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**HOLOCAUST DENIAL LEGISLATION: A JUSTIFIABLE  
INFRINGEMENT OF FREEDOM OF EXPRESSION?**

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Série des Working Papers du  
Centre Perelman de philosophie du droit  
n° 2008/3

**Comment citer cette étude ?**

J. D. JOSEPHS, *Holocaust Denial Legislation : a Justifiable Infringement of Freedom of Expression*, Working Papers du Centre Perelman de philosophie du droit, n° 2008/3, <http://www.philodroit.be>

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INFRINGEMENT OF FREEDOM OF EXPRESSION?***

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## ***Preface***

Holocaust denial is not a particularly pleasant subject to write about. When informing my friends at Exeter University the subject upon which I would be writing my dissertation, they would almost all remark 'but how could anyone deny the Holocaust? It just... happened!'. Unfortunately, Holocaust denial remains a common occurrence today, and I wanted to embark on a mission of legal research to see if legislation was the best way to prevent it.

During my research, I was astonished and captivated at the amount of material available both in academic literature and on the internet. But I also wanted to embrace a more original approach. I remember my father telling me that when he studied law at Leeds University, he had written a dissertation on 'the independence and discretionary powers of the Attorney General in criminal prosecutions'. During his research, he decided to try his luck by writing to Lord Denning, who was at that time Master of the Rolls. He was astonished to receive just a few weeks later a hand written reply. Contact ensued, and it provided him with great source material from one of the greatest legal minds of the twentieth century. Inspired by this, I decided to search outside the bubble, anxious to acquire an in-depth knowledge of Holocaust denial, make contact with and interview the top people in the 'business'. I too was astonished at how accessible people were, ready and willing to provide me with in depth answers to my often incessant queries.

I would therefore like to express my gratitude and appreciation to the following people. It might seem strange to say so, but I have to start off by thanking David Irving. Whilst I abhor his views and approach he was always willing to answer my queries with courtesy and depth. I also want to thank Professor Deborah Lipstadt, who kindly granted me an interview and answered all my questions not just in a precise and clear manner, but with

great warmth and encouragement. Anthony Julius was similarly more than willing to help, as was Professor Evans. At one point it seemed as if I had all of the key players of the celebrated libel case at my personal disposition - I could hardly believe my luck!

The speakers at the Genocide denial conference I attended in Brussels, as part of my research, were likewise all more than willing to speak to me and deal with my queries, especially Professor Benoît Frydman. David Pannick QC was also always happy to provide his opinion, despite the enormous calls on his time. Michael Gapes MP answered every query relating to his Holocaust Denial Bill. An enormous debt of gratitude goes to my personal tutor for this dissertation, Dr. Caroline Fournet, who tolerated my total immersion in the subject with sustained guidance and good humour, tolerating my occasional mental breakdowns! She was the perfect person to guide me through this essay, being so heavily involved and passionate about the topic herself. My thanks again for together providing me with a unique insight into the sinister world of Holocaust denial.

*Jonathan Josephs, March 2008.*

## **INTRODUCTION**

‘Nazism is dead, quite dead, and it’s Fuhrer alongside with it. What remains today is the truth. Let us dare to proclaim it. The non-existence of the “gas chambers” is good news for beleaguered humanity. Good news that it would be wrong to keep hidden any longer.’

Robert Faurisson, writing in *Le Monde*, December 29<sup>th</sup> 1978.

Each genocide is specific to itself. It would therefore not be possible to study every single form of genocide denial, though there are clearly some common motivating factors behind them. Nor will there be a focus on the denier's methods or rebuttals to their theories, for numerous other works already address those issues. This work will instead confine itself to the denial of the Holocaust from a purely legal perspective. Holocaust denial 'does not take the form of one overarching, coherent ideology, but takes a multitude of forms'.<sup>1</sup> Deniers have an infinite number of theories about what happened to the Jews in the Second World War,<sup>2</sup> but for the purpose of this essay, the definition provided by Professor Evans in his capacity as an expert witness in *the David Irving v Penguin books & Lipstadt*<sup>3</sup> trial, and as summed up by the trial judge, will be used. The views expressed by Holocaust deniers include the following:<sup>4</sup>

- i. that Jews were not killed in gas chambers or at least not on any significant scale;
- ii. that the Nazis had no policy and made no systematic attempt to exterminate European Jewry and that such deaths as did occur were the consequence of individual excesses unauthorised at senior level;
- iii. that the number of Jews murdered did not run into millions and that the true death toll was far lower;
- iv. that the Holocaust is largely or entirely a myth invented during the war by Allied propagandists and sustained after the war by Jews in order to obtain financial support for the newly-created state of Israel.

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<sup>1</sup> Kate Taylor (editor), *Holocaust Denial, the David Irving trial and international revisionism*, (Searchlight Educational trust 2000) 64.

<sup>2</sup> In the words of Pierre Vidal-Naquet, *Assasins of Memory, Essays on the denial of the Holocaust*, (Columbia University Press, 1992) 65: 'If every time a 'revisionist' trotted out a new fable it were necessary to respond to, all the forests of Canada would not suffice'.

Irving v. Penguin Books Limited, Deborah E. Lipstadt [2000] EWHC QB 115 (11th April, 2000). Henceforth referred to as 'Irving v Lipstadt'.

<sup>4</sup> The Judgement of *Irving v Lipstadt*, EWHC QB 115 (11th April, 2000), paragraph 8.4.

It must at this point be mentioned that it is common knowledge that it was not only Jews who were exterminated in the gas chambers, but also political opponents to the Nazis, gypsies, homosexuals, the mentally ill and others. But the deniers focus nearly without exception on the Jews, as will be seen, for their own ulterior motives, which are almost exclusively anti-Semitic in nature. In so doing, they set out to transform the Jews from the innocent victims of the Holocaust into manipulative liars, and they tarnish the memory of the millions of victims of the most documented genocide in the whole of human history. It is also the genocide which has had the biggest imprint on European collective memory, which has resulted in laws being enacted in many European countries banning Holocaust denial, and subsequently has been the genocide the denial of which has been the most litigious around the world.

There are powerful arguments both for and against laws banning Holocaust denial. Most of the high profile Holocaust deniers are anti-Semites who later shifted their ground to Holocaust denial in order to further enhance their anti-Semitic credentials – but under a new and more attractive cloak of legitimacy – that of the revisionist historian. By posing as academics, historians or simply revisionists, they can legitimately express their views in forums without being branded an anti-Semite. Many deniers will concede that some Jews may in fact have died, only disputing the method and numbers. This further enhances their status as legitimate historians by putting the Holocaust up as a subject for fair debate. More shockingly perhaps, what they are ultimately aiming towards is the portrayal of another side to the Holocaust discourse: attempting to portray it as legitimate an argument as the historical truth itself.

The deniers are not only denigrating the collective memory of the victims and of the survivors, but also playing into an audience keen to listen to what we will see to be distortions of history and meticulously fabricated lies. For the Holocaust denier, it would appear to be a win-win situation. On the one hand, if they express their views on the Holocaust, they will succeed in putting their message out to a greater public, and an opportunity to spread anti-Semitic propaganda. On the other hand, if their freedom of speech is restricted by the enactment of laws banning Holocaust denial, they will cry 'freedom of speech' and claim that the 'Jewish version' of the Holocaust owns the monopoly, with no real debate, academic or otherwise, allowed on the subject. This is why some argue determinedly against the enactment of laws specifically against Holocaust denial: in so doing, the argument goes, the deniers are provided with a public relations bonanza, and turning them into martyrs for freedom of speech.

There have been relatively few works focusing on the denial of the Holocaust from a purely legal perspective. Examining different laws banning Holocaust denial from an internationally comparative legal perspective will be an interesting and challenging task. Even though each individual law banning Holocaust denial is nationally distinct, they all bear common ground in terms of being an infringement to freedom of speech.

The inclusion and analysis of the relevant legislation in Germany and Austria would have been indispensable had this essay focussed solely on a comparison of laws banning Holocaust denial. However, this paper seeks to tackle the question as to the justification of such legislation, and not the individual merits of each law. It was therefore decided that it would be more challenging to examine issues outside of this more predictable perspective. For this reason, the analysis of state legislation against Holocaust denial will be limited to Spain and France, two countries with particularly interesting case law concerning Holocaust denial (A). By the same token

the approach of countries which have not banned Holocaust denial – notably the United States and the United Kingdom will be examined (B). The spotlight will then be turned to a detailed examination of the renowned *Irving v Lipstadt* trial, because this case exposes the true face of Holocaust deniers and will give a better idea of whether laws are indeed necessary to ban the phenomenon of Holocaust denial (C). Laws banning Holocaust denial obviously entail an infringement of freedom of expression, but after examining legal arguments both for and against such legislation, the question this work will focus on is whether this infringement is legally justifiable (D).

## **(A) STATE LEGISLATION AGAINST HOLOCAUST DENIAL**

### **1) Holocaust denial in Spain – uncertainty prevails**

The situation in relation to Holocaust denial in Spain is an interesting one. The first and most famous affair was undoubtedly the *Violeta Friedman* case. It concerned Léon Degrelle, a Belgian neo-Nazi who made statements denying the Holocaust, and who was duly sued by Holocaust survivor Violeta Friedman. The main point of law was the conflict between Article 20 of the Spanish Constitution (the right to freedom of speech) and Article 18 of the Constitution (the right to dignity). After two unsuccessful appeals by the plaintiff, the Spanish Constitutional court overruled the lower courts in November 1991 in favour of Miss. Friedman. The court held that even though the Holocaust is legitimately recognised as a historical fact, publications which distort history are nevertheless protected by Article 20 of the Spanish Constitution. However, this did not prevent the fact that:

With all evidence regarded, the comments manifestly present an anti-Semitic and racist connotation, which cannot be interpreted as more than an anti-Jewish incitement, with independence of any judgement of opinion on the existence of historical fact.<sup>5</sup>

This means that, at the time of the case, the scope of Léon Degrelle's comments denying the Holocaust constituted an improper assault against the human dignity of the Jewish people. This key case is one with which all students of Spanish Constitutional law must be familiar, for the court declared that the constitutional right to freedom of expression does not extend to cases where statements would

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<sup>5</sup> Sentencia Tribunal Constitucional núm. 214/1991 (Sala Primera ), de 11 noviembre, paragraph 8.

'generate a feeling of hostility against fixed ethnic, foreign, religious or social groups'.<sup>6</sup> It thus comes as no surprise to see that the *Nuevo Código Penal* contains a specific clause relating to genocide denial. It is interesting to note that there is no specific clause relating to the denial of the Holocaust in particular, but of the denial of genocide in general – a distinction which will be further discussed.<sup>7</sup> Article 607-2 puts it thus:

The diffusion by any means of ideas or doctrines that deny or justify the crimes described in the previous section of this article, or has as its intention the rehabilitation of regimes or institutions which they protect (...) will be punished with a prison sentence of one to two years.<sup>8</sup>

The constitutionality of this law was disputed by one Pedro Varela, incarcerated for being the owner of a library distributing Nazi propaganda material and literature exculpating Hitler's regime. On November 11<sup>th</sup> 2007,<sup>9</sup> the Spanish Constitutional Court decided that the words in the above article 'deny or' were unconstitutional, in effect decriminalising Holocaust denial. The court stressed, however, that it was still illegal to 'justify' genocide. This distinction would appear to be both illogical and irrational. It would seem probable that the statement 'no Jews were gassed in Auschwitz' would be perfectly acceptable following the court's decision. However, should one state that 'the gassing of the Jews at Auschwitz was acceptable because of X or Y', then a one year term of incarceration beckons accordingly. No matter what side of the debate one abides by in terms of laws banning Holocaust denial, the situation in Spain surely has to be rectified by its legislature or Constitutional Court without undue delay.

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<sup>6</sup> *Ibid.*

<sup>7</sup> *Infra*, p 67.

<sup>8</sup> Nuevo Código penal article 602.

<sup>9</sup> Tribunal Constitucional, Pleno. Sentencia 235/2007, de 7 de noviembre de 2007. Cuestión de inconstitucionalidad 5152-2000.

## **II) Holocaust denial in France – an established law which has not escaped controversy**

“What have the French university authorities and justice system done? They have tolerated that you, denying the deaths, kill them a second time.”<sup>10</sup>

So wrote Holocaust survivor Primo Levi, faced against the inability of the French system to prosecute Holocaust denier Robert Faurisson, Professor at Lyon University, and poised to become not just the most prolific Holocaust denier in France but also the country's most litigious. And yet it did not take too long for judgement to be found against him in a French court. On July 8<sup>th</sup> 1981, Faurisson was given the symbolic sentence of one franc for having declared that ‘Hitler never ordered or admitted that anyone was killed because of their race or religion’<sup>11</sup>. This sentence was symbolic because there was at that time no law explicitly banning Holocaust denial. The appeal on 26<sup>th</sup> April 1983 subsequently played into Faurisson's hands. By relying on Article 1382 of the French civil code, the onus was put on to the plaintiffs that Faurisson was mistaken in respect of his views relating to the Holocaust. Here, finally, was the public platform for which he had been waiting. Even though he lost the appeal, Faurisson considered this his greatest triumph, arguing that :

...it seems permissible henceforth, basing oneself on revisionist works, to say that the Germans' homicidal gas chambers had no existence in

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<sup>10</sup> From the Corriere della Sera of January 3rd 1979.

<sup>11</sup> LICRA et autres c/Faurisson, Tribunal de Grande Instance de Paris, 1re Chambre, 1re Section, 8 juillet 1981.

reality... on condition of taking care... not to appear insulting or offensive to anyone.<sup>12</sup>

In France the case for a law banning Holocaust denial came to be articulated with more urgency post-Faurisson. For it was not at all clear whether the legislation designed to combat racial hatred, the law of July 1<sup>st</sup> 1972,<sup>13</sup> was sufficient for the task, nor indeed whether or not Holocaust denial might come within its ambit at all. Article 24bis of 1990, more commonly known as the *Loi Gayssot*<sup>14</sup> was voted in by the National Assembly on July 13<sup>th</sup> 1990, adding itself as a subsection to Article 24 of the law of July 29<sup>th</sup> 1881 relating to freedom of the press. It was no coincidence that the legislation came at a period which saw the rise of far-right leader Jean-Marie Le Pen and the success of Faurisson in the public eye, therefore 'the law's supporters hoped to tarnish both'.<sup>15</sup> The French legislature scrutinised the legislation in great detail – and tackled the issue of the danger of the being seen to create an official version of history, and of thus limiting historical debate.

Addressing his critics, Jean Claude Gayssot said that the need and the objective of the law was none of the above. It was, rather on the point of not calling into question the existence of abhorrent 'facts' to use as justification for militant anti-Semitism. Or, as he put it in an article in *Le Monde*:

...the *raffes* of July 14<sup>th</sup> 1942 in Paris, the deportation of more than seventy thousand French Jews, of whom little more than three thousand came back; the children who left the Drancy camps without hope of

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<sup>12</sup> Robert Faurisson, Revisionism on trial: developments in France, 1979 – 1983 (*Journal of Historical Review* 6(2) 1985), 164.

<sup>13</sup> La loi n° 72-546 du 1er juillet 1972 relative à la lutte contre le racisme.

<sup>14</sup> After the name of the Member of Parliament who proposed it.

<sup>15</sup> Robert A Kahn, *Holocaust Denial and the Law (a comparative study)*, (Palgrave MacMillan 2004) 101.

return, all these horrors don't have any 'official' character about them, they are but the awful reality.<sup>16</sup>

The law consists of punishing whoever publicly contests the existence of a crime against humanity; as defined by the military tribunal annexed at the London accord of 8<sup>th</sup> August 1945, commonly known as the Nuremberg trials.

Michel Troper, in his article 'The *Gayssot* law and the Constitution', points out that Holocaust denial is a crime in France only if it is carried out in the public domain.<sup>17</sup> Therefore what is punished is not the holding of opinions, but the diffusion of that opinion, which is an 'act susceptible to produce undesirable effects...'<sup>18</sup>

The French Parliament decided that Holocaust denial is a form of racial hatred and should be punished as such. Unsurprisingly perhaps, Faurisson was the first to be prosecuted under the newly enacted laws. Interviewed by the French monthly *Le Choc du Mois*, he repeated his Holocaust claims whereby the gas chambers designed to kill Jews did not exist. He was duly convicted, on April 18<sup>th</sup> 1991<sup>19</sup> of *contestation de crimes contre l'humanité*<sup>20</sup> under the new law, alongside his co-defendant, the publisher of the monthly, and ordered to pay 326,832 francs. Faurisson subsequently appealed to the United Nations Human Rights Committee over the legality of the *Gayssot* Law<sup>21</sup>. The Committee upheld the legality of the legislation, a decision which will be analysed in due course.

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<sup>16</sup> *Le Monde*, 26 juin 1996.

<sup>17</sup> Michel Troper, [La loi Gayssot et la constitution](#), (Annales, Histoire, Sciences Sociales, 54(6), novembre-décembre 1999), 1253.

<sup>18</sup> *Ibid.*

<sup>19</sup> Ass. Résistants et déportés c/ Faurisson et Boiseau, 18 avril 1991, 17<sup>th</sup> Correctional Chamber of the Tribunal de Grande Instance de Paris.

<sup>20</sup> Contestation of crimes against humanity.

<sup>21</sup> Faurisson v France CCPR/C/58/D/550/1993, (1996) 2 BHRC 1.

Faurisson more recently took court action, suing Robert Badinter, (the former Justice Minister) for libel in a television interview with *ARTE*. In that interview, he stated that his last case before becoming Justice Minister was securing the conviction against Faurisson for being a falsifier of history. Faurisson argued that the court did not use the term 'falsifier' once in its decision, and that was therefore libellous. The court held on May 21 2007<sup>22</sup> for Badinter. It is interesting to note that this was a libel suit, so it did not revolve around whether the applicant was in breach of the *Gayssot* law. Therefore, Badinter had to rely on a panel of experts<sup>23</sup> to dismiss Faurisson's claims. The public prosecutor stated that Faurisson was motivated by a 'raging anti-Semitism' which far from being hidden is 'out there in broad daylight'.<sup>24</sup>

It is worth bearing in mind that Faurisson is not the only person in France to have been convicted under the *Gayssot* law. Another interesting case was *Guionnet*<sup>25</sup>, who significantly minimised the number of dead in the Holocaust by publicly claiming and putting up posters saying 'Auschwitz – 125.000 dead'.<sup>26</sup> The question was therefore whether or not minimisation of the number of victims came within the scope of the *Gayssot* law. The court held that Guionnet was acting in 'bad faith',<sup>27</sup> by massively minimising the number of victims, but that this could not secure a conviction because denying a crime against humanity does not revolve around the number of victims. The court then produced what would appear to be a very vague statement, basing itself not on the number of victims, but on the minimisation of the 'extent and the massive character of the victims exterminated in Auschwitz...

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<sup>22</sup> Faurisson c/ Badinter, 17e Chambre du tribunal correctionnel de Paris, 2007.

<sup>23</sup> Valérie Igounet, Annette Wieviorka, Nadine Fresco, Roland Rappaport, Henry Rousso... This is the francophone equivalent of the expert panel giving evidence for the respondent in the *Irving v Lipstadt* trial.

<sup>24</sup> Book review, [Bernard Jouanneau](#), [Robert Badinter](#) (preface), *La Justice et l'Histoire face au négationnisme*, Au cœur d'un procès, Fayard, 2008, [http://www.jy-martin.fr/article.php3?id\\_article=294](http://www.jy-martin.fr/article.php3?id_article=294).

<sup>25</sup> Ass. FNDIR, UNADIF, parties civiles, c/ Guionnet, 17 Juin 1997 Cour de cassation, chambre criminelle, Bulletin criminel 1997 N° 236 p. 786.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

because of their belonging to a group, and denying therefore the existence of a crime against humanity...'.<sup>28</sup>

It seems clear that the French courts are taking a very liberal interpretation of the law, and that judges are not looking so much into the detail of the wording as to the overriding objectives of the law. As per *Guillonet* it seems as if they are prepared to awkwardly find their way through it, albeit in very vague legal language.<sup>29</sup>

It seems clear, then, that there remain great flaws in the *Gayssot* law. The legislation was designed to prevent repetitions of the Faurisson trial in 1983 in which the prosecution effectively had to prove the veracity of the Holocaust. Prior to the law, the question in court was 'did the Holocaust actually take place?' – playing into the deniers' hands in terms of the extent of the widespread publicity received, even at the expense of a civil conviction. The *Gayssot* law changed the question to 'did you deny the Holocaust?', thus avoiding the task of always having to prove that the Holocaust did indeed take place. However, as Robert A Kahn points out, the *Gayssot* law was more a conception of 'symbolic reassurance'.<sup>30</sup> It was rather an answer to the hostile feeling in France prior to the law being enacted. In this respect it can be seen as a reactive piece of legislation rather than pro-active, and in any event it has clearly not succeeded in dealing a fatal blow to Holocaust deniers, either inside or outside of the court room. Well briefed in terms of the law, French Holocaust deniers continue to seek to deny but within the ambit of the law, with 'defendants becoming increasingly adept at turning procedural defences into opportunities to put the Holocaust on trial'.<sup>31</sup> In so doing they have succeeded in manipulating the law into doing precisely what it set out to prevent – a series of showcase trials relating to the Holocaust. In a case of

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<sup>28</sup> *Ibid.*

<sup>29</sup> As demonstrated in the *Licra v Pichard and Wacquez* 1993 case, ref. Robert A Kahn, *Holocaust Denial and the Law* (a comparative study), (Palgrave MacMillan 2004) 112.

<sup>30</sup> *Ibid* p 118.

<sup>31</sup> *Ibid*, p 118.

12<sup>th</sup> September 2000<sup>32</sup> in the criminal chamber of the *Cour de Cassation*, the judge stated that throughout the trial, 'Roger A... was invited to express himself on the totality of the questions which have just been examined... The defendant, among others, has restated that there is no proof that the final solution envisaged was the extermination of the Jews'.<sup>33</sup>

It cannot be stated that the law was an attempt to root out Holocaust denial once and for all. In any event, be it inside or outside of the courtroom such an objective is almost certainly entirely unrealistic. The French law can nevertheless be dubbed a success in that the judge will no longer enquire into the veracity of the Holocaust, only as to whether or not the accused did indeed make his Holocaust-denying statements. It is of course only right and proper that a defendant should have an opportunity to express himself in court – with publicity perhaps being the price to be paid. The *Gayssot* law has undoubtedly succeeded in that if it can be shown that the defendant did indeed deny the Holocaust, this should be sufficient to secure a conviction.

## **(B) THE LEGAL PERMISSIBILITY OF HOLOCAUST DENIAL**

### **I) Holocaust denial in the United States and the power of the First Amendment**

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<sup>32</sup> Cour de cassation, chambre criminelle, Audience publique du mardi 12 septembre 2000, N° de pourvoi : 98-88200, Non publié au bulletin, Décision attaquée de la Cour d'appel de Paris, 11ème chambre du 16 décembre 1998.

<sup>33</sup> *Ibid.*

In the USA, the situation is clear cut: it is not possible to enact laws banning Holocaust denial because of the First Amendment to the American Constitution which guarantees freedom of speech. The approach is that 'criminalising hate speech would severely impair freedom of speech and would in the long run cause more damage than good'.<sup>34</sup> The necessity to defend free speech – no matter what the cost – seems to be the prevailing legal ethos. The scope of the First Amendment is far reaching, covering nearly every form of expression of freedom of speech - even allowing for the burning of the flag.<sup>35</sup> Hardly surprising, then, that denying the Holocaust is also covered by the First Amendment. Case law in the USA examining the question of whether denying the Holocaust falls within the First Amendment is noticeable only by its absence. Nevertheless, it was held in the renowned *Chaplinsky v. New Hampshire*<sup>36</sup> case that the First Amendment does have certain limits including words which by their utterance inflict injury or tend to incite an immediate breach of the peace.

It would be an interesting debate to ask whether denying the Holocaust inflicts injury 'by their utterance' – the ECHR certainly seem to think so, as will be analysed further on.<sup>37</sup> The leading human rights lawyer David Pannick QC, however, has stated in correspondence to the author that he, for one, does not subscribe to this view.

In general, my view is that it is wrong in principle for the law to ban debate on such a political issue. I subscribe to the view of the US Supreme Court (especially Holmes J in the 1920s-1930s) on the First

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<sup>34</sup> Marko Milanovic, State Responsibility for Genocide (The European Journal of International Law Vol. 17 no.3 EJIL 2006).

<sup>35</sup> Texas v. Johnson 491 U.S. 397 (1989).

<sup>36</sup> Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

<sup>37</sup> Udo Walendy v. Germany, No. 21128/92, decision of 11 January 1995, European Commission of Human Rights. *Infra* p. 63.

Amendment that truth will win out in free debate and does not need protection.<sup>38</sup>

Despite what would appear to be an almost blanket cover for free speech, there has nevertheless been a Holocaust denial related case in the USA. Most unexpectedly, this arose under contract law. The notorious Holocaust Denying Institute for Historical Review (IHR), cynically offered \$50,000 to anyone who could prove that Jews were gassed at Auschwitz. Survivor Mel Mermelstein rose to the challenge and wrote an article to the Israeli daily *The Jerusalem Post* with adequate proof. This included a witness account of how he saw his mother and two sisters walking to what he would subsequently learn to be the gas chambers. The IHR did not fulfil its promise of the reward, and subsequently Mermelstein sued them for breach of contract. The case did not go to trial, but both sides agreed to a summary judgement of the court, which held, on October 29<sup>th</sup> 1981:

...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 just simply is a fact (...)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.<sup>39</sup>

So even with judicial notice of the Holocaust, the First Amendment prohibits any laws banning freedom of expression. Neo-Nazi Groups are routinely seen brandishing Swastika flags and shouting other Nazi slogans whilst the Klu Klux Klan can likewise go about its business unhindered. All of this is protected under the First Amendment. It would seem as if the situation in America requires reform, because of what Kahn

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<sup>38</sup> Personal correspondence with David Pannick QC.

<sup>39</sup> Mel Mermelstein v. Institute for Historical Review, et al., Superior Court of California, Case No. C 356542, (1981).

refers to as a 'dilemma of toleration'.<sup>40</sup> Hundreds of non-US Holocaust denying websites take advantage of America's First Amendment to use US based servers to host their websites, thus finding a loophole to bypass national laws in countries where Holocaust denial is illegal.<sup>41</sup> Under US Law, the authorities can override this 'apparent constitutional carte blanche'<sup>42</sup> only if the hateful material represents an imminent threat to the security of a specific person, as held in *Watts v United States*.<sup>43</sup>

## **II) Holocaust denial in the United Kingdom – unwilling to embrace a legislative approach**

It goes without saying that when it comes to considering whether or not to introduce Holocaust denial legislation, a country will be deeply influenced by the position it took in the Second World War. With the exception of Israel, all national laws relating specifically to Holocaust denial have been from countries which were under German occupation. Whilst this would explain Germany's and Austria's and other nations' absolute determination to prevent the resurgence of a regime whose *raison d'être* revolved around racial hatred. In this way, it can be seen as a 'piece of legislation that completes the jigsaw'<sup>44</sup> of coming to terms with their Nazi past. The UK, having not experienced the horrors of the Nazis to the extent of mainland Europe, has not felt the necessity or the urgency to enact any legislation banning Holocaust denial.

This did not prevent London, however, from becoming the scene of one of the most

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<sup>40</sup> Robert A Kahn, *Holocaust Denial and the Law* (a comparative study), (Palgrave MacMillan 2004) p 137.

<sup>41</sup> Russell Working illegally abroad, hate Web sites thrive here, Tribune staff, November 13, 2007.

<sup>42</sup> Michael Horn, *New Law Journal* 153 NLJ 777 23 May 2003, 777  
Racism and cyber-law This Week Information Technology.

<sup>43</sup> *Watts v United States* 394 US 705, (1969).

<sup>44</sup> Adrian Marshall Williams, Jonathan Cooper, *Hate Speech, Holocaust denial and international human rights law*. (EHRLR 1999).

important cases ever heard concerning the topic. For it was in an English court room that the *Irving v Lipstadt* case would succeed in capturing the attention of the world's media.

Prior to that case, however, Michael Gapes MP had proposed steering the 'Holocaust Denial Bill' through Parliament as a Private Member's Bill. The Bill consisted of amending section (18) of the Public Order Act 1986, a section which was to 'control the stirring up of racial hatred'. It would have added sub section 5(a) which reads:

For the purpose of this section, any words, behaviour or material which purport to deny the existence of the policy of genocide against the Jewish people and other similar crimes against humanity committed by Nazi Germany ('the Holocaust') shall be deemed to be intended to stir up racial hatred.<sup>45</sup>

The Holocaust Denial Bill was a simply drafted Bill which was unlikely to have been effective and may indeed have created precisely the opposite effect to the one intended. Those behind the Bill would no doubt have been better advised to use the *Gayssot* example and state 'crimes against humanity' as defined by the Nuremberg trials. Furthermore, its critics might have concentrated on the fact that the Bill exclusively bans the denial of the policy of genocide specifically against the Jewish people, and not any other group or minorities who were systematically killed in the Holocaust. Moreover, it remained unclear by not defining the abstract term 'similar crimes against humanity committed by Nazi Germany'. In his address to Parliament, defending his Bill, Michael Gapes argued that freedom of speech is already constrained in other legislation,<sup>46</sup> stating that 'there is no such thing as absolute

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<sup>45</sup> Members of JPR Law Panel (Anthony Julius Chairing), Combating Holocaust denial through law in the United Kingdom, (Institute for Jewish Policy Research, No. 3 2000).

<sup>46</sup> The Malicious Communications Act 1988, section 1 makes an offence sending information which is

freedom of speech; it is a question of balance, and I believe that the balance must be adjusted so that we can deal with the problems more effectively...'<sup>47</sup>

Whilst Gapes' Bill was undoubtedly well-intentioned and would have been a start to the criminalisation of Holocaust denial in the United Kingdom, it seems to have been ill-prepared. Some years on Gapes explained to the author why, in his view, the Bill proved unsuccessful – a lack of Parliamentary time caused by the 1997 General Election. 'I stand by the views I expressed in 1997 and believe that the existing legislation still needs to be strengthened.'<sup>48</sup>

The situation as it stood prior to the Bill would have made it hard, if not impossible, to prosecute someone for Holocaust denial using the Public Order Act 1986, on the grounds that it only applies to language which is 'threatening, abusive or insulting'.<sup>49</sup> Jurist Geoffrey Bindman argues that Holocaust deniers avoid using such inflammatory language – they 'deliberately seek[s] credibility by using mild, pseudo-scientific language'.<sup>50</sup> He thus proposed closing the legal loophole by simply taking the words 'threatening abusive or insulting'<sup>51</sup> out of section 18 of the Act and this would extend the ban to non-inflammatory language.

It certainly remains within the realms of possibility that one day a law may be enacted banning Holocaust denial in the United Kingdom. That said, there has never been

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indecent, grossly offensive or false and known to be false by the sender. For an offence to be committed under this section, one of the purposes of sending the material must be to cause distress or anxiety to the recipient.

<sup>47</sup> Hansard, Debate for 29<sup>th</sup> January 1997 (pt 26), Michael Gapes, [http://www.publications.parliament.uk/pa/cm199697/cmhansrd/vo970129/debtext/70129-26.htm#70129-26\\_spnew16](http://www.publications.parliament.uk/pa/cm199697/cmhansrd/vo970129/debtext/70129-26.htm#70129-26_spnew16).

<sup>48</sup> Personal correspondence with Micheal Gapes MP.

<sup>49</sup> Public Order Act 1986 section 18.

<sup>50</sup> NEW LAW JOURNAL 147 NLJ 466 28 March 1997 Outlawing Holocaust denial  
Geoffrey Bindman.

<sup>51</sup> *Ibid.*

any criminal prosecution for Holocaust denial in the United Kingdom, either under the Public Order Act 1986, or indeed more recently under the Racial and Religious Hatred Act 2006, section 29b which states that 'a person who uses threatening words or behaviour, or displays any written material which is threatening, is guilty of an offence if he intends thereby to stir up religious hatred.'<sup>52</sup> Note that a person is liable to prosecution if he stirs up hatred as defined by the act in a public or private place (29B section 2). It would further be possible to prosecute Holocaust denial in the UK under Section 31 of the Crime and Disorder Act 1998, for causing racially aggravated intentional harassment, alarm or distress to the victim. Certainly there is no constitutional impediment as there is in the United States for enacting laws banning Holocaust denial. Furthermore, there seem to be no legislative impediment for prosecuting Holocaust deniers under existing laws.

One is therefore prompted to ask why there has not been even a single successful conviction for Holocaust denial in the UK. One theory is that in order for racial and religious hatred to be spread, 'the more level-headed the recipients of racially inflammatory material, the more difficult it is to show that racial hatred is likely to be stirred up'.<sup>53</sup> And as Deborah Butler pointed out in her paper Holocaust Denial in the UK, people receiving Holocaust denial material will tend to feel more sympathy rather than hatred towards Jews, thus rendering hard the accusation of stirring up racial hatred.<sup>54</sup> So even though there is a great reluctance in the UK to prosecute Holocaust denial for fear of restricting freedom of speech, the courts have not been reluctant to condemn Holocaust deniers in anything other than the strongest possible terms – albeit via the outcome of a civil trial.

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<sup>52</sup> <http://www.statutelaw.gov.uk/content.aspx?activeTextDocId=2320532>.

<sup>53</sup> White Paper (1985) Review of Public Order Law (London: HMSO) Cmnd 9510.

<sup>54</sup> Deborah Butler, Holocaust Denial in England 4 Web JCLI (1997).



## **(C) CASE STUDY: IRVING V PENGUIN BOOKS & LIPSTADT**

### **l) Introduction to the case – the defamation of a Holocaust ‘denier’?**

The United Kingdom set the scene for the greatest ever trial concerning Holocaust denial, being the focus of massive media attention all around the world. It is important to examine, for it will expose the thin facade upon which Holocaust denial is based exposing the ulterior motives of the deniers; relevant when considering whether laws banning Holocaust denial are legally justifiable. The stage was the Royal Courts of Justice, the case getting underway on January 11th 2000. Deborah Lipstadt, Professor of Modern Jewish and Holocaust studies at Emory University, in her book *Denying the Holocaust*, claimed that historical writer David Irving was a ‘Holocaust Denier’<sup>55</sup>. As Gray J, judge of the case, put it in his summing up:

Irving complains that certain passages in the Defendants’ book accuse him of being a Nazi apologist and an admirer of Hitler, who has resorted to the distortion of facts and to the manipulation of documents in support of his contention that the Holocaust did not take place. He contends that the Defendants’ book is part of a concerted attempt to ruin his reputation as an historian and he seeks damages accordingly.<sup>56</sup>

Irving was thus suing Deborah Lipstadt for writing such apparently libellous comments, alongside Penguin Books which published the book in the United Kingdom. The English law of libel states that the burden of proof is on the person who wrote the libellous comments. Whilst not contesting the above summary of the claims against Irving, the defendants would use the defence of justification. In other

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<sup>55</sup> Deborah E Lipstadt, *Denying the Holocaust - the growing assault on truth and memory*, (The Free Press, 1993) 111.

<sup>56</sup> The Judgement of *Irving v Lipstadt*, EWHC QB 115 (11th April, 2000), paragraph 1.1.

words they would set out to prove that everything stated in Lipstadt's book which was being contested was true. Would truth will win out in free debate and not need legal protection, as David Pannick QC had previously argued?

In a standard libel trial the verdict is normally pronounced by a jury. However, due to the complexity of the issues in hand, it was decided by both parties that the trial would be held without a jury. This in turn shifted the bulk of evidence from oral to written. Indeed, the defendants, in proving that what David Irving said was false, would have to prove that the Holocaust did actually take place. And they would have to prove this not in a historical way, but in a legal way – using the rules of evidence, by proving the ‘substantial truth’ described as the ‘sting’.<sup>57</sup> Lipstadt, in the first chapter of her book *Denying the Holocaust*,<sup>58</sup> wrote that she would always refuse to appear on radio and TV shows to debate a Holocaust denier, because there is no ‘other side’ to the Holocaust. In a sad but mildly amusing example of such a debate, she writes of the popular TV show hosted by Montel Williams who told viewers to ‘stay tuned and come back after the break’ so they could hear whether the Holocaust was indeed “a myth or the truth”.<sup>59</sup>

But in this case, as Lipstadt knew only too well, there was simply no way out. If she did not respond, the judge would be obliged to find for the claimant. As she explained to the author: ‘David Irving came after me - and I just hit him back harder’.<sup>60</sup> But whilst appearing everyday of the trial, Lipstadt remained true to her promise – during the entire trial, she did not utter a single word in court – nor was

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<sup>57</sup> History on trial - My day in court with a Holocaust denier, Deborah E Lipstadt, (Harper Perennial, 2005).

<sup>58</sup> Deborah E Lipstadt, *Denying the Holocaust - the growing assault on truth and memory*, (The Free Press, 1993).

<sup>59</sup> *Ibid*, preface.

<sup>60</sup> Personal interview with Professor Deborah Lipstadt.

there any obligation on her so to do. In any event this was as a consequence of her legal team's tactical and strategic thinking:

I did want to speak at the trial, I can hold my own. David Irving doesn't frighten me. But the outcome of the trial was, in basketball lingo, a slam dunk. I couldn't have asked for anything better. After the trial, even the judge said it made great sense for the lawyers not to call me.<sup>61</sup>

Even though Lipstadt claimed that the defence's objective was not to prove the Holocaust happened because no court needs to prove that, the defendants, in seeking to prove the truth of the words of the allegedly libellous statements, would nevertheless find themselves forced to respond to allegations that there were no gas chambers by using photographic evidence of Allied reconnaissance photos taken of the Auschwitz crematoria<sup>62</sup>, even going as far as to provide a reconstructed tour of the crematoria using a slide projector.<sup>63</sup>

The fate of Holocaust denial and more substantially the legal memory of the Holocaust in the United Kingdom was thus hanging on the shoulders of the defendants in this case – all of this being played out within the framework of the English legal system: judge, lawyers, expert witnesses and a court audience overflowing with reporters. A media presence which David Irving would later claim to the author was to have a negative influence on the trial, for 'both the Court and the defence were pandering however to an increasingly hostile press. Hostile to me, that is, because editors and advertising managers know on which side their bread is buttered.'<sup>64</sup>

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<sup>61</sup> *Ibid.*

<sup>62</sup> DD Guttenplan, *The Holocaust on Trial, History, justice and the David Irving libel case*, (Granta Books, 2002) 178.

<sup>63</sup> *Ibid* p 180.

<sup>64</sup> Personal correspondence with David Irving.

Mr Justice Gray remained impeccably independent and neutral in the trial, in the eyes of many perhaps too much so, having to remain impartial upon the existence of the gas chambers in Auschwitz throughout the whole court drama. It was extremely hard to tell, right up until the last day of the hearing, what his final decision was to be. Indeed, on the last day of the trial, this exchange with the Defence QC Richard Rampton made many speculate as to which way his decision was likely to go:

Richard Rampton QC: - What more would [an anti-Semitic historian] want to do than to deny the Holocaust?

Mr. Justice Gray: - Yes, but he might believe what he is saying. That is the point. That is why it is important.<sup>65</sup>

This exchange seemed to demonstrate that the judge somehow understood Irving's motives and his potential to be 'entirely sincere'<sup>66</sup> – whatever the case it certainly reinforced the judge's absolute impartiality throughout the trial.

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<sup>65</sup> Holocaust Denial on Trial, Trial Transcripts, Day 32: Electronic Edition p 46-50 (<http://www.hdot.org>).

<sup>66</sup> DD Guttenplan, The Holocaust on Trial, History, justice and the David Irving libel case, (Granta Books, 2002) 262.

## **II) Arguments of the parties – anti-Semitism, manipulation of history and retractions**

‘Mr. Irving calls himself an historian. The truth is, however, that he is not an historian at all, but a falsifier of history. To put it bluntly, he is a liar.’<sup>67</sup> That was the dramatic phrase with which Richard Rampton QC decided to open the trial. The strategy of the defence was two-fold. The first point they set out to prove was that David Irving deliberately manipulated historical data and falsified the record in order to fit in with his own preconceived conclusions, all geared towards exculpating Hitler and his regime and denying the Holocaust. The second part was to prove that Irving’s denial had another agenda which was the promotion of anti-Semitism,<sup>68</sup> summed up by Justice Gray as ‘... being deliberately perverse blindness and acting in pursuance of what is, effectively, a neo-Nazi agenda...’<sup>69</sup>

David Irving went out of his way to explain in correspondence to the author, concerning the first of the two arguments put forward by the defence; that he had:

... argued in my opening submissions to Gray J that the court should concern itself not with what happened or did not happen 60 years ago, but with what happened within the four walls of my study when I was writing my books: did I have documents before me which I wilfully ignored or deliberately misconstrued when writing my various books?<sup>70</sup>

The defence proved on a number of occasions that Irving constantly changed his mind, speculated, and in some cases actually invented dialogue by top Nazi officials.

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<sup>67</sup> Holocaust Denial on Trial, Trial Transcripts, Day 1: Electronic Edition, p 89.

<sup>68</sup> *Ibid* day 32, p49.

<sup>69</sup> *Ibid* day 32, p 46.

<sup>70</sup> Personal correspondence with David Irving.

One example of mistranslation was when Irving misread a phone log from Himmler. It was clear that this had been a 'grotesque misreading'<sup>71</sup> of the word *haben* as *Juden*<sup>72</sup> ... thus 'misreading' 'administrative leaders of the SS have to stay' for 'the Jews have to stay'. Irving thus claimed that Himmler had ordered the Jews to stay where they were, preventing their deportation. This was one of the many errors which all pointed towards the same direction, that of white-washing the Nazi regime. Another example of a typical error was when 'he [Irving] had to drop the claim that Hitler had called Himmler into his bunker ... and 'required' him to stop the Jews being killed.'<sup>73</sup> In many instances during the trial, Irving made concessions on some of his positions, but later withdrew many of them. This would provide a crucial basis for the judgement. On Irving's concessions, in his final judgement, Justice Gray stated that he considered that 'there is force in the Defendants' contention that Irving's retraction of some of his concessions, made when he was confronted with the evidence relied on by the Defendants, manifests a determination to adhere to his preferred version of history, even if the evidence does not support it'.<sup>74</sup>

Below is an uneasy extract from the court transcript between the expert witness for the defence, Professor Evans, and David Irving clearly showing the claimant's speculation; in this case leading to the minimisation of the number of dead bodies which could be fitted into a pit.

Mr. Irving: "So if it was two meters deep and if it had straight sides and if there was no back fill..."

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<sup>71</sup> Richard J Evans, *Telling lies about Hitler - The Holocaust, History and the David Irving Trial*, (Verso, 2002) 216.

<sup>72</sup> The German word 'have' for the word 'Jew'.

<sup>73</sup> Richard J Evans, *Telling lies about Hitler - The Holocaust, History and the David Irving Trial*, (Verso, 2002) 215.

<sup>74</sup> *The Judgement of Irving v Lipstadt*, EWHC QB 115 (11th April, 2000), paragraph 13.

Prof Evans: That is three 'ifs', Mr Irving

Mr Irving: Would you stop interrupting - you would get 1,500 bodies into that pit, is that right?

Prof Evans: Yes

Mr. Irving: So if it was another meter deep, you would get another 750 in, so you can do an order of magnitude calculation, can you?

Prof Evans: On the basis of those four 'ifs', yes, you can do any calculation you like. (...)

Mr. Irving: Do you accept that when you are writing history and you cannot get all these documents on hand, occasionally you have to make common sense calculations and deductions?

Prof Evans: This is not common sense, Mr. Irving. This is a systematic attempt to undermine the figure given of 27,800 Jews suggesting that this is too large. This is typical of your minimisation of the statistics of the numbers of Jews killed in any number of instances.<sup>75</sup>

The defendants in the case found nineteen similar instances in which Irving had 'in one way or another distorted the evidence'.<sup>76</sup> Furthermore, it has been made clear in court that in most instances that Irving indeed had documents before him which he wilfully ignored or deliberately misconstrued when writing those books. So what was being examined was not solely, as Irving claims, what happened sixty years ago, but in fact exactly as he states: what he wrote within the four walls of his study whilst writing his books.

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<sup>75</sup> Holocaust Denial on Trial, Trial Transcripts, Day 22, p.40.

<sup>76</sup> Richard J Evans, Telling lies about Hitler - The Holocaust, History and the David Irving Trial, (Verso, 2002) 234.

Concerning the claim of the motivation of racism and anti-Semitism behind his Holocaust denial, Irving stated in correspondence that although : ‘in her book Lipstadt had never imputed either anti-Semitism or racism to me, and the two issues had consequently not been pleaded, large parts of the defence turned on these allegations: grossly prejudicial and totally irrelevant... It is my fault that I did not ask the Court to do so, through inexperience.’<sup>77</sup>

The issue of anti-Semitism was undeniably linked to Holocaust denial in this case, even though it may have not taken top priority in terms of the final outcome. What the defence did manage to prove, though, were the links he had with the notorious Holocaust denying organisation in the USA, the IHR, and his racism, which ranged from a ditty about Baby Aryans for his daughter<sup>78</sup> to a racist comment about Sir Trevor McDonald (‘one of them... reading the news to us’).<sup>79</sup> But for the purpose of the trial, the most blatant links connecting his anti-Semitism with his Holocaust denial was when, in court, the defence showed videos of Irving attending rallies by the side of notorious anti-Semite and Holocaust denier Ernst Zundel, telling a joke about a ‘one man gas chamber’.<sup>80</sup> At the risk of giving the verdict of guilty by association, other videos were shown, one of which was a speech given by Irving and met with chants of *Sieg Heil*, and one appearing at a conference in Munich under the slogan ‘*Wahrheit*<sup>81</sup> *macht frei*’.<sup>82</sup> These undeniable links between radical anti-Semitic, far right and Holocaust denying groups were shown to the court, further undermining his self-styled status as a legitimate revisionist historian. So even though no allegations of anti-Semitism had been pleaded, these were considered to be necessary to show

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<sup>77</sup> Personal correspondence with David Irving.

<sup>78</sup> Deborah E Lipstadt, *History on trial - My day in court with a Holocaust denier* (Harper Perennial) 175.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid* p 237.

<sup>81</sup> German for ‘truth’ in mockery of the notorious slogan at the gates of Auschwitz ‘Arbeit macht Frei’.

<sup>82</sup> Deborah E Lipstadt, *History on trial - My day in court with a Holocaust denier* (Harper Perennial) 237.

that it was one of the motivating factors behind Irving's deliberate distortion and manipulation of evidence. And all with the same objective: that of the exculpation of Hitler and his Nazi regime. The true face of Holocaust denial had been unmasked.

### **III) Outcome of the case – the defence of justification, civil liability in London, incarceration in Vienna**

When judgement finally came, it was damning indeed. It was a 350-page document, meticulously incorporating virtually every single detail of the trial, summarising the defendants' and the claimant's opinions, and giving his own judgement with the most lucid of reasoning. In his conclusion, Gray J stated that 'it appears to me incontrovertible that Irving qualifies as a Holocaust denier'. Concerning the manipulations of the historical evidence, he stated that all of Irving's historiographical 'errors' converged in that they all tilted in the same direction: that of the exoneration of Hitler, reflecting Irving's undeniable partisanship towards him. 'If indeed they were genuine errors or mistakes, one would not expect to find this consistency.'<sup>83</sup>

But Justice Gray saved the most damning sentence of the whole trial for the last paragraph of his judgement. Distancing himself from the reserve and restraint he had consistently demonstrated through the whole trial, he was left with no doubt that Irving '...is an active Holocaust denier ... anti-Semitic and racist and associates with right wing extremists who promote Nazism'.<sup>84</sup>

Within the confines of the English legal system, known for its restraint and impartiality, one rarely hears such a damning judgement from a judge, especially in civil matters.

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<sup>83</sup> The Judgement of Irving v Lipstadt, EWHC QB 115 (11th April, 2000), 13.142.

<sup>84</sup> *Ibid* 13.167.

The judge thus concluded that the defence of justification had succeeded and held for the defendants accordingly. The Times reported 'History had its day in Court and scored a crushing victory'.<sup>85</sup> Because there were no laws in the United Kingdom banning Holocaust denial, the Holocaust had to be scrutinised by an English judge. Even Lipstadt admitted to the author that 'if the UK had laws outlawing Holocaust denial, I still would have won, but I wouldn't have had to have gone to such lengths to prove that Irving is a denier.'<sup>86</sup>

This was not to be the end of Irving's brush with the law, however. In 2005, he found himself pleading guilty in an Austrian court to the charge of Holocaust denial, on the basis of a speech and an interview made in 1989, and was duly convicted to three years in prison.<sup>87</sup> This was based on the Austrian *Verbotsgesetz* law as amended in 1992,<sup>88</sup> which applies to 'whoever denies, grossly plays down, approves or tries to excuse the National Socialist genocide or other National Socialist crimes against humanity in a print publication, in broadcast or other media'.<sup>89</sup> Irving's take on this during correspondence is somewhat bizarre:

[In countries with Anglo-Saxon law] we are innocent until proven guilty; in Europe, the reverse is true. It reached its absurd peak when I found myself ambushed on November 11, 2005 and indicted because of opinions I had expressed 16 years earlier to a small audience in a Vienna restaurant, perhaps 40 souls<sup>90</sup> (...). But I shall not allow this sad episode in Austrian history to rule the way I write history.<sup>91</sup>

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<sup>85</sup> The Times, April 14th 2000, page 23.

<sup>86</sup> Personal interview with Professor Deborah Lipstadt.

<sup>87</sup> By the Assiated Press, Austria Imposes 3-Year Sentence on Notorious Holocaust Denier, (The New York Times) February 21<sup>st</sup> 2006. <http://www.nytimes.com/2006/02/21/international/europe/21austria.html>

<sup>88</sup> Article 1 (3)g.

<sup>89</sup> § 3h.

Translation of *Verbotsgesetz*.

<sup>90</sup> Irving added: The 2005 ambush and imprisonment cost me around half a million pounds in lost contracts, a year's lost income, a lost home and possessions (...) it very nearly destroyed my family too.

<sup>91</sup> Personal correspondence with David Irving.

Irving was fully aware that there are laws banning Holocaust denial in Austria, and that there was an arrest warrant waiting for him upon arrival in Austria – so it would surely be hard to characterise his arrest as an ‘ambush’. Since his early release in 2007, Irving has continued on his litigious path, threatening to sue the Jewish Chronicle for calling him an ‘active Holocaust denier’.<sup>92</sup>

Despite all, Professor Lipstadt toes the American line and is against laws banning Holocaust denial. In doing so she shares common ground with many senior professors, lawyers and historians.<sup>93</sup> As she put it to the author in an interview: ‘to tell you the truth I didn’t agree with what happened to him, but I certainly felt no compunction to rush to his defence!’<sup>94</sup>

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<sup>92</sup> The Jewish Chronicle, 19<sup>th</sup> October 2007, “Call me a denier and I’ll sue the JC”.

<sup>93</sup> Appel de 56 juristes à l’abrogation des « lois mémorielles » of the 21 November 2006. [http://www.lidh-toulon.net/spip.php?article1683-gayssot\\_9913.html](http://www.lidh-toulon.net/spip.php?article1683-gayssot_9913.html)

<sup>94</sup> Personal interview with Professor Deborah Lipstadt.

## **(D) HOLOCAUST DENIAL LEGISLATION: A JUSTIFIABLE INFRINGEMENT OF FREEDOM OF EXPRESSION?**

### **I) Introduction – different attitudes based upon different experiences**

Having seen various approaches taken by different countries in respect of Holocaust denial, it is possible to establish two well-defined camps: those who have laws banning denial, and those which do not. They in turn are neatly divided between common law countries and civil law countries.

In those countries with legislation against Holocaust denial, for example, the French *Gayssot* law banning the contesting of crimes against humanity<sup>95</sup> is a completely different approach to the Spanish ban on justifying genocide, whilst permitting its denial. Sanctions vary enormously too. In Austria, for example, the maximum sentence for denying the Holocaust is up to twenty years imprisonment. Whilst in Belgium the punishment for Holocaust denial is anything from eight days to one year,<sup>96</sup> in Germany its up to five years,<sup>97</sup> the same as the punishment meted out by the state under the *Loi Gayssot* in France. In other words the legislation and indeed its accompanying sanctions are hugely inconsistent.

In the two common law countries examined for not having laws banning Holocaust denial (USA and UK), the different approaches are equally striking. The English attitude seems to be that no specific laws against Holocaust denial should be

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<sup>95</sup> (as defined by the Nuremberg trial).

<sup>96</sup> (Of March 23rd 1995) Article I - 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. (<http://www.juridat.be>)

<sup>97</sup> § 130 Volksverhetzung.

enacted, rather for such matters to be dealt with within the framework provided for in the criminal legal system under existing Race Relations laws. The American approach, as expressed (though not agreed with) by Martin Imbleau, a leading authority on Holocaust denial laws, seems to be that 'there cannot be wrong ideas and it should certainly not be up the State to establish what is permitted and what one is forbidden from saying'.<sup>98</sup>

One reason for the difference in approach between the common and civil law countries could be the impact on collective memory. As Dr. Caroline Fournet puts it: 'the duty of remembrance truly represents an unavoidable social imperative – society as a whole has to remember'.<sup>99</sup> The countries which have laws banning Holocaust denial are, for the most part, countries which had been victims of Nazi atrocities. Laws banning Holocaust denial may be an additional mechanism towards coming to terms with the Holocaust whilst ensuring the social imperative to remember the atrocities of the past in order to learn from them both for the present and for the future. This would clearly provide an explanation of the fact that Germany was the first country to enact such laws,<sup>100</sup> and during its EU presidency strongly pushed for a EU wide law banning Holocaust denial.<sup>101</sup> The law was duly 'watered down' though, with those EU member states which did not have specific laws banning Holocaust denial eager not to enforce the law 'if such a prohibition did not exist in their own laws'.<sup>102</sup>

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<sup>98</sup> Martin Imbleau, *La négation du Génocide Nazi, Liberté d'expression ou crime raciste? Le négationnisme de la Shoah en droit international et comparé*, (L'Harmattan) 239.

<sup>99</sup> Caroline Fournet, *The Crime of Destruction and the Law of Genocide: Their Impact on Collective Memory* (Ashgate Pub Co, 2007) 30.

<sup>100</sup> Germany first enacted the § 130 Volksverhetzung in 1985.

<sup>101</sup> Dan Bliefsky, *Berlin seeks to bar Holocaust denial in EU*, International Herald Tribune, January 12, 2007.

<sup>102</sup> Dan Bliefsky *EU adopts measure outlawing Holocaust denial*, International Herald Tribune, April 19<sup>th</sup> 2007.

This special responsibility seems to be uniformly felt by the majority of the European countries in which the Holocaust took place, and which saw the loss of two thirds<sup>103</sup> of its Jewish population. This would also seem to be a key factor as to why the United Kingdom doesn't have a law banning Holocaust denial – no Jews were deported from mainland Britain during the Second World War.<sup>104</sup> The imprint on collective memory is clearly less significant than in other European countries.

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<sup>103</sup> Source: United States Holocaust Memorial Museum.  
<http://www.ushmm.org/wlc/article.php?lang=en&ModuleId=10005151>

<sup>104</sup> The use of the term 'mainland' Britain is used because Jews in the Channel Islands were deported – see Frederick Cohen, *The Jews in the Channel Islands during the German Occupation 1940 – 1945*, (Jersey Heritage trust, 2000).

## II) Arguments against Holocaust denial legislation – don't deny the deniers' freedom of expression

The principle argument of those opposed to Holocaust denial legislation is entirely bound up with freedom of expression. It is one of the most fundamental freedoms of all in any truly democratic society, famously encapsulated in that well-known phrase attributed to Voltaire: 'I disapprove of what you say, but I will defend to the death your right to say it'.<sup>105</sup> In restricting freedom of speech to deny the Holocaust, it is argued, one is playing right into the hands of the deniers. The reasoning for this is the danger of unwittingly turning the Holocaust denier into martyr. Professor Evans, expert witness at the *Irving v Lipstadt* trial, explained to the author that the publicity from Irving's imprisonment in Vienna in 2005 made him 'something of a martyr'<sup>106</sup> for freedom of speech, something Irving 'had no interest in at all'.<sup>107</sup> This is what can be referred to as the *popular-hated figure* dilemma. It will boost the denier's popularity, generating an interest in his words whilst exposing people to his deliberate falsehoods and lies. In the *Irving v Lipstadt* case, the reverse was true. As unpopular a figure as David Irving was, he was the person accusing Lipstadt of libel. So there was no outpouring of public sympathy in Britain during or after the trial in his favour. In fact if anything precisely the opposite was true; one only had to read the next morning headlines for proof.<sup>108</sup> It is surely a paradox that David Irving, whilst calling for his freedom of speech to deny the Holocaust, went out of his way to suppress the freedom of speech of Deborah Lipstadt. However, many sectors of the

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<sup>105</sup> This phrase is attributed to Voltaire, but only appeared in *The Friends of Voltaire* (1906), written by Evelyn Beatrice Hall.

<sup>106</sup> Personal correspondence with Professor Richard Evans.

<sup>107</sup> *ibid.*

<sup>108</sup> The Guardian: "Irving: Confined to History as a Racist Liar".

The Independent: "Racist. Antisemite. Holocaust Denier. How History Will Judge David Irving".

public and press were very sympathetic to him upon his incarceration in Austria<sup>109</sup>. As Lipstadt herself put it during the interview 'when Irving was imprisoned in Austria, people who vehemently opposed him immediately sprang to his defence – some of them even asking me to do likewise'.<sup>110</sup> Furthermore, critics argue that by having such laws demonstrates a lack of confidence in historical truth. Making deniers important enough to warrant legislation, the argument goes, attributes to them a status they should not be entitled to. After all, as playwright George Bernard Shaw once put it: 'martyrdom is the only way in which a man can become famous without ability'.<sup>111</sup>

Harvard Law Professor Alan Derschowitz is another academic 'categorically opposed to any court, any school board, any governmental agent taking judicial notice about any historical event'.<sup>112</sup> The reason for this is that he 'doesn't want any government to tell me that it occurred because I don't want any government ever to tell me that it didn't occur'.<sup>113</sup> The state denial of the Armenian Genocide by Turkey is one example of a government telling a people that genocide did not take place. It was only recently that US president George W. Bush urged Congress not to recognise the Armenian genocide.<sup>114</sup> Israel, which will understandably refuse to enter into diplomatic relations with any state which denies the Holocaust, has still not formally recognised the Armenian Genocide, for fear of worsening relations with its regional ally Turkey. The politicisation of the recognition (or non-recognition) of a genocide is thus a potentially serious consequence of legislation of this nature.

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<sup>109</sup> The Guardian, <http://www.guardian.co.uk/news/2005/nov/28/topstories3.austria>.

<sup>110</sup> Personal interview with Professor Deborah Lipstadt.

<sup>111</sup> Quote from George Bernard Shaw (1856-1950): *The Devil's Disciple* (1901), found in the *Oxford Dictionary of Phrase, Saying and Quotation*, edited by Elizabeth Knowles, Oxford University Press, 1997, p163.

<sup>112</sup> *Freedom of Speech and Holocaust Denial*, 8 *CARDOZO L. REV.* (1987) 566.

<sup>113</sup> *Freedom of Speech and Holocaust Denial*, 8 *CARDOZO L. REV.* 559 (1987).

<sup>114</sup> The Associated Press, Bush administration urges U.S. Congress to reject Armenia genocide resolution, October 9<sup>th</sup> 2007.

Another, more specific, legal argument against laws banning Holocaust denial was put to the author by Benoit Frydman, professor of Law at the *Université Libre de Bruxelles* and the moderator of the debate concerning the penal response to denial at the International Conference “Genocide and Denial” in Brussels.<sup>115</sup> He believes that criminal law should only be used to ban Holocaust denial if there is an effective remedy (a pragmatic approach) and after the evaluation of the advantages of such legislation, but also the cost of such measures (a utilitarian approach).<sup>116</sup> The reasons for his scepticism can be summarised as follows:

- 1) If we ban Holocaust denial, there is no reason not to do so in respect of other 20<sup>th</sup> Century genocides and other crimes against humanity.
- 2) The criteria of forbidden acts are blurred, uncertain and very broad: ‘to deny or minimise’ genocide are very vague terms, in respect of which not just lawyers would struggle to make sense.

The result of such legislation risks paralysing debate including by good faith historians on controversial questions. Such a law could create the impression of an “official history” that is contrary to our conception of freedom to expression.<sup>117</sup>

The counter-argument is equally effective: that it is not the legislator who is paralysing the debate, but the denier. Laws were not enacted to suppress the legitimate right to debate and research history – precisely the opposite. The denier is paralysing fair historical debate by spreading lies intended to disrupt fair debate for their own personal motives. There is not one known case in which a serious

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<sup>115</sup> Genocide and Denial International Conference, 21, 22 and 23 November 2007, ULB, Brussels.

<sup>116</sup> Personal correspondence with Professor Benoît Frydman.

<sup>117</sup> *Ibid.*

historical researcher has found the *Gayssot* law an obstacle to research.<sup>118</sup> *Bona fide* historians, according to French philosopher Bernard-Henri Lévy, know perfectly well that the law seeks to protect and shelter them, not punish them.<sup>119</sup> However, what the law does indeed set out to sanction is people stating that ‘the real was non-existent’.<sup>120</sup>

But by far the most common argument against having laws banning Holocaust denial was neatly summed up by *The Economist*: ‘Historians who distort, inflate and invent [should] find their credibility shredded by their peers, not the police’.<sup>121</sup> People should, and do counter distorted lies with historical arguments and ultimately the truth. The truth will not stop neo-Nazis shouting slogans such as ‘the Holocaust was a myth’ outside Holocaust memorial events. The truth will not stop Turkey from pursuing its policy of State denial of the Armenian genocide. The truth has not stopped Holocaust denial, for as clearly demonstrated in the *Irving v Lipstadt* trial, deniers do not care much for history. The deniers’ version of history is tactical and manipulated, being another step forward in their anti-Semitic progression. There are thus strong arguments for laws banning Holocaust denial, as both International and European courts have found.

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<sup>118</sup> Devoir de mémoire ; un droit moral à protéger, Bernard-Henri Lévy, Discours au Conseil de Coordination des Organisations Arménienne de France, 17 Janvier 2007.

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*

<sup>121</sup> Denying the Holocaust, *The Economist* print edition, Feb 23rd 2006.

### **III) Arguments in favour of Holocaust denial legislation – can words *never* hurt?**

#### ***i – An international perspective***

There are many persuasive arguments against banning Holocaust denial, most of them revolving around the theme of freedom of expression. However, as the ECHR, the UN's Human Rights Committee (UNHRC) and indeed many national courts throughout Europe have noted: freedom of expression is not absolute, nor has it ever been. In fact one of the most little known but highly significant judgements justifying laws banning Holocaust denial emerged during an appeal made by Faurisson against France to the UNHRC.<sup>122</sup>

Article 19 of the Universal Declaration of Human Rights guarantees the right to freedom of expression. Article 19 of the International Covenant on Civil and Political Rights does likewise, whilst at the same time outlining the limitations on freedom of speech, in paragraph 3.<sup>123</sup>

(a) For respect of the rights or reputations of others

(b) For the protection of national security or of public order or of public health or morals.

The question in this case was whether the French Republic was legally justified under Article 19 paragraph 3 of the covenant to restrict the freedom of speech of Faurisson under the *Gayssot* Law. The court concluded that the restriction of the author's freedom of speech under the previous article was indeed permissible, since the

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<sup>122</sup> Faurisson v France CCPR/C/58/D/550/1993, (1996) 2 BHRC 1.

<sup>123</sup> International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976.

statements made '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'.<sup>124</sup>

Here, finally, was a clear recognition that the issue of anti-Semitism is inextricably bound up with Holocaust denial. Another judge, Prafullachandra Bhagwati<sup>125</sup> neatly summed up the need for laws banning Holocaust denial in an individual concurring opinion, stating that the restriction of freedom of speech was clearly justified because the *Gayssot* law was intended to protect the Jewish community against hostility, antagonism and ill will which would be generated from the '...dishonest fabrication of the myth of the gas chambers and the extermination of Jews by asphyxiation in those gas chambers'.<sup>126</sup>

The Canadian Supreme Court, in *R. v. Keegstra*,<sup>127</sup> reminded the obligations countries have under international law concerning justifiable restrictions of freedom of speech in Article 19 of the International Covenant on Civil and Political Rights, but also via Article 4(a) of the International Convention on the Elimination of All Forms of Racial Discrimination, and its obligations imposed on signatory States.<sup>128</sup> Therefore, according to the court:

CERD<sup>129</sup> and ICCPR<sup>130</sup> demonstrate that the prohibition of hate-promoting expression is considered to be not only compatible with a

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<sup>124</sup> *Faurisson v France*, Communication No. 550/1993, views adopted. on November 8<sup>th</sup> 1996, UN Doc. CCPR/C/58/D/550/1993, 16, December 1996.

<sup>125</sup> It is interesting to note that Thomas Buergenthal, one of the judges who participated in the hearing was himself a Holocaust survivor and therefore withdrew himself from participating in the decision.

<sup>126</sup> *Faurisson v France*, Communication No. 550/1993, views adopted. on November 8<sup>th</sup> 1996, UN Doc. CCPR/C/58/D/550/1993, 16, December 1996.

<sup>127</sup> *R. v. Keegstra*, [1990] 3 S.C.R. 697.

<sup>128</sup> 'shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin ...'.

<sup>129</sup> Convention on the Elimination of All Forms of Racial Discrimination.

signatory nation's guarantee of human rights, but is as well an obligatory aspect of this guarantee.<sup>131</sup>

A further case with potentially large consequences is that of *Töben*,<sup>132</sup> concerning Holocaust denial material on the internet. Dr. Töben is an Australian citizen who published Holocaust denial material on the internet using an Australian server. When he entered Germany he was arrested and charged under their strict Holocaust denial laws. The argument raised by the defence was that here was an Australian citizen acting within Australian law, therefore out of the scope of German jurisdiction. The German Federal Court of Justice held that Töben had 'intended to produce material with an intention to disturb the public peace in Germany'.<sup>133</sup> Furthermore, and more contentiously perhaps, the court held that as it could be viewed in Germany, it was 'sufficient to found a successful German prosecution'.<sup>134</sup> The implications of this case are far reaching, meaning that any one who hosts a Holocaust denial website, upon entry to Germany, could be arrested and convicted under Section 130 (3) of the German Federal Criminal Code, and imprisoned for 'not more than five years or a fine'<sup>135</sup>. This is an area of international cyber law to be watched with great interest in the future.

The United Nations General Assembly recently<sup>136</sup> voted on a resolution calling on all UN 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'.<sup>137</sup> Even though it is an

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<sup>130</sup> International Covenant on Civil and Political Rights.

<sup>131</sup> R. v. Keegstra, [1990] 3 S.C.R. 697.

<sup>132</sup> R v Töben BGH, Urt, v, 12.12.2000 – 1 StR 184/00 (LG Mannheim).

<sup>133</sup> Uta Kohl, The Rule of Law, Jurisdiction and the Internet, (International Journal of Law and Information Technology, Vol 12 number 3) 374.

<sup>134</sup> Michael Horn New, Racism and cyber-law Law, (Journal 153 NLJ 23 May 2003) 777.

<sup>135</sup> Criminal Code (Strafgesetzbuch), [Section 130 \(3\)](#) As promulgated on 13 November 1998 (Federal Law Gazette I, p. 945, p. 3322). Translation provided by the [Federal Ministry of Justice](#).

<sup>136</sup> Resolution A/61/L.53, 26<sup>th</sup> January 2007.

<sup>137</sup> Rafael Medoff & Alex Grobman Holocaust Denial : A Global Survey – 2007, The David S. Wyman

encouraging resolution in the global fight against Holocaust denial, in practice it is unlikely to have much effect because of its non-binding nature; and certainly does not call for countries to enact legislation banning the phenomenon.

It has been demonstrated, then, that under International law states are legally justified for to impose restrictions on freedom of speech when it comes to incitement to racial hatred. The courts have also provided compelling arguments demonstrating the link between Holocaust denial and racial hatred. This is a matter in respect of which the ECHR has taken a lead, when confronted with challenges relating to the legality of laws banning Holocaust denial.

## ii - *A European perspective*

The ECHR has recognised that is of the 'utmost importance'<sup>138</sup> that Article 10 guaranteeing the right to freedom of expression should not be used to protect those claiming freedom of speech to protect them from propagating Holocaust denial. The Court encountered no difficulty in deeming this to be equivalent to racial hatred. Many of the ECHR cases involving Holocaust denial have involved applicants attempting to invoke their right to freedom of expression, as guaranteed by Article 10 of the Convention.

The case of *Lehideux and Isorni v France*<sup>139</sup> concerned the defence of Marshal Pétain in a full page advertisement in *Le Monde*, but did not specifically deal with Holocaust denial. The court held that although the applicants were clearly trying to rehabilitate the reputation of Petain,<sup>140</sup> it nevertheless constituted legitimate debate amongst historians.

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.<sup>141</sup>

It was thus held that when it comes to Holocaust denial, reliance upon Article 10 would fall within the scope of Article 17, preventing the Abuse of Rights. The ECHR was indeed making increasing use of Article 17 of the ECHR, in the light of the re-emergence of a strong post-Communist National Socialist empathy, rather similarly,

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<sup>138</sup> Martin Imbleau, *La négation du Génocide Nazi, Liberté d'expression ou crime raciste? Le négationnisme de la Shoah en droit international et comparé*, L'Harmattan, 348.

<sup>139</sup> *Lehideux and Isorni v. France* 55/1997/839/1045, application 24662/94, Publication 1998-VII, no. 92.

<sup>140</sup> France's wartime collaborator and head of the Vichy regime.

<sup>141</sup> *Lehideux and Isorni v. France* 55/1997/839/1045, application 24662/94, Publication 1998-VII, no. 92.

in fact, to the increased usage of the *Gayssot* law in France which corresponded with the rise of the National Front.

In the case of *Witzsch v. Germany*,<sup>142</sup> it was held that the general purpose of Article 17 was to prevent abusive applicants taking advantage of other rights guaranteed in the Convention, if deemed to be contrary to its spirit.

The Court, and previously, the European Commission of Human Rights, have found that the freedom of expression guaranteed under Article 10 of the Convention may not be invoked in conflict with Article 17, in particular in cases concerning Holocaust denial and related issues.<sup>143</sup>

Holocaust denial was therefore tackled head on by the ECHR, providing member states with a clear justification for the legality of these laws, which accordingly do not constitute an infringement of freedom of expression.

Perhaps the most powerful assertion by the ECHR that legislation is the preferred way to combat Holocaust denial came in *Udo Walendy v. Germany*, in which it was stated that: Holocaust denial ‘...constituted an insult to the Jewish people and at the same time a continuation of the former discrimination against the Jewish people’.<sup>144</sup>

The ECHR then went one step further in *Garaudy v France* case.<sup>145</sup> Garaudy was a French author who wrote the book *The Founding Myths of Modern Israel* in which he adopted revisionist theories seeking to rehabilitate the Nazi regime.<sup>146</sup> The court held

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<sup>142</sup> *Witzsch v. Germany*, No. 7485/03, 13 December 2005.

<sup>143</sup> *Ibid.*

<sup>144</sup> *Udo Walendy v. Germany*, No. 21128/92, decision of 11 January 1995, European Commission of Human Rights.

<sup>145</sup> *Garaudy v France*, dec. no. 65831/01.

<sup>146</sup> in *Schimanek v. Austria* (N° 32307/96) Decision 1.2.2000, the court asserted that ‘Moreover, the Commission has already stated earlier that National Socialism is a totalitarian doctrine incompatible with democracy and human rights and that its adherents undoubtedly pursue aims of the kind referred to in Article 17’.

that Holocaust denial was in direct contradiction with the ongoing fight against racism and anti-Semitism, constituting a serious threat to public order.

Such acts are incompatible with democracy and human rights because they infringe the rights of others. Its proponents indisputably have designs that fall into the category of aims prohibited by Article 17 of the Convention.<sup>147</sup>

By framing Holocaust denial as a 'continuation of the former discrimination of the Jewish people' and as 'a serious threat to public order', the ECHR could hardly have set out its position more clearly. Outlawing Holocaust denial, according to the Court, does not constitute an affront to freedom of expression, under Article 10 of the Convention. The ECHR thus clearly recognises that denying the Holocaust constitutes hate speech. Not only does the Court endorse the outlawing of Holocaust denial, but it provides some of the most compelling arguments that denial is synonymous with incitement to racial hatred. Accordingly, the ECHR provides clear legal justification for the infringement on freedom of speech that Holocaust denial laws inevitably entail.

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<sup>147</sup> Garaudy v France, dec. no. 65831/01.

## **CONCLUSION**

It is worth bearing in mind that both proponents and opponents of laws banning Holocaust denial have one thing in common. As Professor Benoît Frydman puts it, both sides agree that Holocaust denial is ‘shocking and repugnant’.<sup>148</sup> Whilst Holocaust deniers are clearly excluded from their ranks, many academics and jurists simply come from different socio-legal perspectives to justify their view on the vexed issue of Holocaust denial legislation versus freedom of speech. It is ultimately a question of balancing the rights of a Holocaust denier spreading his message and the right of communities to live in an atmosphere free from fear, incitement, and anti-Semitism.

In the eyes of many, the common ground between Holocaust denial and anti-Semitism will not seem obvious. As examined, International and European jurisdictions have clearly provided this link. As Lipstadt further explained in an interview with the author, Holocaust denial is in fact a particularly pernicious form of anti-Semitism.

The denier will tell you: ‘what did the Jews get out of the Holocaust? They got Israel and they got money – reparations.’ This fits into the anti-Semitic stereotype of the Jews doing these evil things right the way back the days of Jesus, in order for a minority to politically trick the majority, for “thirty pieces of silver”. So there is this element of financial gain which goes with it too. That’s why it fits right into anti-Semitism.<sup>149</sup>

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<sup>148</sup> Personal correspondence with Professor Benoît Frydman.

<sup>149</sup> Personal interview with Professor Deborah Lipstadt.

The fact is that Holocaust deniers are not historians at all, but manipulators who lie in order to 'destroy[ing] more thoroughly the targeted group and at allowing one particular instance of genocide to continue while opening the doors for other genocides'.<sup>150</sup> In this respect, Holocaust denial could aptly be renamed Holocaust glorification.

A recent report published by the Washington-based David S. Wyman Institute for Holocaust Studies concluded that when there were efforts by European governments to prosecute Holocaust deniers, this 'helped curb the extent of denial activity'.<sup>151</sup> After all, as Michael Gapes argued in Parliament when introducing his Holocaust Denial Bill:

Some people will also say that the Bill is not necessary because we shall create martyrs, but what is the point of legislating against incitement to racial hatred unless we are prepared to enforce it rigorously against those who incite such hatred by peddling material of this kind?<sup>152</sup>

It seems absurd that, as in the *Irving v Lipstadt* case, specialist historians on the gas chambers have to be called upon to prove that they actually existed. This again is playing into the hands of the denier, forcing the Holocaust up as a legitimate subject for debate. In countries where there are laws banning Holocaust denial, a trial such as *Irving v Lipstadt* would not have been possible. The only question the judge would have to ask in order to secure a conviction, or indeed acquit, is whether or not the defendant had committed the offence of denying the Holocaust.

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<sup>150</sup> Caroline Fournet, *The Crime of Destruction and the Law of Genocide: Their Impact on Collective Memory* (Ashgate Pub Co, 2007) 89.

<sup>151</sup> Rafael Medoff & Alex Grobman *Holocaust Denial : A Global Survey – 2007*, The David S. Wyman Institute for Holocaust Studies.

<sup>152</sup> Hansard, Debate for 29<sup>th</sup> January 1997 (pt 26), Michael Gapes. [http://www.publications.parliament.uk/pa/cm199697/cmhansrd/vo970129/debtext/70129-26.htm#70129-26\\_spnew16](http://www.publications.parliament.uk/pa/cm199697/cmhansrd/vo970129/debtext/70129-26.htm#70129-26_spnew16)

It is worth addressing the issue as to whether or not it would be better to promote a law specifically against the denial of genocides in general, or whether legislation should be restricted to Holocaust denial in particular. Critics argue that having a law which exclusively bans only Holocaust denial promotes an air of unfortunate exclusivity to the Holocaust, thus disregarding other genocides, and perhaps entails an element of competition and even resentment between various genocides' victims. It is for this reason among others that many academics would be in favour of a law encompassing the denial of all genocides, providing it fits within the strict legal definition of genocide provided in the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide. The claim of the uniqueness of the Holocaust is clearly a highly polemic and emotional issue. Whilst there are characteristics which demonstrate the singularity of the Holocaust (discriminatory legislation, deportations, gassings), other genocides clearly have their own horrific singularities too. It is for this precise reason that this author believes that individual laws encapsulating the specifics of each genocide would be more effective in the fight against genocide denial. A generic law banning genocide denial would almost certainly be too broad a sweep, rendering it unable to adequately incorporate the singularities and specificities of each genocide and perhaps more significantly the specificities of the *denial* of each genocide.

States have a responsibility for the security and well being of its citizens and banning Holocaust denial should form an integral part of this. Countries such as the UK and the USA have been havens for Holocaust deniers who are not prosecuted for their hate speech. The fact that nobody<sup>153</sup> has been prosecuted for denying the Holocaust

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<sup>153</sup> Notoriously David Irving.

in the UK under race-relations legislation surely speaks volumes. But those in the UK who are quick to cry 'freedom of speech' when opposing laws banning Holocaust denial tend to forget that citizens are already subjected to numerous limitations as to what they can and cannot say. The Terrorism Act 2006 s21 (5a), for example, is designed to silence those who 'glorify terrorism'.<sup>154</sup>

Ultimately, Holocaust denial is surely a form of rehabilitation of the Nazi regime. People will argue that Holocaust deniers are only expressing their opinions; not preparing for a new genocide. But one must not forget that the Holocaust started with anti-Semitic speeches and literature, not least *Mein Kampf*. It cannot be overstated: words are undoubtedly a key part of the pathway which can lead towards genocide. The deniers tarnish the memory of the millions of victims, ultimately turning them into liars. In seeking to white-wash the Nazi regime by denying the Holocaust or grossly minimising it, deniers are laying the foundations for a new genocide.

It is well known that the Nazis deceived the Jews and other victims in concentration camps and extermination camps until the very end. As Bernard-Henri Levy demonstrates, one of the specificities that characterises and distinguishes genocide is that its plan of action already includes provisions towards its denial.<sup>155</sup> The vocabulary used by the Nazis was likewise full of euphemisms such as 'transfers', 'resettlements' and 'the final solution'. Towards the end of the Second World War, as the Nazis faced the prospect of imminent defeat, they set about burning evidence and ordered the destruction of the camps so that no trace would be left as to the scale of

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<sup>154</sup> See the Race Relations Act 1976.

<sup>155</sup> Devoir de mémoire ; un droit moral à protéger, Bernard-Henri Lévy, Discours au Conseil de Coordination des Organisations Arménienne de France, 17 Janvier 2007.

their crimes. Holocaust survivor Primo Levi recalls a Nazi guard in Auschwitz taunting prisoners:

However this war may end, we have won the war against you; none of you will be left to bear witness, but even if someone were to survive, the world will not believe him. There will be perhaps suspicions, discussions, research by historians, but there will be no certainties, because we will destroy the evidence together with you. And even if some proof should remain and some of you survive, people will say the events you describe are too monstrous to be believed ... and will believe us, who will deny everything, and not you. We will be the ones to dictate the history of the Lagers.<sup>156</sup>

This is aptly confirmed by the archive of documents collected in the Warsaw Ghetto in 1940 by historian Emanuel Ringelblum and his team, knowing that death was soon going to be upon them. One such document recounts:

History is usually written by the victor... Should our murderers be victorious, should they write the history of this war, our destruction will be presented as one of the most beautiful pages of world history. Or they may wipe out our memory altogether.<sup>157</sup>

By refuting the existence of these atrocities, the deniers are thus continuing the work of deception that the Nazis started.<sup>158</sup> In the words of Levy, 'the revisionist act is a contemporary of the criminal act'.<sup>159</sup> After all, the perfect crime has to be

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<sup>156</sup> Primo Levi, *The Drowned and the Saved*, translated by Raymond Rosenthal (New York: Summit Books, 1988), 11.

<sup>157</sup> Ben Macintyre, *Buried, razed - but not forgotten*, *The Times*, May 23<sup>rd</sup> 2008 compiled from Samuel D. Kassow, *Who Will Write Our History*, (Indiana University Press, 2007)

<sup>158</sup> In this way, as put by Geoffrey Bindman, '[laws banning Holocaust denial are] justifiable restrictions in the context of the use of such forms of incitement by European fascists' – *When will Europe act against racism?* EHRLR 1996, 2.

<sup>159</sup> *Devoir de mémoire ; un droit moral à protéger*, Bernard-Henri Lévy, *Discours au Conseil de Coordination des Organisations Arménienne de France*, 17 Janvier 2007.

'traceless'.<sup>160</sup> The denial of genocide is thus in many respects the final stage of that process. In effect, denial 'is not a pseudo-historical speech, but an apology of the crime (...) The sentence: "the gas chambers didn't exist" boasts of the crime, defends it...'<sup>161</sup>

Laws alone will never be sufficient in the struggle to counter those with an agenda brimming with hate. Yet they clearly have a key role to play. Lipstadt argues that the biggest threat from Holocaust denial is yet to come, being a 'future danger',<sup>162</sup> arguing that as there will be no more survivors to step up and state their personal stories, it will become 'easier to deny'.<sup>163</sup> All the more reason, then, for the urgency of legislation banning Holocaust denial – to prevent deniers from spreading their manipulative lies. This is not just about respecting the memory of the victims of the Holocaust but, perhaps more importantly, to respect the social imperative of preventing the Holocaust, or any other genocide from ever happening again. Laws banning Holocaust denial, imperfect though they may be, are clearly an infringement to freedom of expression – but a wholly necessary and justifiable infringement at that.

The Czech writer Milan Kundera reminds us why:

You begin to liquidate a people (...) by taking away its memory. You destroy its books, its culture, its history. And then others write other books for it, give another culture to it, invent another history for it. Then the people slowly begin to forget what it is and what it was. The world at large forgets it still faster.<sup>164</sup>

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<sup>160</sup> *Ibid.*

<sup>161</sup> Natasha Michel, *Paroles à la bouche du présent – Le négationnisme : histoire ou politique*, (Marseille Editions Al Dante, 1997) 14.

<sup>162</sup> Holocaust denial's assault on memory: precursor to twenty-first century genocide? Dr. Harold Brackman and Aaron Breitbart, Simon Wiesenthal report, April 2007, 4.

<sup>163</sup> *Ibid.*

<sup>164</sup> Milan Kundera, *The Book of Laughter and Forgetting*, (Harper Perennial Modern Classics, 1999) p218.

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