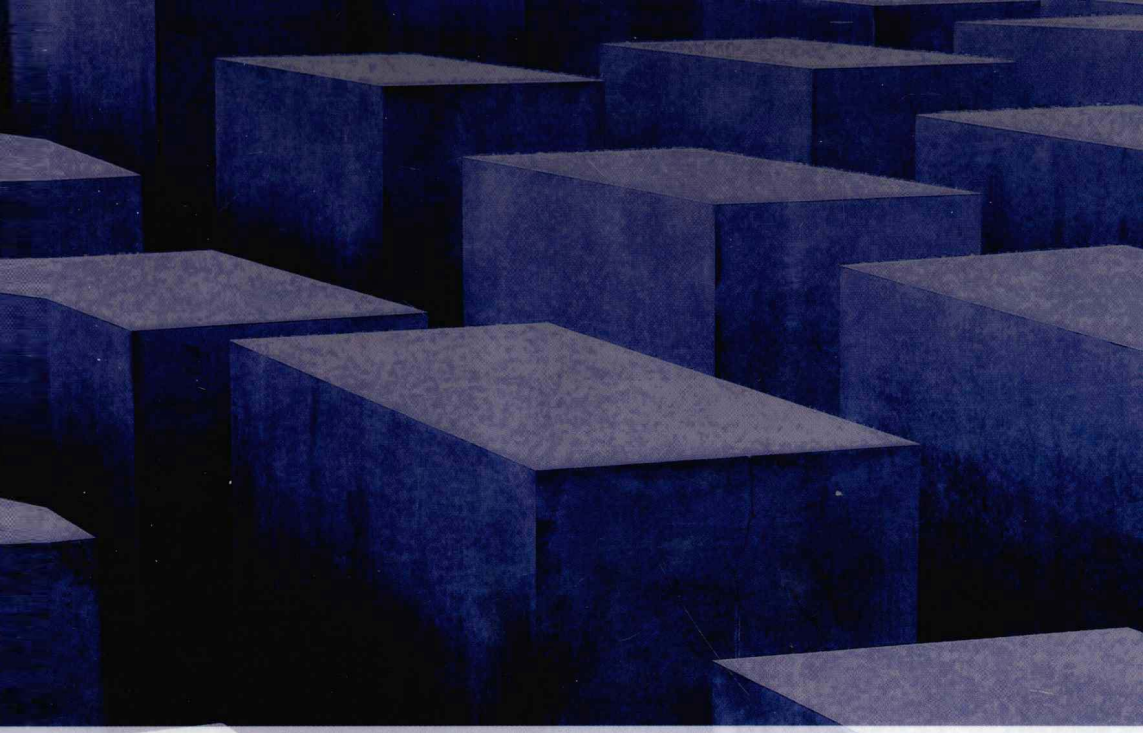

Genocide Denials and the Law

Ludovic Hennebel • Thomas Hochmann

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LUDOVIC HENNEBEL ⁂ THOMAS HOCHMANN

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Preface

"IRVING: CONSIGNED TO HISTORY as a racist liar," read the headline in *The Guardian* on April 12, 2000, after the famous decision by Justice Charles Gray in the libel suit against Deborah Lipstadt was released. I can still recall the excitement that morning, when I first saw it on a newsstand at the Vienna airport. The headline was provocative, almost as if *The Guardian* was inviting Irving to file another claim in court, against it this time, but I don't believe he ever did. The idea that he was "consigned to history" is rich in significance. The suggestion, finally, is that "history" triumphed over falsehood. In this case, at any rate, the marketplace of ideas seems to have worked.

My own views on this complex issue have evolved over the years. They may change in the future, too. Sometimes, I find myself sharing the opinion of the last persuasive person with whom I have spoken, my perspective tilting in one direction or another. I find myself torn between the militant antiracism of punishing denial and a latent libertarianism that bristles at any attempt to muzzle expression. I think that at various times in my life, I have argued for both extremes on these issues. Now, I find myself somewhere in the middle. My preferable compass, international human rights law, seems to have two needles that point in opposite directions.

Nearly two decades ago, when I was teaching in Canada, the *Zundel* and *Keegstra* trials were on the docket of the Supreme Court. At about the same time, *Faurisson* was adjudicated by the United Nations Human Rights Committee. Both the Supreme Court of Canada and the Human Rights Committee seemed divided. There was a visible rupture in *Keegstra*, with four justices opting for what might be called the "European" approach to hate speech, while the minority of three judges preferred the "American" approach. In *Zundel*, the Court shifted ever so slightly the other way. It was a quintessentially Canadian standoff.

At the Human Rights Committee, the disagreement may have been more subtle. Thomas Buergenthal recused himself on the basis of his

own personal involvement in the fact of Auschwitz, where he had been imprisoned as a boy. I never found this explanation for recusal to be very convincing. I would have thought a survivor would be a particularly appropriate person to assess the behavior of Faurisson. I've since wondered whether Judge Buergenthal might also have been of two minds, pulled between his inevitable hatred of anti-Semitism and the strong commitment to free speech that he would have absorbed as one of America's greatest human rights experts. I would love to read the decision that he never wrote. There was also a nuanced individual opinion signed, amongst others, by another Jewish member of the Committee, David Kretzmer. One can imagine the surprise of Faurisson himself, whose perverse world view probably made him fear a Jewish conspiracy. As it turned out, the Jewish members of the Committee were probably among those most uncomfortable with the French anti-denial legislation.

The legacy of the prosecutions of *Zundel, Keegstra,* and *Faurisson* seems shrouded in ambiguity, whereas it is the Irving trial, launched by the famous revisionist himself, which seems to have cleared the air. Since then, one has the impression that the storm of Holocaust denial may have passed or at least subsided. The big exception is Ahmadinejad's famous conference in Tehran. Iran's demagogic president muddles the distinction between anti-Semitism and harsh criticism of Israel. His opponents seize on the point and suggest that anti-Semitism is somehow linked to the important struggle for the rights of the Palestinians. Thus, the memory of one of history's greatest atrocities, the attempted extinction of European Jews, gets reduced to a debating ploy by both Ahmadinejad and his detractors.

But if denial was once a vehicle for anti-Semites, the concept has spread to other historical issues. The other two great genocides of the twentieth century, of the Armenians in the Ottoman Empire in 1915 and of the Rwandan Tutsi in 1994, have their own deniers. The Armenian diaspora has campaigned for legislation and declarations acknowledging the Armenian genocide, in some places with considerable success, in others with failure. Debates about historical events of nearly a century ago feature on parliamentary agendas in Brussels, Washington, and elsewhere. Increasingly, legal regulations seem to frame our view of history. Truth has become a matter for legislators, a strange situation given the reputation of many politicians.

Often, there is confusion between the factual underpinning and its legal qualification. The term "genocide" has become such a loaded label that those who may disagree on its application to specific facts find themselves called

"deniers," even if there is little or no disagreement about the reality of the events themselves. Thus, some who speak of crimes against humanity in Bosnia or Darfur or Cambodia but who resist the term "genocide" may find themselves described as "deniers." And what of disputing whether the Ukrainian famine of the 1930s, whose cause may have been a combination of the natural and artificial, should be branded as genocide? Or the argument as to whether the bombing of Hiroshima and Nagasaki was "genocide" or a lawful act of war?

There is a lot of abuse of language, and it is not just the racists who are responsible. Well-meaning activists for groups of victims sometimes indulge in their own forms of hyperbole. This can poison both historical and legal debate. At what point does legitimate discussion about the appropriate terminology to describe historic atrocities start to merge with vulgar racism? Law doesn't have to provide absolute clarity, but it should aspire to a norm with some degree of predictability, so that sincere academic discussion can be clearly demarcated from hate propaganda.

The European Parliament made a stab at this in its recent Framework Directive. It requires Member States to enact legislation addressed at punishment of "publicly condoning, denying or grossly trivializing crimes of genocide, crimes against humanity and war crimes . . . carried out in a manner likely to incite to violence or hatred" against groups defined by race, color, religion, descent, or national or ethnic origin. Thus, denial is linked to incitement, which becomes the real test. It is presented as a form of incitement, although an inchoate one in the sense that the law can intervene before the result.

The "likely to incite" phrase seems calculated to make this context specific. For example, it would appear unlikely that an Irish historian or legal academic who disputed elements of the great famine who be "likely to incite" violence or hatred, although this remark might well have been less unequivocal a few decades ago, at the height of the "troubles" and if the denial were made in one of the conflict zones of Northern Ireland.

The objective approach by which denial is "likely to incite" seems preferable to the subjectivity of other legislative models, such as the Additional Protocol on the Convention on Cybercrime. The latter makes the test whether denial "is committed with the intent to incite hatred, discrimination or violence." The focus is on the individual intent, rather than on the environment and the probability of consequences. We may make more progress in dealing with racism by focusing on the potential for results. The more obvious the danger of violence and persecution, the more such

encroachments on freedom of expression can find some justification. Where these threats are absent or very remote, it is much harder to allow the law to intervene, even in situations where the intent is an ugly one.

In the final words of their introduction, Ludovic Hennebel and Thomas Hochmann invite the readers to "decide for themselves." There will be some, however, including myself, who are buffeted by conflicting values and who find they are unable to draw a clear line. Maybe that's because there isn't one.

Professor William Schabas OC MRIA
Galway, January 25, 2010

Introduction
Questioning the Criminalization of Denials

-Ludovic Hennebel & Thomas Hochmann

FOR HISTORIANS, DENIAL OF GENOCIDE (or of any other crime against humanity) does not raise any serious issue. Indeed, they can demonstrate easily the absurdity of the deniers' arguments. Furthermore, historians can take denial as a subject of inquiry.[1] They can wonder whether it is preferable to expose the denier for what he is in a debate, or rather to avoid such direct confrontation, given the fact that deniers understand better than anybody else Schopenhauer's *Art of Controversy* and its leitmotiv that the "discovery of objective truth must be separated from the art of winning acceptance for propositions; for objective truth is an entirely different matter."[2] It seems fair to say that one of Schopenhauer's stratagems to win this acceptance seems to have been written for deniers:

> This is chiefly practicable in a dispute between scholars in the presence of the unlearned. If you have no argument *ad rem*, and none either *ad hominem*, you can make one *ad auditores*; that is to say, you can start some invalid objection, which, however, only an expert sees to be invalid. . . . To show that your objection is an idle one, would require a long explanation on the part of your opponent, and a reference to the principles of the branch of knowledge in question, or to the elements of the matter which you are discussing; and people are not disposed to listen to it.[3]

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1. See, for instance, DEBORAH LIPSTADT, DENYING THE HOLOCAUST: THE GROWING ASSAULT ON TRUTH AND MEMORY (New York: Free Press, 1993); FLORENT BRAYARD, COMMENT L'IDÉE VINT À M. RASSINIER, NAISSANCE DU RÉVISIONNISME (Paris: Fayard, 1996); VALÉRIE IGOUNET, HISTOIRE DU NÉGATIONNISME EN FRANCE (Paris: Seuil, 2000).

2. ARTHUR SCHOPENHAUER, THE ART OF CONTROVERSY (London: Swan Sonnenschein & Co., 1990), 7 (Die Kunst, Recht zu behalten, 1831.)

3. *Id.* at 42.

Furthermore, because the deniers' contributions are void to the historical inquiry, most historians have concluded that although demonstrating the deniers' falsehood is a task worth undertaking, it is preferable not to honor the deniers with a debate; or to put it in a widely quoted formula: "there can be no question of any discussion with [the negationists]."[4]

Denial is much more problematic for the legal scholar since denial prohibition currently may be the most controversial issue related to the freedom of expression in Europe, especially since the 2008 adoption of the European Union Framework Decision on combating racism and xenophobia. The present book aims at offering a legal analysis of such a limit on free speech along with some legal-political reflections on its legitimacy.

In this general introduction to the book, some clarification must be made concerning the title. Although it refers to "Genocide Denials," the present volume includes the study of denial of other crimes against humanity. Most of the existing statutes only target the denial of the Holocaust and other crimes against humanity committed by the Nazis and their accomplices. For a long time, only Switzerland and Spain had adopted a broader approach; the former for every crime against humanity and the latter for every genocide.[5] Things may change however, due to the European Union's Framework Decision, which includes the denial of any genocide, crime against humanity, or war crime. One should nevertheless be aware that the Framework Decision contains other stipulations restricting its scope; indeed, it seems only to require the Member States to target "aggravated denial."[6]

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4. Pierre Vidal-Naquet, *Qui sont les assassins de la mémoire?* (1981), *in* PIERRE VIDAL-NAQUET, LES ASSASSINS DE LA MÉMOIRE 206 (Paris: La découverte, 2005)

5. The Spanish statute was found to be unconstitutional by the Tribunal Constitucional in 2007. See in this volume the contributions of Emmanuela Fronza and Laurent Pech.

6. According to Article 1, the denial must be "directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin." (The English and the French versions of the Decision do not allow understanding whether this requirement applies to the expression of denial or to the denied crime, but the German and Italian versions do not leave any doubt.) The denial must also be "likely to incite to violence or hatred against such a group or a member of such a group." Furthermore, Article 1, paragraph 2 allows limiting the punishment of denial to the cases where it is "threatening, abusive or insulting."

"Denial,"[7] indeed, describes many types of expression.[8] Under its purest form, denial is an expression contesting the existence of a crime or a characteristic feature of a crime.[9] Examples include statements such as "the Holocaust did not happen," and "no gas chambers were used to kill anybody under the Third Reich." The German legal scholarship[10] called this kind of denial *einfache Auschwitzleugnung*, which can be translated as "bare denial." But there exists also a kind of expression called *qualifizierte Auschwitzleugnung* or "aggravated denial." In this case, a group of individuals is targeted explicitly. An example is the "usual" claim that "Jews invented the myth of the Holocaust to exploit Germany financially." Furthermore, some expressions are closely related to denial. More often than not, the statutes forbidding the denial of a crime against humanity also target its approval, justification, and minimization.[11]

It seems that these various expressions can be located on a continuum stretching from "hate speech" to "bare denial." Aggravated denial is indeed a kind of hate speech, a hostile expression targeting a group of individuals for some reasons such as origin, nationality, color, or "race." Justification, approval, or qualitative minimization of a crime against humanity, while not necessarily targeting anyone explicitly, can be linked quite easily to the expression of hate and possibly also to the infliction of harm toward victims of crimes alleged to have been legitimate. Bare denial and quantitative minimization—considered literally—do not appear to target anybody; rather, they seem to act only as general statements about a historical event without drawing any conclusions.

Of these kinds of speech, the most striking issue arises with bare denial and quantitative minimization. The well-examined path of "hate speech"

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7. The French word for Denial is *Négationnisme*. In German, Holocaust Denial is referred to as *Auschwitzleugnung*, although a number of authors keep on resorting to the confusing term of *Auschwitzlüge* (Auschwitz Lie).

8. *See* Gérard Cohen-Jonathan, *Négationnisme et droits de l'homme -Droit international et européen (la sentence du Comité des droits de l'homme, Faurisson c. France)*, 32 REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 571 (1997).

9. CAROLE VIVANT, L'HISTORIEN SAISI PAR LE DROIT. CONTRIBUTION À L'ÉTUDE DES DROITS DE L'HISTOIRE 417 (Paris: Dalloz, 2007).

10. See, for instance, the major German study on the topic: THOMAS WANDRES, DIE STRAFBARKEIT DES AUSCHWITZ-LEUGNENS 96–9 (Berlin: Duncker & Humblot, 2000).

11. For an overview of the statutes, please refer in this volume to the contribution of Martin Imbleau.

is certainly relevant to any study of genocide denial,[12] but one must acknowledge that "bare denial" confronts the regulation of freedom of expression with some new questions and casts a new light on some more classical "hate speech regulation" problems. Some of these questions are merely legal, while others pertain more broadly to the political or philosophical reflection about the limitation of expression. This introduction (1) presents the main legal issues raised by the prohibition of denial, (2) offers some deeper analysis of the relationship between freedom of speech and denial in international law, and (3) inquires about the existence of an international obligation to criminalize denial under international human rights law. Last, (4) it confronts the main political and moral arguments *pro* or *contra* the prohibition of denials.

1. Prohibiting Denials: Legal Issues

The first question that arises whenever one studies the constitutionality of a norm forbidding a type of behavior is whether the behavior is covered by the Constitution, i.e., whether it belongs to the domain of protection (*Schutzbereich*) of some of the guarantee of the right. In some legal systems, denial is precluded from any protection at this very first step. The European Court of Human Rights considers Holocaust denial to "run counter to the fundamental values of the Convention, as expressed in its Preamble, namely justice and peace"[13] and thus is excluded from any protection by the Convention, in accordance to Article 17. In Austria, the *Verbotsgesetz* (Prohibition Act), a norm with constitutional rank, forbids any expression favorable to the Nazi ideology, including the denial of crimes committed in its name.[14] One can also wonder whether some treaties are arguing for genocide denial as an internationally uncovered expression.

More tangentially, the German Constitutional Court ruled that as a false statement of fact dealing with a notorious historical event, "bare" Holocaust

12. See the recently published and excellent collection of essays gathered in EXTREME SPEECH AND DEMOCRACY, (Ivan Hare & James Weinstein eds., New York: Oxford University Press, 2009). On the relationship between "bare" denial and hate speech, see the contribution of Robert Kahn in this volume.

13. Garaudy v. France (dec.), no. 65831/01, 2003. See *infra*.

14. See Felix Müller, DAS VERBOTSGESETZIM SPANNUNGSVERHÄLTNIS ZUR MEINUNGSFREIHEIT (Vienna: Verlag Österreich, 2005).

denial, did not belong to the domain of protection of the freedom of expression.[15] One could wonder whether the almost proverbial sentence of the Supreme Court of the United States in *Gertz v. Robert Welch, Inc.*, stating that "there is no constitutional value in false statements of fact,"[16] could be understood as denial as an expression uncovered by the First Amendment. However, one should not forget the subsequent observation that the "First Amendment requires that we protect some falsehood in order to protect speech that matters."[17] The First Amendment does cover false statements of facts: they can be suppressed only in some circumstances, such as defamation, and even then only under certain conditions, such as proving the speaker's "actual malice" or at least negligence.[18]

To say that an expression is covered by the protection of free speech does not lead to any conclusion regarding its effective protection. Indeed, in most legal systems, the norm that guarantees the freedom of expression entails some possibilities to restrict it under certain conditions, such as for the protection of individual rights or collective interests.

There are two main ways to forbid an expression, both of which can apply to denial. First, a lawmaker can target an expression that has some consequences and provokes some harm. These harmful effects may pertain to individuals (for instance, seeing denial as harming victims and survivors of the denied crime and/or their descendants). A lawmaker may also wish to counter a more general and indirect consequence, like the threat to democracy perceived in a whitewashing of National Socialism. The organ applying these kinds of norms will have to establish whether the targeted consequence did occur.

In Germany for instance, Holocaust deniers can be convicted with the offenses of insult or defamation, since the courts consider this expression to be an attack on the "personality," that is, the "self-conception" (*Selbstverständnis*) of Jews living today in the country.[19] In the United States,

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15. BVerfGE 90, 241, 249. See in this volume the contribution of Laurent Pech.

16. 418 U.S. 323 (1974), 340.

17. *Id.*, 341.

18. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964), 279; Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), 347.

19. This reasoning of a 1979 decision of the civil chamber of the Federal Court of Justice was afterwards adopted by both criminal and constitutional jurisprudence. In 1985, a statute was voted that suppressed the requirement of a request to prosecute for a lawsuit based on insult if the person targeted was persecuted as a member of a group under the National

given the unconstitutionality of group libel regulation after *New York Times v. Sullivan*[20] and *R.A.V. v. City of St. Paul*,[21] Holocaust denial cannot be prosecuted as a defamation of "the Jews." Nevertheless, it is fair to say that the case—which seems insignificant for practical purposes—of an aggravated denial targeting a specific individual can be punished in the United States: "X is a liar because the Holocaust did not happen" may give rise to liability.[22]

The European Union Framework Decision requiring the prohibition of denial allows the Member States to include such a "consequential requirement" in their statutes. One should wait and see how this international instrument will be implemented, but it is possible to already observe that most of the statutes specifically targeting denial did not choose this path. Germany seems to link the prohibition of denial with some consequences since its statute requires that the speech be able to "disturb the public peace." But the definition of "public peace" shows how toothless this requirement is. It is generally understood by German scholars and judges to be "the condition of general security as well as general trust in the further existence of safe conditions and the sense of security within the population."[23] One must thus agree that such a "public peace" is automatically "disturbed" whenever a criminal act is committed.[24]

Socialist or another authoritarian regime and if the insult is connected to this persecution. A very widespread extrapolation and mistake in the English and French speaking scholarship persists in arguing that this statute forbade Holocaust denial. The article usually cited to support this claim did not make it. *See* Eric Stein, *History against Free Speech: The New German Law against the "Auschwitz"—and Other—Lies"*, 85 MICH. L. REV. 277 (1986). It seems that the French Parliament was also persuaded that Germany forbade Holocaust denial in 1985 and intended to follow this example while voting the Gayssot Act in 1990. See Jean Stengers, *Quelques libres propos sur « Faurisson, Roques et Cie »*, CAHIERS-BIJDRAGEN, Centre de recherches et d'études historiques de la seconde guerre mondiale, no. 29, May 12, 1989. No earlier than 1994 did Germany pass a law forbidding Holocaust denial.

20. 376 U.S. 254 (1964).

21. 505 U.S. 377 (1992).

22. The Supreme Court ruled explicitly that "X is a liar" can be a defamatory statement. Milkovich v. Lorain Journal, 497 U.S. 1 (1990), 19.

23. See Tatjana Hörnle, *Offensive Behavior and German Penal Law*, 5 BUFF. CRIM. L. REV. 255 (2001), 256.

24. See Andreas Stegbauer, *Anmerkung*, JURISTISCHE RUNDSCHAU (2003), 75. It seems therefore that the "public peace" clause is nothing but a way to comply with the constitutional requirement that a statute limiting expression be "general," i.e., that it does not target an opinion as such but aims at protecting some interest. However, the Constitutional Court seemed recently to adopt a more demanding conception of the public peace, defining its

Therefore, the German statute corresponds much more to the second manner of forbidding an expression and is similar to most of the other European statutes forbidding denial that target a meaning without requiring the judge to verify that it has caused some harmful consequences. The prohibition of denial seems therefore to be very "un-American" because one of the most characteristic features of the First Amendment is precisely that "[w]henever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; [and] whether the danger, if any, was imminent."[25] The legislative estimation is "merely a rebuttable presumption that these conditions have been satisfied."[26] In Europe and Canada, the rational legislative estimation that racist speech or genocide denial is likely to have some harmful consequences is sufficient to justify speech regulation, and thus a mere meaning can be prohibited without requiring that its empirical consequences be verified in each case. American judges, to the contrary, "are compelled to examine for [themselves] the statements in issue and the circumstances under which they were made to see whether or not they do carry a threat of clear and present danger."[27] In the words of one contributor to this volume: "While Americans, post-Brandenburg, debate about the impact of the words on an audience, Europeans debate the meaning of the words themselves."[28] European statutes forbidding genocide denial generally do not require the judge applying it to establish that the speech caused any harm to anybody or threatened anything. As a result, since the mens rea of an offense is linked with its actus reus, these statutes, lacking a specific provision, also do not require evidence that the denier intended to inflict any harm.[29]

Of course, the fact that the lawmaker did not make harmful effects of denial a part of the offense does not mean that it did not want to avoid such consequences. From a legal point of view, the judge controlling the

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threat as the danger of the commission of an illegal act. See BVerfG (2009), *Wunsiedel*, 1 BvR 2150/08, par. 77–78.

25. Whitney v. California, 274 U.S. 357 (1927), 378–79 (Brandeis, conc.)

26. *Id.*, 379.

27. Pennekamp v. Florida, 328 U.S. 331 (1946), 335. See especially Brandenburg v. Ohio, 395 U.S. 444 (1969), 447.

28. See in this volume the contribution of Robert Kahn.

29. See in this volume the contribution of Thomas Hochmann.

conformity of the statute with a superior norm will be competent to identify which possibility to limit the freedom of expression the statute concretizes, a task that in some cases can amount to identifying which consequences one can attribute to denial.

The International Human Rights Law regime regarding freedom of expression helps to understand the dialectic between denial and free speech. The posture of international human rights law regarding genocide denials can be analyzed through two main questions. First, the criminalization of genocide denial questions the compatibility of such limitations to freedom of speech with human rights standards. It questions whether and under what conditions States may or may not, under international human rights law, criminalize genocide denials. Second, international human rights law may impose some positive obligations born by the States to criminalize some behaviors that affect the full enjoyment of the rights and liberties protected at the international level. It is therefore critical to solve the question of whether or not the States have a positive obligation under international human rights law to criminalize denials.

2. Denial as Speech

Deniers claim the protection of their freedom of expression. That is why the chapters of this book refer extensively to the moral foundations and the legal arrangements related to free speech. This freedom is one of the key human rights protected in all the major human rights treaties as well as in most of the world's domestic constitutions. At the international and regional levels, the protection of freedom of expression is provided by the 1948 Universal Declaration of Human Rights (UDHR),[30] the 1966 International Covenant on Civil and Political Rights (ICCPR),[31] the 1950 European Convention for the

30. Universal Declaration of Human Rights, G.A. Res. 217 (III), U.N. Doc. A/810, at 71 (1948), Art. 19: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

31. International Covenant on Civil and Political Rights, opened for signature Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976), art. 19 § 2: "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."