe, Paris, 1980), pp. xiv-xv.

¹² John C. Knechtle, ‘Holocaust Denial and the Concept of Dignity in the European Union’, 36 *Florida State University Law Review* (2008) 41-65, p. 53.

¹³ Frederick Schauer, ‘Slippery Slopes’, 99(2) *Harvard Law Review* (1985) 361-383, p. 363.

potentially allow a range of harms, including violence, in various circumstances'.¹⁴ Indeed, 'at the extreme', he suggests, 'successful genocide denial begets genocide'.¹⁵ This claim finds support elsewhere, too: Caroline Fournet, for example, argues for the outlawing of denial on the grounds that it is 'not merely the expression of an idea or of an opinion, but [...] nothing else than an act of genocide, even under the most restrictive understanding of the Genocide Convention'¹⁶ – a view that tallies with Gregory H. Stanton's counting of denial as the 'tenth stage' of genocide.¹⁷ Still others, meanwhile, make the case for criminalisation not under the terms of the Genocide Convention, but rather as a permissible exception to freedom of expression – noteworthy here is the work of Sévane Garibian, who has convincingly set out a justification for anti-denial laws not as a violation of the democratic principle of free speech, but rather and precisely as a necessary measure to protect and preserve democracy 'in the strict sense of the term'.¹⁸ It is on this basis that Garibian has, moreover, made the pronouncement – from which the present article takes its cue – that the verdict in *Perinçek* need not spell the 'end' for genocide denial criminalisation.¹⁹

3. Genocide Denial and Justifiable Limits to Freedom of Expression

¹⁴ Henry C. Theriault, 'Denial and Free Speech: The Case of the Armenian Genocide', in Richard G. Hovannisian (ed.), *Looking Backward, Moving Forward: Confronting the Armenian Genocide* (Transaction Publishers, Brunswick, 2003), pp. 231-261, p. 251.

¹⁵ *Ibid.*

¹⁶ Caroline Fournet, *The Crime of Destruction and the Law of Genocide: Their Impact on Collective Memory* (Ashgate, Aldershot, 2007), p. 83.

¹⁷ Gregory H. Stanton, 'The Ten Stages of Genocide', *Genocide Watch*, <<http://genocidewatch.org/genocide/tenstagesofgenocide.html>>, accessed 15 February 2017.

¹⁸ Sévane Garibian, 'Taking Denial Seriously: Genocide Denial and Freedom of Speech in the French Law', 9 *Cardozo Journal of Conflict Resolution* (2008) 479-488, p. 482. Garibian phrases the main claim of her article in the following terms: '[T]he non absolute character of freedom of expression is a given in democracies and only the degree of possible restrictions and their reasons differ, depending on the function attached to free speech (democracy-protecting function in France, truth-declaring function in the United States). The justification for anti-denial laws based on the argument that such laws help preserve democratic values might seem surprising to those who believe that outlawing genocide denial amounts to violating these same values. Yet the former argument does stand in France, in view of the legal limitations of the prohibition of denial' (p. 483). See further Sévane Garibian, 'ECHR Ruling Doesn't Mean an "End" to Genocide Denial Criminalization', *Panorama*, 26 October 2015, available at: <<http://www.panorama.am/en/news/2015/10/26/sevan-gharibyan/1468914>>, accessed 17 February 2016, and Sévane Garibian, 'The Polarization in Grand Chamber is Important', *AGOS*, 27 October 2015, available at: <<http://www.agos.com.tr/en/article/13158/svane-garibian-the-polarization-in-grand-chamber-is-important>>, accessed 17 February 2016.

¹⁹ See Sévane Garibian, 'ECHR Ruling Doesn't Mean an "End" to Genocide Denial Criminalization'.

3.1 *The Gravity of Genocide Denial*

The essence of the argument here aligns closely with Garibian's position. The view that genocide denial should be regarded as part of the genocidal act and thus as punishable under the Genocide Convention is one with which I have a good measure of sympathy; for the purposes of the present article, however, the focus will be on a consideration of the criminalisation of denial as an allowable limit to freedom of expression. With this in mind, the reflections that follow in this section are intended to build upon and further Garibian's argument via engagement with two core issues: first, the seriousness of genocide denial and its harmful impact, and second, current legislative provisions for limitations to freedom of expression.

At root, the gravity of the act of denial rests with its effect upon the targeted victim group. Elie Wiesel has famously testified to the severity of this impact as representing a 'double killing' that extinguishes both the remembrance of the crime and the dignity of the survivors. The strategies that might contribute to and comprise such acts of denial are numerous. As Stanton puts it:

[T]he perpetrators of genocide dig up the mass graves, burn the bodies, try to cover up the evidence and intimidate the witnesses. They deny that they committed any crimes, and often blame what happened on the victims. They block investigations of the crimes, and continue to govern until driven from power by force, when they flee into exile [...].²⁰

²⁰ Gregory H. Stanton, *supra* note 17.

Israel Charny has, meanwhile, outlined twelve denial tactics, including efforts to ‘question and minimize the statistics’, to ‘claim that the deaths were inadvertent’, or to ‘claim that what is going on doesn’t fit the definition of genocide’²¹ – an example of the latter being the not uncommon attempt to characterise actions, and have them recognised, as ethnic cleansing and thus as a practice yet to be defined as an international crime.²² Political agendas also often play a key role: an obvious example here is Turkey’s official policy on the non-recognition of the Armenian genocide – the decision of the German parliament, in May 2016, to adopt a resolution declaring the mass killing of Armenians by Ottoman Turks a genocide is the latest in a series of instances that have bred tensions with Ankara. Clearly, the prospect of punishment and international stigmatisation often fosters a desire on the part of perpetrator states to rewrite history in such a way as to demonise the victims and rehabilitate themselves. Reviewing such processes, Charny provides a typology of four kinds of political pressure that can be brought to bear on such issues. The first is to deny certain types of event to avoid legal responsibility. The second is to attempt to exclude events that may hamper the possibility of developing diplomatic or economic ties with another nation – that is, to deny genocide in the name of *Realpolitik*. The third, meanwhile, relates to the pressure to define and rank instances of mass murder in terms of their respective gravity; while the fourth concerns what Charny refers to as blatant denials and revisionism of known historical events of mass murder.²³

Yet it would be wrong to think that denial only happens after the fact. It is, on the contrary, invariably present throughout the planning and perpetration of physical violence, and may manifest itself through less obvious strategies. Mass murder by starvation, for instance, has

²¹ Israel W. Charny, ‘Templates for Gross Denial of a Known Genocide: A Manual’, in Israel W. Charny (ed.), *The Encyclopaedia of Genocide*, Vol. 1 (ABC Clio, Santa Barbara, 1999), p. 168. See also Genocide Watch, <<http://www.genocidewatch.org/aboutgenocide/12waystodenygenocide.html>>, accessed 17 June 2017.

²² See further Clotilde Pégorier, *Ethnic Cleansing: A Legal Qualification* (Routledge, Abingdon, 2013), pp. 17-33.

²³ Israel Charny, ‘Toward a Generic Definition of Genocide’, in George J. Andreopoulos (ed.), *Genocide: Conceptual and Historical Dimensions* (University of Pennsylvania Press, Philadelphia, 1994), pp. 64-94.

been a method of genocide for centuries, practised by the Turks in Armenia in 1915 and by Stalin in 1933 Ukraine, and again by the Sudanese government, both in the south and in Darfur. One reason is, as Stanton points out, precisely that it permits denial:

It is a shrewd strategy because death comes slowly and denial is easy. All a government need do is arm and support militias, which drive a self-sufficient people off their land through terror; herd them into displaced persons and refugee camps; then systematically impede aid from getting to them, letting them slowly die of starvation and disease. The deaths can then be blamed on “famine,” “disease”, “ancient tribal conflicts,” or “civil war,” or most cynically, “failure of the international community to provide needed relief.”²⁴

In a broader sense, moreover, the entire genocidal process can, as Fournet argues, be seen to revolve around an encompassing notion of denial – ‘denial of the victims’ humanity and dignity, denial of their right to live, denial of their right to exist and, consequently, denial of their right to die’.²⁵ That such acts contribute to the social death of the victim group seems clear and the grievous impact of denial as an assault on individual and collective identity, dignity and rights thus can be readily recognised.

Understanding the harms caused by denial as a collective policy is vital for an appropriate consideration of those instances – with which we are primarily concerned here – that occur at the level of individual expression. One need only think of the *Faurisson* case,²⁶ for instance, or those involving David Irving,²⁷ Roger Garaudy,²⁸ Jean Plantin,²⁹ Vincent Reynouard³⁰ and

²⁴ Gregory H. Stanton, *supra* note 17.

²⁵ Caroline Fournet, *supra* note 16, p. 83.

²⁶ *Faurisson v. France*, *supra* note 10.

²⁷ *Irving v. Penguin Books Limited, Deborah E. Lipstadt* [2000] EWHC QB 115, 11 April 2000, 8.1, <www.bailii.org/ew/cases/EWHC/QB/2000/115.html>, accessed 15 February 2017.

George Theil,³¹ to recognise how denialist agendas can be expressed by individuals, frequently under the mask of genuine scholarly or academic discourse – the veneer of respectability afforded to which can make the act of denial doubly dangerous in terms of its impact on victim groups and survivors. In this sense, Garibian defines denial as a method of ‘dissimulation or distortion of information’, often used ‘under the cover of academic legitimacy’, and designed to ‘spread a denialist ideology grounded on anti-Semitic, racist or heinous propaganda’.³² Whether one considers the act of denial to be constitutive of genocide itself, or as a mode of expression based on ‘anti-Semitic, racist or heinous propaganda’, the acuteness of its impact in violating the dignity, identity and rights of the victim group is evidently severe. As Irwin Cotler succinctly phrases it, denial is a form of speech that constitutes an ‘assault on the inherent dignity and worth of the human person whose very utterance results in substantial harm or injury to the target group’.³³ If we take full and serious account of the gravity of denial – as we surely must – this impels us to rethink the question of the relation between genocide denial and the principle of freedom of expression, and to consider anew whether the potential harms threatened by the act propel it across the threshold of permissible limitations to the latter.

²⁸ *Garaudy v. France*, 24 June 2003, European Court of Human Rights, no. 65831/01, ECHR 2003-IX, <<http://hudoc.echr.coe.int/eng?i=001-23829>>, accessed 15 February 2017.

²⁹ Claude Francillon, ‘Un éditeur Lyonnais condamné pour “publicité” en faveur des œuvres révisionnistes’, *Le Monde*, 29 May 1999, <[www.lemonde.fr/archives/article/1999/05/29/un-editeur-lyonnais-condamne-pour-publicite-en-faveur-d-oeuvres-revisionnistes_3546816_1819218.html?xtmc=un editeur lyonnais condamne&xtcr=1](http://www.lemonde.fr/archives/article/1999/05/29/un-editeur-lyonnais-condamne-pour-publicite-en-faveur-d-oeuvres-revisionnistes_3546816_1819218.html?xtmc=un+editeur+lyonnais+condamne&xtcr=1)>, accessed 15 February 2017.

³⁰ ‘Oradour-sur-Glâne, le révisionniste Reynouard condamné à six mois de prison ferme’, *Le Monde*, 9 June 2004, <[http://www.lemonde.fr/archives/article/2004/06/09/oradour-sur-glane-le-revisionniste-reynouard-condamne-a-six-mois-de-prison-ferme_368219_1819218.html?xtmc=oradour sur glane le revisionniste reynouard&xtcr=1](http://www.lemonde.fr/archives/article/2004/06/09/oradour-sur-glane-le-revisionniste-reynouard-condamne-a-six-mois-de-prison-ferme_368219_1819218.html?xtmc=oradour+sur+glane+le+revisionniste+reynouard&xtcr=1)>, accessed 15 February 2017.

³¹ ‘Un ancien élu du FN a été condamné à six mois de prison ferme suite à des propos négationnistes’, *Le Monde*, 3 January 2006, <www.lemonde.fr/societe/article/2006/01/03/un-ancien-elu-du-fn-condamne-a-six-mois-de-prison-ferme-suite-a-des-propos-negationnistes_727062_3224.html?xtmc=prison&xtcr=3>, accessed 15 February 2017.

³² Sévane Garibian, ‘Taking Denial Seriously: Genocide Denial and Freedom of Speech in the French Law’, *supra* note 18, p. 484.

³³ Irwin Cotler, ‘Debate: Freedom of Speech and Holocaust Denial’, 8 *Cardozo Law Review* (1986-1987) 559-594, p. 579.

3.2 *Limitations to Freedom of Expression*

Limitations to freedom of expression are provided for in a core set of legal instruments, notably Article 10 of the European Convention of Human Rights (ECHR)³⁴ and Article 19 of the United Nations International Covenant on Civil and Political Rights (ICCPR).³⁵ On the one hand, the Human Rights Committee has considered the right to freedom of expression in Article 19 ICCPR to embrace ‘even expression that may be regarded as deeply offensive’.³⁶ The ECtHR has, in the *Handyside* judgment, likewise held that the right to freedom of expression applies ‘not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population’.³⁷ These are, it states, ‘the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society”’; the right to freedom of expression thus constitutes ‘one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man’.³⁸ On the other hand, however, limitations to this right are clearly prescribed. Article 10(2) ECHR reads:

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

³⁴ European Convention for the Protection of Human Rights and Fundamental Freedom, adopted by the Council of Europe in Rome on 4 November 1950 (entry into force 3 September 1953).

³⁵ International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by the General Assembly Resolution 2200A(XXI) of 16 December 1966 (entry into force 23 May 1976).

³⁶ Human Rights Committee, *General Comment No. 34, Article 19: Freedom of opinions and expression*, 102nd Session (CCPR/C/GC/34), 12 September 2011, para. 11, <www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>, accessed 17 June 2017.

³⁷ *Handyside v. United Kingdom* [GC], 7 December 1976, European Court of Human Rights, no. 5493/72, Series A no. 24, para. 49, <hudoc.echr.coe.int/eng?i=001-57499> accessed June 2017.

³⁸ *Ibid.*

disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.³⁹

In *Handyside*, the ECtHR also stated that ‘whoever exercises his freedom of expression undertakes “duties and responsibilities,” the scope of which depends on his situation and the technical means he uses’.⁴⁰ In *Otto Preminger Institute v. Austria*, too, the Court refers again to the individuals’ ‘duties and responsibilities’ and stipulates that these may legitimately include ‘an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs’.⁴¹ Especially pertinent to our specific interest here, meanwhile, are the Court’s findings in the *Garaudy* case that Holocaust denial represents:

one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based [...]. Such acts are incompatible with democracy and human rights because they infringe the rights of others.⁴²

Accordingly, the complaint was found inadmissible under Article 17 ECHR.

³⁹ Article 10(2) ECHR.

⁴⁰ *Handyside v. United Kingdom* [GC], *supra* note 37.

⁴¹ *Otto Preminger Institute v. Austria*, 20 September 1994, European Court of Human Rights, no. 13470/87, Series A no. 295-A, para 49, < <http://hudoc.echr.coe.int/eng?i=001-57897>>, accessed 16 September 2017.

⁴² *Garaudy v. France*, *supra* note 28.

In the *Faurisson* case, moreover, the Human Rights Committee similarly held that the imposed restrictions on freedom of expression were permissible under Article 19 paragraph 3(a) ICCPR as necessary ‘for respect of the rights or reputations of others’:

Since the statements made by the author, read in their full context, were of a nature as to raise or strengthen anti-Semitic feelings, the restriction served the respect of the Jewish community to live free from fear of an atmosphere of anti-Semitism. The Committee therefore concludes that the restriction of the author's freedom of expression was permissible under article 19, paragraph 3 (a), of the Covenant.⁴³

The judgments in these cases provide a strong precedent and argument for regarding the criminalisation of denial as a justifiable restriction to freedom of expression – on the basis that denial violates the rights of others and thus represents a threat to fundamental democratic principles. Claims to the right to freedom of expression thus do not, in other words, provide a sweeping justification for denial.⁴⁴ Yet the three rulings with which we began the article would seem to illustrate that this view still struggles to find traction, particularly in instances of genocides other than the Holocaust. In these cases especially, the burden of proving the act of denial to be so harmful as to cross the threshold into carrying a threat to the rights of others and thus to democracy has been a major hurdle and stumbling block. It is with this in mind that we might look to current hate speech provisions to perhaps provide alternative possibilities that may enable prosecution cases to steer clear of the barriers upon which recent efforts to pursue criminal sanctions for denial have run aground.

⁴³ *Faurisson v. France*, *supra* note 10.

⁴⁴ Garibian remarks in this context that freedom of speech should not be used as a ‘sword’, but rather only as a ‘shield’. See Sévane Garibian, ‘Taking Denial Seriously: Genocide Denial and Freedom of Speech in the French Law’, *supra* note 18, p. 487.

4. Genocide Denial: A Form of Hate Speech?

4.1 *Understanding Hate Speech*

That a nexus exists between genocide denial and hate speech is, in and of itself, no novel observation. The connection has been made explicit in the EU Framework Decision of 2008 in its provision that Member States are required to enact legislation designed to punish ‘publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes [...] carried out in a manner likely to incite violence or hatred’⁴⁵ against groups identified by race, colour, religion or national origin. The Council of Europe’s 2003 Additional Protocol on Cybercrime, which requires the criminalisation of hate speech as enacted via electronic networks, also makes specific reference in its Article 6 to ‘denial, gross minimisation, approval or justification of genocide or crimes against humanity’ by requesting states parties to adopt legislative measures ‘as may be necessary to establish the following conduct as criminal offences under its domestic law [...]’:

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.⁴⁶

⁴⁵ Article 1c *Framework Decision 2008/913/JHA on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law*, Council of the European Union, 28 November 2008.

⁴⁶ Article 6(1) *Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems* (European Treaty Series No. 189), Council of Europe, Strasbourg 28 January 2003.

Such measures speak to an affiliation between hate speech and genocide denial. National legislation also invokes such a link. In Germany, for instance,

whosoever publicly or in a meeting approves of, denies or downplays an act committed under the rule of National Socialism of the kind indicated in section 6 (1) of the Code of International Criminal Law, in a manner capable of disturbing the public peace shall be liable to imprisonment not exceeding five years or a fine [or] whosoever publicly or in a meeting disturbs the public peace in a manner that violates the dignity of the victims by approving of, glorifying, or justifying National Socialist rule of arbitrary force shall be liable to imprisonment not exceeding three years or a fine.⁴⁷

France⁴⁸ and Switzerland⁴⁹ have also made a direct connection by adopting legislations on denial under the heading of incitement to hatred or racial discrimination. In June 2016, Italy, too, approved a bill that makes hate propaganda based on Holocaust denial or the denial of the crime of genocide a criminal offence.⁵⁰ Other national jurisdictions, such as Austria⁵¹ and Belgium⁵² appear less ready to make the necessary link, primarily in concession to freedom of expression principles.⁵³

⁴⁷ Section 130 (3) and (4) of the German Penal Code. On 2 June 2016, the German Bundestag passed a further resolution recognising the genocide against the Armenian population.

⁴⁸ Gayssot Act, 13 July 1990, no. 90-615, recognising the Nazi Genocide and criminalising the denial of the Holocaust. In 2001 the Armenian genocide was recognised by the Law No. 2001-70 of 29 January.

⁴⁹ Article 261 bis (4) of the penal code criminalising genocide denial in general.

⁵⁰ See unipd-centrodirittiumani.it/en/news/Italy-the-Parliament-approves-a-law-criminalising-negationism/4096, accessed 15 February 2017.

⁵¹ Prohibition Law 1947, amended in 1992 to include §3g and §3h on denial.

⁵² Article 1, Law of 23 March 1995 for the Repression of the denial of the genocide committed by the German National-Socialist regime during the Second World War.

⁵³ See further the above-mentioned ruling of the Constitutional Court of Spain, from 7 November 2007, that the words ‘deny or’ were unconstitutional (235/2007).

These latter instances notwithstanding, the understanding of an association between denial and hate speech appears to have gained a broad level of recognition and acceptance. Yet in spite of this, the legislative ramifications of this connection – particularly as they pertain to the question of the criminalisation of denial – are yet to be fully explored. In part, this may too have much to do with a lack of definitional clarity – as Anne Weber notes in her *Manual on Hate Speech*:

No universally accepted definition of the term “hate speech” exists, despite its frequent usage. Though most States have adopted legislation banning expressions amounting to “hate speech”, definitions differ slightly when determining what is being banned.⁵⁴

The absence of any such ‘universally accepted definition’ has meant that the term has remained contested – to the extent that it is usually avoided in resolutions of the UN Human Rights Council in favour of formulations such as ‘intolerance, negative stereotyping and stigmatisation of, and discrimination, incitement to violence, and violence against persons based on religion or belief’,⁵⁵ or ‘the spread of discrimination and prejudice,’ or ‘incitement of hatred’.⁵⁶ The Council of Europe’s Committee of Ministers Recommendation No. R (97) 20 on ‘hate speech’ has, however, supplied a workable definition:

“[H]ate speech” shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by

⁵⁴ Anne Weber, *Manual on Hate Speech* (Council of Europe Publishing, September 2009), p. 3.

⁵⁵ Human Rights Committee, *Resolution 16/18 on Combating Intolerance, Negative Stereotyping and Stigmatisation of, and Discrimination, Incitement to Violence, and Violence Against Persons Based on Religion or Belief* (A/HRC/Res/16/18), adopted without a vote on 24 March 2011.

⁵⁶ Human Rights Committee, *Resolution 21/29 on the Situation of Human Rights of Rohingya Muslims and Other Minorities in Myanmar* (A/HRC/Res/29/21), adopted without a vote on 3 July 2015.

aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.⁵⁷

In terms of international human right treaties, the most relevant instrument on hate speech is the ICCPR, which, while not referencing the term explicitly, nonetheless provides, in Article 20, for the prohibition of ‘any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence’.⁵⁸ The ECHR, by contrast, does not address hate speech directly. Nor does the African Charter on Human and Peoples’ Rights,⁵⁹ which guarantees the right to freedom of expression in Article 9, and protects against discrimination in articles 2⁶⁰ and 28,⁶¹ but does not refer to hate speech. The Convention on the Elimination of Racial Discrimination (ICERD),⁶² meanwhile, does also require that State parties ‘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 group of persons of another colour or ethnic origin’.⁶³ Its jurisprudence has, however, been largely inconsistent with that of the Human Rights Committee.⁶⁴ The focus here will thus remain largely on the ICCPR.

⁵⁷ Council of Europe’s Committee of Ministers, *Recommendation 97(20) of the Committee of Ministers to Member States on “Hate Speech”*, Appendix to Recommendation No. R (97)20, 30 October 1997, Scope, p.107.

⁵⁸ Article 20 ICCPR.

⁵⁹ African Charter of Human and Peoples’ Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (entry into force 21 October 1986).

⁶⁰ Article 2 African Charter of Human and Peoples’ Rights: ‘Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status’.

⁶¹ Article 28 African Charter of Human and Peoples’ Rights: ‘Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance’.

⁶² International Convention on the Elimination of all Forms of Racial Discrimination, adopted and opened for signature and ratification by General Assembly Resolution 2106(XX) of 21 December 1965 (entry into force 4 January 1969).

⁶³ Article 4 ICERD.

⁶⁴ The conception of hate speech in the ICERD is limited to race and ethnicity (*see* Article 4 ICERD) and less specific than in the ICCPR (*see* Human Rights Council, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 entitled “Human Rights Council” - Incitement to Racial and Religious Hatred and the Promotion of Tolerance: Report of the High Commissioner for Human Rights (A/HRC/2/6)*, 20 September 2006,

The decision to include Article 20 in the Covenant, which can be characterised as embodying a particular conceptualisation of hate speech, was not straightforward. Annotations to the 1955 draft expose divergent opinions.⁶⁵ While some countries considered the more generic limitation clause on the right to freedom of expression as included in Article 19(3) to be sufficient to deal with hate speech, others campaigned in favour of a stand-alone provision (Article 20) that expressly prohibits hatred that constitutes incitement to harm. Summarising the dispute, the UN General Secretary remarked:

The question was debated whether the covenant should include an article prohibiting ‘any advocacy of national, racial or religious hostility’. On the one hand, the opinion was expressed that legislation was not the most effective means to deal with the matter, and that if propaganda should constitute a menace to public peace, Article 19 [freedom of expression], Paragraph 3 [restrictions] of the draft Covenant on Civil and Political Rights would be applicable. On the other, it was emphasized that the strong influence of modern propaganda on the minds of men rendered legislative intervention necessary and that the general provisions of Article 19, Paragraph 3 were not adequate, as they did not impose upon States parties any obligation to prohibit the advocacy of national, racial or religious hostility. Fears were expressed that an article prohibiting such advocacy might lead to abuse and would be detrimental to freedom of expression. It was proposed

para. 39, <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G06/139/97/PDF/G0613997.pdf?OpenElement>>, accessed 12 June 2017).

⁶⁵ Annotations on the Text of the Draft International Covenants on Human Rights (A/2929), 1 July 1955, paras. 189-194, <www2.ohchr.org/english/issues/opinion/articles1920_iccpr/docs/A-2929.pdf>, accessed 12 June 2017.

that only such advocacy of national, racial or religious hostility as ‘constitutes an incitement to violence’ should be prohibited by the law of the State.⁶⁶

The scope of this latter provision was also subject to much discussion. The suggested extension to ‘incitement to discrimination, hostility or violence’ met with the objection that, while ‘incitement to violence’ was a legally valid concept, the same was not true of ‘incitement to discrimination’ or ‘incitement to hostility’. The prevailing opinion among the states was, however, that incitement to discrimination or hostility was also likely to incite violence and should thus be prohibited.⁶⁷ Nonetheless, when the final document came to the ratification stage, some signatories still placed reservations on Article 20.⁶⁸ The US, for instance, noted that ‘Article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States’.⁶⁹

Such reservations speak to and underscore certain tensions between Article 20 and Article 19. Alive to these, the HRC has sought to stress that Article 20 is fully compatible with the right to freedom of expression.⁷⁰ In 2011, it clarified its views on the relationship between the two articles, reaffirming that the respective provisions complement each other and that:

[w]hat distinguishes the acts addressed in Article 20 from other acts that may be subject to restriction under Article 19, Paragraph 3, is that for the acts addressed

⁶⁶ *Ibid.*, paras. 189-190. Footnotes omitted.

⁶⁷ Marc J. Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights* (Martinus Nijhoff Publishers, Leiden, 1997), p. 408.

⁶⁸ Australia, New Zealand, and the United States. *See also* Katharine Gelber, ‘Australia’s Response to Articles 19 and 20 of the ICCPR’, 2011 Expert Workshops on the Prohibition of Incitement to National, Racial or Religious Hatred, Bangkok, 6-7 July 2011, p. 3.

⁶⁹ US Reservation to Article 20 of the ICCPR.

⁷⁰ Human Rights Committee, *General Comment No. 11, Article 20: Prohibition of Propaganda for War and Inciting National, Racial or Religious Hatred, 90th session* (CCPR/C/GC/11), 29 July 1983, para. 2.

in Article 20, the Covenant indicates the specific response required from the State: their prohibition by law. It is only to this extent that Article 20 may be considered as *lex specialis* with regard to Article 19.⁷¹

The distinction between the two provisions lies in that between optional and obligatory limitations to the right of freedom of expression. Article 19(3) states that restrictions on freedom of expression may be necessary. Article 20, meanwhile, includes the specific obligation to prohibit hate speech in law. Brief consideration of the ways in which cases refer to the two articles is instructive. In its decision in *J. R. T. and the W. G. Party v. Canada*, for instance, the Human Rights Committee held that J. R. T.'s petition to contest the curtailment of his telephone service was inadmissible on the basis that the opinions J. R. T. wished to disseminate through the system 'clearly constitute the advocacy of racial or religious hatred which Canada has an obligation under Article 20(2) of the Covenant to prohibit'.⁷² In the *Faurisson* case, France, too, initially invoked Article 20(2) as a general clause against freedom of expression claims made by extremists, and argued that it saw itself to be merely complying with its 'international obligations by making the (public) denial of crimes against humanity a criminal offence'.⁷³ Citing the *J. R. T. and the W. G. Party v. Canada* decision, France approved the Human Rights Committee's finding that, should a statement fall under the ambit of Article 20(2), this renders consideration under Article 19 redundant. In its substantive assessment of the case, however, the Committee elected to ignore Article 20 altogether, and applied only Article 19, finding, as cited above, that the restrictions on Faurisson's freedom of expression were justifiable as a means of safeguarding the 'respect of the rights or reputations of others'. In *Ross v. Canada*, meanwhile, the HRC took a middle

⁷¹ Human Rights Committee, *General Comment No. 34, Article 19: Freedom of opinions and expression*, 102nd Session (CCPR/C/GC/34), 12 September 2011, paras. 50-52. Emphasis in the original.

⁷² *J. R. T. and the W. G. Party v. Canada*, communication no. 104/1981, U.N. Doc. CCPR/C/OP/2, p. 25 (1984), <hrlibrary.umn.edu/undocs/html/104-1981.htm> accessed June 2017, para 8(b).

⁷³ *Faurisson v. France*, *supra* note 10, para. 7.7.

ground, admitting the claim – and subsequently rejecting it – under both Article 19(3) and Article 20(2): especially relevant here is the manner in which the HRC distanced itself from its previous position and held that restrictions pertaining to incitement to hatred have to pass the standards for speech limitations under Article 19, while the provisions of Article 20 supply additional support for such. In this view, we see the complementarity of the two articles, as Article 20 stipulates those instances – within the larger scope of Article 19 – where State parties are not only permitted to restrict freedom of expression, but obliged to do so: namely, in cases that pertain to ‘any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence’.⁷⁴

4.2 *On Incitement and Intent*

The core question of what constitutes incitement is evidently central to any interest in criminalising genocide denial under the ambit of hate speech. In *Faurisson*, the exclusive focus on Article 19 and the question of permissible limits meant that the issue was sidestepped to a degree, with no clear statement on whether the denial of the Holocaust does, in and of itself, necessarily constitute incitement. Yet it is interesting to note that the individual opinions suggest a preference on the part of several Committee members for a direct application of Article 20(2), articulated not least via frequent, explicit reference to the issue of incitement: the opinion by Elizabeth Evatt and David Kretzmer (and co-signed by Eckart Klein), for instance, argues at various points that every individual has the ‘right not only to be free from discrimination on grounds of race, religion and national origins, but also from incitement to such discrimination’;⁷⁵ ‘the right to be free from racial, national or religious incitement’;⁷⁶ and/or ‘the right to be free from incitement to racism and anti-

⁷⁴ Article 20 ICCPR.

⁷⁵ Individual Opinion by Elizabeth Evatt and David Kretzmer co-signed by Eckart Klein, *Faurisson v. France*, *supra* note 10, para. 4.

⁷⁶ *Ibid.*, para. 7.

Semitism'.⁷⁷ The specifics of the *Faurisson* case notwithstanding, it is clear that to qualify any instance of denial under Article 20 requires passing the test of proving incitement to discrimination, hostility or violence. To expand our gaze momentarily, it might also be observed how the case law of the ECtHR indicates that the issue of the *intent* to incite is also a relevant factor in recognising limitations to freedom of expression. In *Jersild v. Denmark*, for instance, the Court took the view that the applicant, a television journalist who had been prosecuted and convicted of disseminating racist views on account of documentary interview material, was justified in his claim to ECHR Article 10 violations, on the grounds that the programme as a whole 'could not objectively have appeared to have as its purpose the propagation of racist views or ideas'.⁷⁸ Thus it stated:

The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so.⁷⁹

The Court reached similar decisions in a number of its Turkish cases, including *Incal v. Turkey*,⁸⁰ *Arslan v. Turkey*,⁸¹ *Gokceli v. Turkey*⁸² and *Gunduz v. Turkey*.⁸³ In *Sürek v. Turkey (No. 1)*, by way of contrast, it found that the expression in question did constitute 'hate speech and glorification of violence', precisely on account of a 'clear intention to stigmatise the other

⁷⁷ *Ibid*, para. 10.

⁷⁸ *Jersild v. Denmark*, 24 September 1994, European Court of Human Rights, no. 15890/89, Series A no. 298, para. 31, <hudoc.echr.coe.int/eng?i=001-57891>, accessed 15 February 2017.

⁷⁹ *Ibid.*, para. 35.

⁸⁰ *Incal v. Turkey*, 9 June 1998, European Court of Human Rights, no. 22678/93, ECHR 1998-IV, para. 58, <hudoc.echr.coe.int/eng?i=001-58197>, accessed 19 September 2017.

⁸¹ *Arslan v. Turkey*, 9 July 1999, European Court of Human Rights, no. 23462/94, para. 46, <hudoc.echr.coe.int/eng?i=001-58271>, accessed 19 September 2017.

⁸² *Yasar Kemal Gokceli v. Turkey*, 4 March 2003, European Court of Human Rights, nos. 27215/95 and 36194/97, para. 37, <hudoc.echr.coe.int/eng?i=001-65521>, accessed 19 September 2017.

⁸³ *Gunduz v. Turkey*, 4 December 2003, European Court of Human Rights, no. 35071/97, ECHR 2003-XI, para. 51, <hudoc.echr.coe.int/eng?i=001-61522>, accessed 19 September 2017.

side of the conflict' via such references as 'murder gangs', 'massacres' and 'brutalities'.⁸⁴ Inasmuch as the ECHR Article 10 decisions have, generally speaking, been less amenable to efforts to uphold justifiable limits to freedom of expression than the ICCPR Article 19/20 cases, it is worth noting that the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights at the Organization of American States, in a joint statement with the United Nations' Special Rapporteur on Freedom of Opinion and Expression and the Organization for Security and Cooperation in Europe (OSCE) Representative on Freedom of the Media, has reiterated that hate speech laws should, as a minimum, conform to the principle that 'no one should be penalised for the dissemination of hate speech unless it has been shown that they did so with the intention of inciting discrimination, hostility or violence.'⁸⁵

In view of all this, we might draw the following preliminary conclusion at this point. Current hate speech provisions, as they relate to justifiable limitations to freedom of expression, may provide a workable framework for dealing with instances of genocide denial – insofar as the particular speech or expression can be shown to overcome the required threshold(s). As a minimum, this would mean meeting the threefold demand of the limitation being provided by law, having a legitimate aim and being necessary and proportionate in a democratic society; in addition, it would require proof of the advocacy of 'national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence', and possibly the intent to incite such. These thresholds are – rightly – stringent, given the stakes involved, but might readily be met in many, maybe even most, cases of denial. Whether this represents an ideal solution remains very much open to question: one might, for instance, ask with Robert A. Kahn

⁸⁴ *Sürek v. Turkey (No.1)* [GC], 8 July 1999, European Court of Human Rights, no. 26682/95, ECHR 1999-IV, para. 62, <hudoc.echr.coe.int/eng?i=001-58279>, accessed 15 February 2017.

⁸⁵ Joint Statement on Racism and the media by the UN Special Rapporteur on freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 27 February 2001, <www.osce.org/fom/40120?download=true>, accessed 18 June 2017.

whether any attempt to subsume denial under hate speech serves to deflect attention from the specific harm it poses.⁸⁶ In other words, if instances of denial are criminalised as hate speech, and are thus transformed into hate speech in law, might we run the risk of losing sight of that which marks them as acts of denial in the first place – and thus of their specific seriousness? More precise measures that recognise the distinct character of denial would be advantageous in this regard, and further explorations into the possibility of such solutions should be pursued. Nonetheless, present hate speech provisions do offer a viable – and important – line of opportunity for pursuing criminal measures against denial, particularly so in explicit cases, where the language used permits recognition of a likelihood to incite discrimination, hostility or violence, and an apparent threat to democratic values and society.

5. Hate Speech: Interpretative Approaches

5.1 *The Question of ‘Bare’ Denial*

The obvious issue that presents at this point, then, is that of those cases where the language used perhaps does *not* readily permit such recognition – those instances of mere or ‘bare’ denial, where the harm stems not from the language *per se*, but rather from the content of the message and its resonance and impact in particular contexts.⁸⁷ Establishing the prospect of incitement – let alone an intent to incite – is obviously much more arduous in such scenarios. Yet here too current thinking and case law on hate speech might present additional feasible options. A first point to note is those arguments that submit that the category of expression

⁸⁶ See Robert A. Kahn, ‘Holocaust Denial and Hate Speech’, in Ludovic Hennebel and Thomas Hochmann (eds.), *Genocide Denials and the Law* (Oxford University Press, Oxford, 2011), pp. 77-108, p. 77.

⁸⁷ Mari Matsuda, for example, has spoken of the ‘cold’ nature of denialist tracts that are ‘cunningly devoid of explicit hate language’ – the implication being that, by expressing their views in ostensibly non-offensive or non-abusive terms, authors and speakers are cleverly able to avoid prosecution under hate speech laws. Despite the absence of explicit ‘hate’ language, the harm caused by such expressions to their intended targets is, however, no less real. See Mari J. Matsuda, ‘Public Response to Racist Speech: Considering the Victim’s Story’, 87(8) *Michigan Law Review* (1989) 2320-2381, p. 2366.

with a ‘tendency’ to cause hatred, discrimination or violence is much wider than that which is commonly understood by the notion of ‘hate speech’.⁸⁸ As Robert Post notes:

Even the branch of hate speech regulation that purports to turn on objective and empirical facts, like the causation of discrimination or violence, turns out on closer inspection to participate in the venerable tradition of using law to enforce essential community norms.⁸⁹

Elsewhere, Post has spoken more broadly of the possibilities for alternative and/or wider-ranging definitions:

We can always construct a definition. The question is whether the definition will do any work. In law, we have to define hate speech carefully to designate the forms of speech that will receive distinctive legal treatment. This is no easy task. Roughly speaking, we can define hate speech in terms of the harms it will cause – physically contingent harms like violence or discrimination; or we can define hate speech in terms of its intrinsic properties – the kinds of words it uses; or we can define hate speech in terms of its connection to principles of dignity; or we can define hate speech in terms of the ideas it conveys. Each of these definitions has advantages and disadvantages.⁹⁰

Perhaps the key observation here is that defining hate speech in terms of the ‘physically contingent harms’ it will cause – on the basis of its capacity to ‘spread, incite, promote or

⁸⁸ See Richard Moon, ‘Hate Speech Regulation in Canada’, 36 *Florida State University Law Review* (2008) 79-98, p. 79 and Robert Post, ‘Hate Speech’, in Ivan Hare and James Weinstein (eds.), *Extreme Speech and Democracy* (Oxford University Press, Oxford, 2009), pp. 123-138, pp. 134-136.

⁸⁹ Post, *ibid.*, p. 136.

⁹⁰ ‘Interview with Robert Post’, in Michael Herz and Peter Molnar (eds.), *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge University Press, Cambridge, 2012), pp. 11-36, p. 31.

justify racial hatred, xenophobia, anti-Semitism or other forms of hatred'⁹¹ – is only one possible approach amongst several. Post's comments suggest a raft of viable definitional alternatives founded on other factors. A broader understanding along these lines of what constitutes hate speech may be double-edged. On the one hand, a wider definition that looks beyond contingent harms perhaps runs the risk of lacking specificity and thus of being applied too indiscriminately, unduly eroding freedom of expression and creating vague criminal law contrary to the rule of law. On the other hand, however, an approach that also heeds hate speech's 'intrinsic properties', its 'connection to principles of dignity' and/or 'the ideas it conveys' may do much more to capture the full harm of the act.

An example of the problems posed by 'bare' denial is supplied by the 2007 Spanish Constitutional Court Judgment mentioned at the head of the article: while Section 607 (2) of the Spanish Criminal Code provides sanctions for imprisonment for the dissemination of views that condone or justify genocide, or look to rehabilitate its practitioners, the above ruling determined that the criminalisation of mere denial would encroach upon the constitutionally-guaranteed right to freedom of expression. Thus the judgment ruled that national criminal legislature:

reaches its limit in the essential content of the right to freedom of expression, in such a way that in the case in question, our constitutional system does not permit the mere transmission of ideas to be classified as a crime, not even in cases where those ideas are truly execrable, being contrary to human dignity, a precept which forms the basis of all the rights included in the Constitution, and therefore our political system.⁹²

⁹¹ Council of Europe's Committee of Ministers, *supra* note 57.

⁹² Constitutional Court Judgment 235/2007, *supra* note 8, para. 5.

A quite different interpretive approach is provided by the 1990 Canadian Supreme Court judgment *R. v. Keegstra*.⁹³ This is perhaps, as Karen Eltis argues, ‘the leading case relevant to hate speech and genocide denial’.⁹⁴ It involved a high-school teacher, James Keegstra, who for years spread anti-Semitic views to students and denied the occurrence of the Holocaust. Keegstra was eventually charged under what was then Section 281(2) of the Canadian Criminal Code, which outlawed the wilful public dissemination of extreme hatred against any identifiable group. He subsequently challenged the constitutional legitimacy of the provision, arguing that it violated his right to freedom of expression (Section 2(b) of the Canadian Charter of Rights and Freedoms), but the Canadian Supreme Court adjudged that Section 281(2) as was (which had, in the meantime, become sub-section 319(2) of the Criminal Code) represented a reasonable restriction on freedom of expression on account of the right of minorities to protection from vilifying speech acts. Critically, the Court did not set the threshold at incitement to violence; instead, it took nuanced account of a broad range of factors including the likely impact of hate propaganda on not only the target group but also other (non-targeted) audiences, as well as the possible longer-term threats posed to core constitutional values (e.g. multicultural diversity and equality) and social cohesion. In part, the reasoning of the majority opinion rested on the view that hate speech can, and often does, prefigure genocide and that thus a precautionary approach is advised and necessary. Just as relevant to our concerns, however, is that it was also founded on what was perceived to be a threat to the targeted group’s ‘sense of human dignity’ and ‘belonging to the community at large’⁹⁵ – as a violation of fundamental rights and identity. The conceptualisation of hate speech here thus appears to have gone beyond a focus on contingent harms to take account of

⁹³ *R. v. Keegstra*, [1990] 3 S.C.R. 697 < <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/695/index.do>>, accessed 15 February 2017.

⁹⁴ Karen Eltis, ‘A Constitutional “Right” to Deny and Promote Genocide? Pre-empting the Usurpation of Human Rights Discourse Towards Incitement from a Canadian Perspective’, 9 *Cardozo Journal of Conflict Resolution* (2007/8) 463-477, p. 472.

⁹⁵ *R. v. Keegstra*, *supra* note 93, para. omitted.

a wider set of characteristics similar to those noted by Post. Two sets of considerations might open up from all this. A first centres on how such an approach might point towards a broader understanding of the concept of hate speech that encompasses not only inflammatory denialist statements with the clear potential to incite hatred and violence but also expressions that ‘merely’ deny the occurrence of genocide, and that thus permits qualification of the latter category under current hate speech regulations. The second, meanwhile, has to do with the implications of an interpretative approach that attends more fully to questions of content and context, rather than narrowly fixing on causal harms. In the space remaining, the discussion will focus on these latter concerns – that is, on the interpretative possibilities that might accrue from the judgment, and whether and how these might be productively harnessed to augment current legislative approaches to denial in Europe.

5.2 *The ECtHR, Hate Speech and Genocide Denial*

A first point to note is that the ECtHR has, in its hate speech rulings, taken account of a range of factors relating to the specific content and context of expression. Under Article 10(2), the case law has, as Frédéric Krenc summarises, demonstrated the following elements to be important:

The author of the speech, the type of speech, the targeted audience, the content of the speech, the form of the speech, temporal and geographical context of the speech, the means of communication of the speech, and finally the control of the speech by the authorities.⁹⁶

⁹⁶ Frédéric Krenc, ‘La liberté d’expression vaut pour les propos qui “heurtent, choquent ou inquiètent”. Mais encore’, 106 *Revue trimestrielle des droits de l’homme* (2016) 311-350. Translation by the author.

The view that such factors are significant for establishing justifiable limitations on freedom of expression in hate speech cases is thus established. In its case law on instances of genocide denial, too, the Court has undertaken detailed engagement with similar concerns. The point is not to suggest a blindness on the part of the Court to such surrounding factors; rather, it is to suggest that the manner of engagement has been flawed and inconsistent.

The *Perinçek* case, to bring us full circle, stands as something of an exemplar in this regard. The argumentation used by the Grand Chamber explicitly deals with questions of context and other elements in an extensive and elaborate fashion. These include:

- Nature of the applicant's statements;
- The context of the interference (geographical/historical factors and time factor);
- Extent to which the applicant's statements affected the rights of the members of the Armenian community;
- The existence or lack of consensus among the High Contracting Parties;
- Could the interference be regarded as required under Switzerland's international law obligations?;
- Method employed by the Swiss courts to justify the applicant's conviction;
- Severity of the interference;
- Balancing the applicant's right to freedom of expression against the Armenian's right to respect for their private life.⁹⁷

Elsewhere, Caroline Fournet and I have offered a critical analysis of the Court's argumentation on several of these points.⁹⁸ There is no need to recapitulate our discussion in

⁹⁷ *Perinçek v. Switzerland* [GC], *supra* note 6, paras. 226-282.

⁹⁸ See Fournet and Pégurier, *supra* note 4, pp. 220-226.

detail here. Instead, we might focus on a particular limiting factor in the Court's general consideration of contextual concerns – the tendency to strictly distinguish between denial of the Holocaust and that of other instances of genocide. A clear exemplification of this can be seen in the oppositional positions taken by the Court in *Perinçek* and the case of *M'Bala M'Bala v. France* from 2013.⁹⁹

5.3 Article 10 versus Article 17 ECHR: Creation of a Hierarchy in Criminalising Genocide Denial?

A root issue here is the manner in which questions of hate speech and racist discrimination engage both Article 10 and Article 17 ECHR. The relationship between the provisions has been the source of much confusion, as reflected in the early decisions of the Commission. Article 17, known as the abuse clause, comes into play in connection to racist speech, whereas expressions qualified as hate speech are generally considered under Article 10, even when they are deemed capable of inciting violence.¹⁰⁰ Article 17 is only applicable on an exceptional basis and in extreme cases, as it effects to negate the exercise of the Convention right that the applicant seeks to vindicate in the proceedings before the court. It cannot be invoked independently and is mainly invoked in relation to Article 10 ECHR. In cases related to Article 10, Article 17 should only be resorted to if it is immediately clear that the impugned statements sought to deflect the article from its real purpose by employing the right to freedom of expression for ends clearly contrary to the values of the convention. A decisive point under Article 17 is whether the applicant's statements sought to stir up hatred or violence, and whether by making them s/he attempted to rely on the Convention to engage in

⁹⁹ *Ibid.*, pp. 222-224.

¹⁰⁰ *Sürek v. Turkey (No.1)* [GC], 8 July 1999, European Court of Human Rights, no. 26682/95, ECHR 1999-IV, para. 62, <hudoc.echr.coe.int/eng?i=001-58279>, accessed 15 February 2017, *Sürek v. Turkey (No. 3)*, 8 July 1999, European Court of Human Rights, no. 2473594, para. 40, <hudoc.echr.coe.int/eng?i=001-58281>, accessed 15 February 2017, *Osmani and Others v. The Former Republic of Macedonia*, (dec.), 11 October 2001, European Court of Human Rights, no. 50841/99, ECHR 2001-X, para. omitted, <hudoc.echr.coe.int/eng?i=001-22050>, accessed 15 February 2017.

an activity or perform acts aimed at the destruction of the rights and freedoms laid down in it. Thus in relation to Article 10, the Court considers whether the question under Article 17 overlaps with that of whether the interference with the applicant's right to freedom of expression was 'necessary in a democratic society'.¹⁰¹

Through its case law, the ECtHR has linked the scope of this article explicitly to Holocaust denial. In its judgment in *Lehideux and Isorni v. France*, from 1996, the Court made plain, in the context of a specific historical point concerning the conduct of Marshal Pétain during the Vichy period, that it considers it:

not its task to settle this point, which is part of an ongoing debate among historians about the events in question and their interpretation. As such, it does not belong to the category of clearly established historical facts – such as the Holocaust – whose negation or revision would be removed from the protection of Article 10 by Article 17.¹⁰²

With this judgment, the Court revives, as Paolo Lobba notes, the “guillotine effect” of Article 17, suggesting ‘that its application would entail the content-based exclusion of a certain set of expressions from the scope of the free speech principle’.¹⁰³ This principle can further be observed in both the *Garaudy* and *Witzsch* cases. In the former, the judgment may be seen to still imply a necessary correlation of the denial of the historical facts with a racist or anti-Semitic intention;¹⁰⁴ in the latter, however, there was no evidence of such intent, and the

¹⁰¹ *Perinçek v. Switzerland [GC]*, *supra* note 6, paras. 114 and 115.

¹⁰² *Lehideux and Isorni v. France [GC]*, 23 September 1998, European Court of Human Rights, no. 24662/94, ECHR 1998-VII, para. 47, <hudoc.echr.coe.int/eng/?i=001-58245>, accessed 15 February 2017.

¹⁰³ Paolo Lobba, ‘Holocaust Denial Before the European Court of Human Rights’, 26(1) *European Journal of International Law* (2015) 237-253, p. 242.

¹⁰⁴ ‘There can be no doubt that denying the reality of clearly established historical facts, such as the Holocaust, as the applicant does in his book, does not constitute historical research akin to a quest for the truth. The aim and

application of Article 17 was legitimated on the basis of the applicant's 'disdain towards the victims of the Holocaust'.¹⁰⁵ Thus, as Lobba sums up, 'the categorical exclusion of Article 17 is seen to attach to Holocaust denial as such and is divorced from a finding of racism'.¹⁰⁶ In *Perinçek*, meanwhile, the ECtHR confirmed that the guillotine effect of Article 17 does not automatically apply in cases concerning the denial of other historical instances of genocide, such as that of the Armenians.¹⁰⁷

The problems that arise from this current regime are manifold. First amongst these is the manner in which the applications of Article 10 and Article 17 establish a hierarchy of genocides, whereby the Holocaust is granted more robust protection than others. The necessity of recognising the uniqueness of the Holocaust as a human experience very obviously needs no elaboration here. Yet the propensity to hold Holocaust denial apart from that of other genocides yields the kind of inconsistencies evidenced by the *Perinçek* and *M'Bala M'Bala* judgments. Moreover, it also has a limiting effect in terms of understanding the broader characteristics and structure of denial as both a practice (*why* is it committed?) and process (*how/where/when* it is committed?). To consider the Holocaust alongside other genocides in this context by no means indicates equivalency. To do so would, I would suggest, be beneficial in enabling the development of more consistent and effective legal measures for confronting denial more broadly.

the result of that approach are completely different, the real purpose being to rehabilitate the National-Socialist regime and, as a consequence, accuse the victims themselves of falsifying history. Denying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order. Such acts are incompatible with democracy and human rights because they infringe the rights of others. Their proponents indisputably have designs that fall into the category of aims prohibited by Article 17 of the Convention'. *Garaudy v. France*, *supra* note 28.

¹⁰⁵ *Witzsch v. Germany (dec.)*, 13 December 2005, European Court of Human Rights, no. 7485/03, para. 3, <<http://hudoc.echr.coe.int/eng?i=001-72786>>, accessed 15 February 2017.

¹⁰⁶ Lobba, *supra* note 103, p. 243.

¹⁰⁷ *Perinçek v. Switzerland*, *supra* note 4, para. 52.

A second problem is that upon which Lobba focuses in his essay – namely, the dangers of an expansive interpretation of Article 17 that, if extended beyond the specific case of Holocaust denial, might legitimise a sweeping set of restrictions on freedom of expression in the vague aim of protecting democratic values.¹⁰⁸ The third, meanwhile, is the way in which Article 17 not only nullifies important substantive safeguards on issues of freedom of expression, but also puts aside the requirement for any kind of detailed engagement with the kind of contextual factors alluded to in the above. The categorical exclusion of statements based on content alone – i.e. through the reference to only specific instances of genocide – is likewise uncondusive to any attempt to arrive at a consistent, and just, legal position.

6. Conclusion

In lieu of a full conclusion, we might close by putting forward a few tentative recommendations. On the one hand, we might, for the sake of consistency, argue for a wider application of Article 17 to cases other than those involving denial of the Holocaust. Yet the risks of an overly broad understanding of the abuse clause, and the extent to which it debars a full engagement with all factually and legally relevant elements of denialist statements render this disadvantageous. Alternatively, we might go the way of appealing to the ECtHR to regard all forms of such speech, irrespective of the particular genocide to which they refer, under Article 10 and not Article 17.¹⁰⁹ This might, however, be too drastic a measure in eroding entirely the potential value of Article 17 in helping to safeguard democracy, dignity and rights. On this basis, I would thus follow Lobba in proposing a more mixed approach whereby

¹⁰⁸ Lobba, *supra* note 103, pp. 251-253.

¹⁰⁹ For an argument along these lines, see Hannes Cannie and Dirk Voorhoof, 'The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection?', 29(1) *Netherlands Quarterly of Human Rights* (2011) 54-83.

Article 17 is applied not as a category tool of decision-making through its guillotine effect, but rather as an interpretative principle – within the framework supplied by Article 10. This would have the advantage of returning Article 17 to a role as a complimentary aid to preserving democratic stability, while at the same time permitting extended consideration of contextual factors. On the latter point, and looking beyond Lobba’s arguments, we might perhaps take useful initial bearing from the Committee on the Elimination of Racial Discrimination’s General Recommendation No. 35 on ‘Combating Racist Hate Speech’, which catalogues the following factors as significant considerations in determining whether certain acts should be criminalised:

The content and form of speech: whether the speech is provocative and direct, in what form it is constructed and disseminated, and the style in which it is delivered.

The economic, social and political climate prevalent at the time the speech was made and disseminated, including the existence of patterns of discrimination against ethnic and other groups, including indigenous peoples. [...].

The position or status of the speaker in society and the audience to which the speech is directed. [...]

The reach of the speech, including the nature of the audience and the means of transmission: [...].

The objectives of the speech: speech protecting or defending the human rights of individuals and groups should not be subject to criminal or other sanctions.¹¹⁰

¹¹⁰ Committee on the Elimination of Racial Discrimination, *General Recommendation No. 35: Combatting Racist Hate Speech* (CERD/C/GC/35), 26 September 2013, para. 15. Emphasis in the original.

Such a clearly enumerated list of factors would provide a useful framework for a constant and regular approach to instances of denial. To be sure, the specific elements would require detailed critical thought and reflection; the current list should, moreover, obviously not be considered exhaustive or final, but rather as providing a fruitful starting point from which to proceed. However this may be developed, it certainly seems advised, in sum, to loosen the focus on differentiating between particular genocides, and to apply a more coherent set of criteria geared towards arriving at a clearer understanding of denial as a practice and process – that is to say, to pay more consistent attention to issues of content and context in each case, and, in particular, the specific questions of why, how, when and where denialist statements are uttered or written. Such an approach seems, under present conditions, the most hopeful route to enabling us to adequately and justly confront instances of denial in and through the mechanisms of law.