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WHEN LAW ENTERS HISTORY: PROHIBITION OF CRIME NEGATIONISM AND ITS LIMITS IN INTERNATIONAL LAW

The topic of this article is the interaction between the freedom of expression and the memorial laws concerning historical crimes. The author offers an analysis of the phenomenon of negationism through the prism of international law. The article is based on two interrelated hypotheses. The first is that the prohibition of negationism has a legal foundation in international law only if accompanied by the ability to incite hatred or violence. For this purpose, international and regional European standards on negationism are analyzed. The second hypothesis is that in the practice of implementation of memorial laws, the border between hate speech and legitimate historical denialism becomes blurred. This fact might lead to excessive encroachment upon the freedom of expression. The author offers an analysis of the practice of the European Court of Human Rights as a referential framework for the application of memorial laws in practice aimed at evading these excesses.

Key words: *Freedom of expression. – Memorial laws. – Hate speech. – Genocide. – Human rights*.

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1. INTRODUCTION

I was prompted to write this article by recent events in the region of the Western Balkans that received much public attention. A Minister in the Government of the Republic of Montenegro had to resign his post due to a public speech in which he questioned the official interpretation of the events surrounding the crimes committed in the region of Srebrenica (Kajosevic 2021). A few months later, the adoption of the amendments to the Criminal Code of Bosnia and Herzegovina (BH),[1] which criminalized the negation of judicially proven cases of atrocities that occurred during the civil war in this country if they are capable of inciting to hatred or violence, provoked reactions not only in BH but also in other neighboring countries that were directly or indirectly involved in the civil war.

The first described case is one of political responsibility – the other of criminal. Despite the difference, the underlying logic behind both events was the need of the state in question to react to expressions that contradict official versions of history. A social need was recognized to suppress one's freedom to express its own beliefs. Both states in question are nominally democratic, guaranteeing their citizens' freedom of expression, among other numerous human rights and freedoms. Both cases involve several inter-related concepts which deserve a short explanation before I delve into the main arguments of the article, such as memorial law, negationism, historical denialism, hate speech, and freedom of expression.

1.1. Memorial Laws – Keepers of Official History

The states from the examples above are just two among many that have instituted some form of laws limiting the freedom of expression to preserve the version of historical truth that is found to best suit the values of democracy and protection of human rights (see parts 1.2. and 2.3. for a brief comparative overview of state practice). This practice is in doctrine associated with the term *Memorial Law*. Memorial law refers to an intervention of a legislator in the domain of historical memory, either through declaring a certain interpretation of events as official history (Frazer 2011, 29), or through prohibiting certain negationist actions towards official history. This second form of memorial law often prohibits negationism of certain crimes from the past, especially so-called core international crimes, such as genocide,

[1] High Representative Decision Enacting the Law on Amendment to the Criminal Code of Bosnia and Herzegovina, *Official Gazette of Bosnia and Herzegovina* 46/21.

war crimes, and crimes against humanity. The term "*official history*" will be used in this article to refer to three types of historical interpretation: 1) That which is declared as truthful by a law, parliamentary resolution, or other act of political power; 2) The predominant interpretation shared by scholars and other influential members of a society in a particular historical moment; 3) The interpretation of events reached during criminal trials or other similar proceedings (e.g. reconciliation or fact-finding commissions). The term "negationism", on the other hand, will be used to describe expressions (words, actions, symbols, gests, etc) that deny the official version of events, offer alternative versions, or in another manner conflict with the official interpretation of facts concerning crimes of genocide. This term was coined by French historian Henry Rousso to describe politically-motivated denial of the Holocaust (Rousso 1987). The same author made a clear difference between negationism and historical revisionism. The second term, in his view, describes the legitimate practice of new historical interpretations made in the light of newly accessible information acquired by adequate research methods (Rousso 1987, 35). However, as will be seen later in the article, it is not easy to differentiate between the two once a memorial law establishes the official version of history.

1.2. Negationism – Between Hate Speech and Freedom of Expression

The freedom of expression is intrinsically linked to the democratic character of society since democracy presupposes the ability of an individual citizen to express their own beliefs and arguments in the "marketplace of ideas" (Mill 1863)[2], otherwise, democracy would be unable to function properly. On the other hand, none of the guaranteed individual rights and liberties in a democracy are absolute. Limitations to individual rights are believed to be legitimate since they are imposed to protect the foundations of the democratic order itself and at the same time to enable the enjoyment of rights for other members of society.

One of the well-known examples of limitations to the freedom of expression is the ban on "hate speech", or "pejorative or discriminatory language with reference to a person or a group on the basis of who they are" (UN 2019; Krstić 2008, 7–20; Krstić 2020a, 7–10; Krstić 2020b, 318; Munivrana-Vajda, Šurina-Marton 2016, 435–467). Hate speech is regarded as contrary to the

[2] See also the practice of the US Supreme Court, *Abrams v. United States*, 250 U.S. 616 (1919).

rules of democratic debate and a threat to the rights of others since it can lead to atrocities against the targeted group (Rosenberg 2012). Stereotyping, insensitive remarks, non-inclusive language, are just some examples of hate speech that might present a risk to people targeted by it. As history has shown, prolonged and massive usage of such expressive techniques has indeed led to atrocities committed, preparing the atmosphere conducive to acts of violence (UN 2014). Once the atrocities are committed, however, can denial of these atrocities also lead to another round of atrocities? Authors originating from the regions affected by historical atrocities often believe this might be the case. In this context they usually cite Stanton (Muftić 2018, 2), for whom the denial of atrocities such as genocide is just a last stage of the process. However, Stanton explicitly states that this denial is a part of the effort of the perpetrators themselves to cover up the evidence and evade prosecution (Genocide Watch 2021). If the denier is just an ordinary person who individually had nothing to do with the atrocities (except perhaps being just a part of the same social group as the perpetrator), their freedom of expression would surely have to be guaranteed?

The answer to this question currently depends on the state in which the supposed denier lives. Fronza (2018, 180) notes that 21 out of 27 EU member states recognize in their legislation the crime of denial in certain circumstances, either as a separate criminal offense, or an aggravating circumstance. Out of these 21 states, four of them criminalize only Holocaust denialism, while the other 17 include various other core international crimes – genocide, war crimes, crimes against humanity (for a detailed analysis see Fronza 2018, 180–188). There are also examples other than in Europe, the most prominent being Rwanda.

Due to its historical experience with the genocide against the Tutsi, committed as part of the inter-ethnic civil war, which was prosecuted before an *ad hoc* international tribunal that categorized the massacres against the Tutsi as genocide, Rwanda has inserted in its Constitution the provision on the suppression of genocidal ideologies and adopted laws that criminalize genocide condonation, minimization or denial (Jansen 2014, 191–213). A person who states that the genocide never happened, or that the other side committed genocide as well, or otherwise disputes the established facts can be sentenced to up to seven years in prison.[3] On the other hand, the Rwandan experience shows how the ban on genocide denial might be abused by the government to suppress political opposition. According to some

[3] Rwanda, Law No. 59/2018 of 22/8/2018 on the crime of genocide ideology and related crimes § 2, Art. 5.

critics, the president of Rwanda, a member of the Tutsi people, used this law as a convenient vehicle to suppress the voices of dissent from the Hutu opposition, whose members were convicted of genocide by the International Criminal Tribunal for Rwanda (Tsesis, 2020, 117).

Bearing in mind the examples from the beginning, it can be argued that the historical experience of Bosnia and Herzegovina, or the Balkan societies at large, makes it more urgent to constrain the freedom of expression through memorial laws, as some Bosniak authors claim. (Smailagić 2020; Muftić 2018; Memišević 2015; Omerović, Hrustić 2020). I would not like to open a debate of whether the three constitutive ethnic communities in BH have reached a common historical interpretation of their recent past, and whether this interpretation corresponds to the historical facts established by the International Criminal Tribunal for Yugoslavia (ICTY). For the present purpose, it would suffice to say that a comparative glance at the laws in force in the former Yugoslav member states and territories does not prove that they share the need to protect the ICTY's judicial truth: Kosovo and Macedonia do not criminalize negationism at all, Serbia does not criminalize negationism related to the ICTY judgments,[4] and Croatia[5] and Slovenia[6] do not specifically mention the ICTY judgments. Only BH and Montenegro,[7] had the need to protect the ICTY legacy from negation through criminalization.

1.3. Article Structure

As one of the leading authorities in the field of studies of memorial laws states: "Curiously, most analyses of memory laws have been written by political scientists, sociologists, and historians rather than lawyers" (Belavusau, Gliszczyńska-Grabias 2017, 3). This article aims to provide a purely legal analysis of the phenomenon, and more precisely – an international legal one. The purpose of the article is to prove two inter-related hypotheses. The first one is that the prohibition of negationism does not have a clear legal foundation in international law, unless it is accompanied by the intention

4 Criminal Code of Serbia, *Službeni glasnik Republike Srbije* 85/2005, as amended, Art. 387.

5 Criminal Code of Croatia, *Narodne novine* 125/11, as amended, Art. 325 (4).

6 Criminal Code of Slovenia, *Uradni list RS* 55/2008, as amended, Art. 297.

7 Criminal Code of Montenegro, *Službeni list RCG* 070/03, as amended, Art. 370 (2–4).

to incite hatred or violence, i.e. unless it is a form of hate speech. For this purpose, international and regional European standards on negationism are analyzed in the second part of the article. The second hypothesis is that in the complicated practice of the implementation of this provision the border between hate speech and legitimate historical denialism becomes blurred. As indicated in the comparative study, memorial laws are generally insufficiently clear about their scope – "whether the punishment should only be for undermining the fact that certain persons have committed the crime or for contesting the legal qualification of the crime, the number of victims or the participation of other persons" (Grzebyk 2020, 14).

This fact might lead to excessive encroachment upon the freedom of expression, as an internationally guaranteed human right, in the implementation of memorial laws before domestic authorities. Therefore, the third part of the article gives an analysis of the practice of the European Court of Human Rights in cases involving negationism of core international crimes. This practice must serve as a referential framework for the application of memorial laws in practice, and for general public debate, to prevent the improper breaches of a person's right to freely express their vision of the crimes haunting our pasts, even if this vision involves some form of negation of those crimes.

2. PROHIBITION OF NEGATIONISM IN INTERNATIONAL LAW

International law contains no norms that expressly ban negationism in any form. Limitations of the freedom of expression are at the same time limitations of the ability to contest official interpretations of historical crimes. These limitations are enumerated in various international legal sources that contain freedom of expression as a basic human right (Gordon 2017, 62). In essence, they require a legally established, legitimate, and proportionate limit to a particular expression, which inevitably requires a highly contextual-based analysis of the conditions prevalent in the society that might expose its vulnerability to negationist acts.

2.1. General International Law

Thus, for example, Article 19 of the Universal Declaration of Human Rights states that "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."[8] According to this definition, the right to freedom of expression contains an active and a passive component. Any legal constraint of this right prevents someone not only from expressing himself but also enjoying the right to receive the expressions of other persons. The Declaration creates the legal framework for a free flow of information in both directions, as a precondition for a functioning democracy. Thus, any legal ban on denialist statements limits the right of a person not only to emit a statement but also to receive such statements from other denialists. The Declaration contains the general limits to the freedom of expression which are inspired by the idea that every right comes with a duty attached to it: "Everyone has duties to the community in which alone the free and full development of his personality is possible" (Art. 29 [1]). These limits must be determined by law and are motivated by the need to protect the foundations of a functioning democratic society: the rights and freedoms of others, the just requirements of morality, public order, and general welfare (Art. 29 [2]). Finally, as the essential United Nations document, the Declaration states that the freedom of expression "may in no case be exercised contrary to the purposes and principles of the United Nations" (Art. 29 [3]). A denialist statement that may contribute to the destabilization of international peace and security is therefore outside the limits of protection of the Declaration.

The definition of the International Covenant on Civil and Political Rights[9] is in a similar vein, with an important addition. The denial that is formulated in a way that constitutes an incitement to its recipients to discriminate against the victims of a crime, or to be hostile or violent against them, is outside the Covenant's protection, and the Covenant requires its signatories to prohibit such an expression by law (Art. 20 [2]). The UN Human Rights Committee, which is responsible for individual communications on the alleged breaches of the ICCPR, dealt with the issue of the freedom of expression and criminal repression of historical denialism in the case of *Faurisson v. France*.[10] Faurisson and his historian colleague claimed that gas chambers in concentration camps under Nazi control during World War II were not used for the extermination of numerous victims, but rather that the gas chamber story is pure fiction. Their published works started to gain in popularity during the 1980s in France to such an extent that the state

8 Universal Declaration of Human Rights, 1948, *https://www.un.org/en/about-us/universal-declaration-of-human-rights* (last visited 31 October, 2021).

9 International Covenant on Civil and Political Rights. Adopted by the General Assembly of the United Nations on 19 December 1966. *United Nations Treaty Series 1976*, Art. 19.

10 UN Human Rights Committee, 2 January 1993, *Robert Faurisson v. France*, Communication No. 550/1993, U.N. Doc. CCPR/C/58/D/550/1993(1996).

decided to react and suppress the wave of historical revisionism that the two have started. Under the pressure of a society of former camp prisoners, in 1990 the National Assembly adopted amendments to the Law on the Freedom of Press in France (the so-called *Gayssot* law, named of the member of parliament that submitted the motion),[11] which criminalized denial of the holocaust perpetrated against the Jews during World War II by Nazi Germany and its collaborators, as well as other mass atrocities defined by the Article 6 of the Statute of the International Military Tribunal in Nuremberg, or any other international or French court. Nevertheless, Faurisson proceeded to express his views and in an interview for a monthly magazine, shortly after the adoption of the law, he claimed again that concentration camps did not have gas chambers. He was tried and convicted on appeal before the French courts, and he promptly forwarded to the HRC a communication claiming his right of expression under the ICCPR was violated in this conviction.[12] HRC denied the protection for Faurisson, with the explanation that his statements were given with the aim of inciting antisemitism, however, it concluded *obiter dictum* that the ICCPR does not contain a general ban on the denial of international crimes, nor the facts upon which they were based, except if this denial is expressed with the intention to provoke hatred or violence.[13]

The International Convention on the Elimination of all Forms of Racial Discrimination gives more detailed instructions to its signatories on how to ban such expressions by suggesting that the state should criminalize denial of genocide and other crimes if such denial aims to incite the recipients to violence or discrimination against the members of a victimized group.[14] The Convention, notwithstanding its titular protected group, is not limited to victimized groups based on race only, as is visible from the definition of Article 4(a), which also mentions color and ethnic origin as the basis of incitement to discrimination or violence. In the case of the *Jewish community of Oslo et al. v. Norway,* the Committee found a violation of Article 4 in an antisemitic speech given during a march in commemoration of the Nazi leader Rudolf Hess, since the speaker's comments contained ideas of racial

[11] Loi n° 90–615 du 13 juillet 1990 tendant à réprimer tout acteraciste, antisémiteou xenophobe, JORF No. 0162 of 14 July 1990, p. 8333.

[12] UN Human Rights Committee, 2 January 1993, *Robert Faurisson v. France*, Communication No. 550/1993, U.N. Doc. CCPR/C/58/D/550/1993(1996).

[13] *Ibid*.

[14] International Convention on the Elimination of All Forms of Racial Discrimination. Adopted and opened for signature and ratification by UN General Assembly resolution 2106 (XX) of 21 December 1965, Art. 4(a), *https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx* (last visited 31 October, 2021).

superiority and hatred, making the speech "exceptionally offensive" and not protected by the right to freedom of expression.[15] There have been so far no cases dealing with atrocities other than the Holocaust.

The UN General Assembly and the Special Rapporteur for contemporary forms of racism, racial discrimination, xenophobia, and similar modes of intolerance have condemned in the first place the denial of the Holocaust, but also other types of historical denialism, omitting to clarify if criminal law is the adequate tool to deal with these issues (Parisi 2020, 44–45).

Thus, this brief overview of relevant general international legal sources shows that simple denial of historical facts, or unqualified negationism, does not represent a breach of international law, nor does the international law require states to criminalize this act in their legal systems. The only requirement under international law for states to criminalize a certain form of qualified negationism, which is committed with the special intention to provoke hatred or discrimination towards a certain part of the population.

2.2. A Special Historical Responsibility of European Legal Systems?

Regardless of the situation in general international law, there might be some support to the argument that European history requires special attention to negationist speech and that regional European standards should be stricter in this regard, in particular because of the Holocaust heritage. However, in Africa, another world region that has experienced terrible crimes in its history, which might be easily interpreted as genocide (and indeed one such event in Rwanda *was* declared genocide by an international criminal tribunal), the African Charter on Humans and People's Rights[16] has a simple provision that everyone has the right to express an opinion, without any limitations (Kurtsikidze 2017, 18).

Nevertheless, in 2019 the European Parliament adopted a resolution on the importance of European remembrance for the future of Europe, calling the distortion of historical facts and the concealment of crimes an integral part of the "information war" (EP 2019). The resolution recognized that the falsification of history is a threat to European unity and democratic values and stressed the importance of preserving the memory of "horrific totalitarian

[15] CERD, *The Jewish community of Oslo et al. v. Norway*, Communication No. 30/2003, U.N. Doc. CERD/C/67/D/30/2003 (2005).

[16] Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

crimes against humanity and systemic gross human rights violations" as a condition for reconciliation (EP 2019). Thus, the EU Parliament called on the Member States to "condemn and counteract all forms of Holocaust denial, including the trivialization and minimization of the crimes perpetrated by the Nazis and their collaborators, and to prevent trivialization in political and media discourse" (EP 2019; see also Grzebyk 2020, 13).

However, if we look at this issue from a purely legal stance, it seems there is not much difference between the general international legal framework and European standards. The only regional legal instrument that provides for the punishment of unqualified negationism is the Council of Europe's 2003 Additional Protocol to the Convention on Cybercrime,[17] which obliges state parties to prohibit, as criminal offenses under domestic law, acts that deny, grossly minimize, approve or justify "acts constituting genocide or crimes against humanity, as defined by international law and recognized as such by final and binding decisions" of the Nuremberg Tribunal or "any other international court established by relevant international instruments and whose jurisdiction is recognized by that party" (Art. 6). However, this Protocol is restricted to acts performed online or, as stated in Article 6, acts of distributing the punishable material or otherwise making it available to the public *through a computer system*. Furthermore, under the provisions of the Protocol, states are allowed to either not implement the said provision or part thereof or limit its application to cases where the conduct is carried out with the intention to incite hatred, discrimination, or violence for reasons of race, color, origin, nationality, ethnicity or religion (Art. 6, para. 2).

2.3. European Union Law – A Tale of Many Interpretations

On the European Union level, the need to regulate the topic of negationism of certain international crimes was addressed through its secondary law. In 2008 the EU Council adopted the Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law.[18] The Decision requires member states to ensure that their legislations recognize as an offense punishable by law the act of "publicly condoning,

[17] Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, Strasbourg, 28. 1. 2003, *European Treaty Series – No. 189*.

[18] Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ L 328, 6. 12. 2008, p. 55–58.

denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes," as defined in the Statute of the International Criminal Court or the Charter of the International Military Tribunal in Nuremberg, if this act is "directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group" (Art. 1, para. 1 (c and d)). Member states are left with options to choose whether they want to additionally qualify the offense so as to be punishable only if it is "carried out in a manner likely to disturb public order," or "is threatening, abusive or insulting" (Art. 1 para. 2), or whether it is "established by a final decision of a national court of the Member State and/or an international court, or by a final decision of an international court only" (Art. 1, para. 4). This final qualifying element of the Decision serves as an official endorsement of judicially established facts as the supreme interpretation of historical events. Some authors have noted that there is a certain degree of hypocrisy in this provision, having in mind that such "Eurocentric" courts have never dealt with many devastating atrocities committed by the armed forces of member states in their former colonies, for example by the French military against the Algerians during the Algerian War of Independence or British concentration camps for the residents of the Boer Republics at the beginning of the 20th century. Such history is necessarily subjective and incomplete for any meaningful culture of remembrance in European society. In its essence, it is neocolonial (Parisi 2020, 48).

The first proposal of the Framework Decision published by the EU Commission back in 2001 criminalized only Holocaust denial.[19] Seven years of difficult negotiations on the Decision contents ensued, finally ending in a triumph of those member states that already had in their legislation the crime of negationism in various forms, as they were able to pressure other member states to accept their vision of the scope of the punishable act (see more in Parisi 2020, 48).

The Framework Decision requires member states to punish the negation of those core international crimes likely to cause a *consequence* – specifically hatred or violence. The denial by itself is not punishable, therefore, the same as in general international law. However, the Decision fails to closely define the terms "denial" or "gross trivialization". Thus, member states enjoy a wide margin of discretion to decide whether to punish, for example, a

[19] Council of the European Union, 26 March 2002, Proposal for a Council Framework Decision on combating racism and xenophobia, in *Official Journal of the European Communities*, COM (2001)/664, C 75 E/269.

statement that denies that a certain crime occurred at all, a statement that accepts that a crime occurred but offers a diminished number of victims than the official version, a statement that places the responsibility for a crime on a perpetrator other than the one established by a court decision, or a statement that offers a different legal qualification of the crime than the one established by a court decision. Another complicating factor for the delimitation of criminalized and free speech is the provision that states that the "Framework Decision shall not have the effect of requiring the Member States to take measures in contradiction to fundamental principles relating to freedom of association and freedom of expression, in particular, freedom of the press and the freedom of expression in other media as they result from constitutional traditions or rules governing the rights and responsibilities of, and the procedural guarantees for, the press or other media where these rules relate to the determination or limitation of liability" (Art. 7, para. 2). One might wonder if this provision serves in essence as the legal loophole for a state to completely disregard the obligation to prohibit negationist speech, which might in part explain why some member states have failed to implement it so far.

As per the Commission's report from 2014, member states differ on various aspects of the implementation of the Decision. They either fail to implement all three acts of negation, all the core crimes that might be negated, or claim that the already existing Holocaust denial provisions can be interpreted to cover these crimes as well (EU 2014). Just five member states do not require incitement to hatred or violence as the element of the crime, but four member states require additional qualified elements not provided in the Decision (EU 2014). Some member states introduce the role of "judicial truth", requiring the act to negate crimes established by international or domestic courts to be punishable, the others do not give such importance to courts (EU 2014; for a detailed analysis see also Memišević 2015, 157–158).

The conclusion can be reached that the overwhelming majority of all these various legislative solutions require incitement to hatred or violence as a necessary constitutive element of the crime of negationism. This is a necessary precondition for the state reaction in all legal systems of the EU candidate states from the Balkans region that have implemented the Decision. As also a necessary element of general international legal prohibition of negationism, it deserves special attention, given to it in the next section.

2.4. Incitement to Hatred or Violence – A Necessary Ingredient

Whether the act of negation was capable of inciting hatred or violence would be most easily established through the intention and motives of the negator. The doctrine has identified several types of motives behind one's negationist act. In the first place are pure cases of hate speech, when the denier acts consciously and with the intention to provoke hatred against the targeted group. The second group of cases is those when a denier is a person seeking public attention, attempting to gain personal promotion through sensationalist alternative visions of official history. The third is the case of a fanatic, a person blindsided by ideology, who resists the reality through persistent belief in its alternative versions. Finally, there are simply people who believe in a version of the event that they have learned in school, people who did not have a chance to gain insight into versions of history accepted by law (Hochmann 2011, 281). The authors who support this point of view analyze negationism only as the "management of guilt" (Bieńczyk-Missala 2020, 20), i.e. more or less conscious and malicious activity that falsifies historical facts.

If the intention is not easily discernible, the analysis would have to take into account the objective circumstances surrounding the act. In the next section, I will delve into this issue more closely. However, for the moment, I would like to point out that the doctrine identifying motives behind the negationist act presupposes that the official version of history is correct. If there is no clear intention to mislead and spread fake news capable of incitement to hatred or violence, it is doubtful that a national law preventing people from receiving this information would be in accord with international human rights obligations. Article 10 of the ECHR contains a positive obligation on the part of the state to enable every citizen to receive information from other persons that would like to impart that information.[20] Thus, it is necessary to offer particularly strong reasons for any measure that restricts the access to information that a citizen needs to know.[21] On the other hand, a state has the positive obligation to enable conditions of public debate in which every person can without fear of reprisal express his ideas and opinions, without fear of reprisal, no matter if that opinion contradicts

[20] ECtHR, *Leander v. Sweden*, Appl. No. 9248/81, Judgment of 26 March 1987 at § 74. Similarly in: ECtHR, *Gaskin v. The United Kingdom*, Appl. No. 10454/83, Judgment of 07 July 1989, para. 52.

[21] ECtHR, *Węgrzynowski and Smolczewski v. Poland*, Appl. No. 33846/07, Judgment of 16 July 2013, para. 57.

the official state policy or influential social opinions.[22] Especially in cases where the debate concerns the history of a society, anyone's opinion should be tolerated and the debate must be conducted freely and rationally.[23]

It seems that both the limits of the intent to incite hatred or violence and the relationship between the "right to know" and the "right to negate" can be established only by a highly contextual analysis of every specific act of negation. At least for the states belonging to the Council of Europe, more precise guidelines for domestic authorities in their implementation of memorial laws can be inferred from the practice of the European Court of Human Rights (ECtHR). Even the EU Framework Decision indicates that its provisions will not interfere with the obligations of the Member States to respect the Council of Europe's Convention on Human Rights (ECHR) (Art. 7). This would mean that in practice the member states would not be allowed to restrict the freedom of expression through the margin of discretion offered by the Decision more than is allowed under the ECHR's legal framework, including its authoritative interpretation by the ECtHR's judgments.

3. EUROPEAN COURT OF HUMAN RIGHTS AS A REFERENTIAL FRAMEWORK

Convention for the Protection of Human Rights and Fundamental Freedoms provides for the freedom of expression, defined as the "freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers" (Art. 10, para. 1).[24] The exercise of this freedom is conditioned by the observance of certain legally prescribed limits that are necessary for the functioning of a democratic society. These limits are enumerated in the following paragraph of the same article: "national security, territorial integrity or public safety, for prevention of disorder or crime, for protection of health or morals, for protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining of the authority and impartiality of the judiciary" (Art. 10, para. 2). As summarized by Kaminski (2020, 69), this definition contains three basic elements that the state parties need to fulfill

[22] ECtHR, *Dink v. Turkey*, Appl. Nos 2668/07, 6102/08, 30079/08, 7072/09, and 7124/09, Judgment of 14 September 2010, para. 137.

[23] ECtHR, *Monnat v. Switzerland*, Appl. No. 73604/01, Judgment of October 2006.

[24] Convention for the Protection of Human Rights and Fundamental Freedoms, *https://www.echr.coe.int/documents/convention_eng.pdf* (last visited 31 October, 2021).

in order to legitimately restrict the freedom of expression: a legal base of the restriction in the form of law or judicial decision, available to citizens and precisely defined;[25] a legitimate aim of protection of any value enumerated in the Convention provision; and necessity of restriction for the purpose of preservation of the democratic character of a society. Kaminski also notes that in the majority of cases before the ECtHR the act of state parties that restricted the freedom of expression failed to fulfill the third element – the necessity of the preservation of the democratic society (Kaminski 2020, 69).

3.1. What is Historical Truth?

A general overview on the practice of the ECtHR and its predecessor, the Commission for Human Rights, leads to the conclusion that the freedom of expression has always been a highly valued commodity by the judges, although the level of protection awarded to a particular expression varied based on its character (Mężykowska 2020, 102–103). The Court expressly concluded that the purposeful spreading of lies and misinformation does not fall under the guarantee of the freedom of expression.[26] Only misinformation expressed in good faith can enjoy the protection of Article 10 ECHR.[27] On the other hand, The Court generally considers historical research as something which should not be prohibited by law, even if it denies the existence of historical crimes that form a part of the identity of the victimized group.[28]

The concept of "public interest" plays a very important role in connecting these dots, since the Court believes that the discussion on matters political or generally in the public interest is a necessary precondition for the welfare of a democratic society.[29] In the case of *Handyside v. United Kingdom*, the Court concluded that such discussion does not exclude expressions that might shock, insult or disturb state organs or certain social groups.[30] Yet,

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[25] ECtHR, *Sunday Times v. United Kingdom* (No. 1), Appl. No. 6538/74, Judgment of 26 April 1979, para. 49.

[26] ECtHR, *Nilsen and Johnsen v. Norway*, Appl No. 23118/93, Judgment of 25 November 1999, para. 49.

[27] ECtHR, *Niskasaari and Otavamedia Oy v. Finland*, Appl No. 32297/10, Judgment of 23 June 2015, para. 58.

[28] ECtHR, *Perinçek v. Switzerland*, Grand Chamber, Appl. No. 27510/08, Judgment of 15 October 2015, paras. 64–65

[29] ECtHR, *Otto-Preminger-Institut v. Austria*, Appl. No. 13470/87, Judgment of 20 September 1994, para. 49.

[30] ECtHR, *Handyside v. United Kingdom*, Appl. No. 5493/72, Judgment of 7 December 1976, para. 49.

this would depend on the specific historical context of the society, its social and cultural reality, and the manner in which the public opinion perceives a given topic.[31]

The Court regards certain historical events that influenced the destiny of a number of peoples, as well as historical persons who took part in them and bear responsibility for the way the events played out, as a special object of public interest which must be subjected to objective historical critique.[32] Therefore, the Court prohibits states from interfering in historical discussions, even if they involve topics such as war crimes, crimes against humanity, and genocide, and especially prohibits any state repression against participants in those discussions.[33] The Court finds the state's intervention necessary only in cases when the discussion could lead to justification of committed crimes, as it judged in a case concerning the Katyn massacre.[34] However, if the negation of the crime is expressed through a work of art, such as a novel, there is no need for state repression because it is a work of fiction and not of historical fact.[35]

But what does the ECtHR consider historical fact or historical truth? The Court expressly stated that there is no "sole historical truth."[36] The Court makes a difference between historical truth and historical interpretation, with only the former being protected by the Convention,[37] but memorial laws tend to represent official historical interpretation as the only possible truth, so this difference is not very helpful. In a way, the judicially ascertained historical truth has a higher value for the court than historically researched truth, which is apparent from the comparison between the Holocaust and the genocide against Armenians, where the Court made a difference between the two since the first was established by an international criminal tribunal

31 ECtHR, *Petkevičiūtė v. Lithuania*, Appl. No. 57676/11, Judgment of 27 February 2018, para. 21.

32 ECtHR, *Dzugashvili v. Russia*, Appl. No. 41123/10, Judgment of 9 December 2014, para. 32.

33 ECtHR, *Dink v. Turkey*, Appl. No. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, judgment of 14 September 2010; compare with ECtHR, *Fatullayev v. Azerbeijan*, Appl. No. 40984/07, Judgment of 22 April 2010.

34 ECtHR, *Janowiec v. Russia*, Appl. Nos. 55508/07 and 29520/09, Judgment of 23 October 2013, para. 187.

35 ECtHR, *Orban and others v. France*, Appl. No. 20985/05, Judgment of 15 January 2009, para. 46 and 47.

36 ECtHR, *Monnat v. Switzerland*, Appl. no. 73604/01, Judgment of 21 September 2006, para. 68.

37 ECtHR, *Lehideux and Isorni v. France*, Appl. No. 55/1997/839/1045, Judgment of 23 September 1998, para. 47.

while the other was not.[38] In the absence of judicial truth, however, the Court would regard as truth only those historical facts that are unanimously accepted in historical doctrine. Some other important conclusions can be deduced from this paragraph. However, in some specific cases, such as the Holocaust, the Court believes that the combination of abundant historical research and judgments of international courts is enough proof to make a negationist's intent visibly malicious when they try to deny the facts of the killing of Jews, or the legal qualification that these killings were given in the Nuremberg trials.

The Holocaust is the only historical truth that the Court finds to be sufficiently proven to prevent historical or legal research from disputing it. As for other historical crimes, some authors who researched the attitudes of the Court towards particular historical events conclude that if there are disagreements between the Council of Europe members over the interpretation of some historical, event from their common pasts, the Court will most probably refrain from accepting as legitimate the state-imposed restrictions over the denial of such events (Lobba 2017, 126). At the same time, the Court raises the bar of expectation from the states to distance themselves from the Nazi regimes that were active on their territories in the past, and therefore encourages the restrictions of the freedom of speech for those persons that negate, justify or minimize Nazi crimes (Lobba 2017, 126).

3.2. The Special Case of the Holocaust and the "Abuse of Rights Clause"

To conclude the previous section, there can be no doubt that the public discussion of major historical events is in the public interest and should be awarded a high level of protection guaranteed by the ECHR. However, if during the course of historical discussions, individuals start to celebrate historical personalities and regimes, or their acts, which by their nature were undemocratic, discriminatory towards certain social groups, or in the worst case, constituted worst international crimes, such as genocide, the Court tends to approve some form of state repression against them. To decide whether the limitations of the freedom of expression were needed in every single case, the Court puts these expressions through a special normative test that will be discussed in this section.

[38] ECtHR, *Perinçek v. Switzerland*, Grand Chamber, Appl. No. 27510/08, Judgment of 15 October 2015.

This normative has test evolved through time, but one constant element of the test was the use of Article 17 ECHR as the interpretative supporting tool. Article 17 states:

"Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

In essence, Article 17 is the "abuse of rights" clause. The origins of the ECHR, deeply embedded in the anti-fascist sentiments after the end of the Second World War, influenced the way of thinking about the dangers to democracy posed by the abuse of its tenets. One must not forget that the Nazi party came to power in Germany through a democratically won election, continuing afterward with the accommodation of democratic institutions and procedures to its ideological needs that were inherently undemocratic, even anti-democratic (Haldemann 2005, 166).

Article 17, thus, in the practice of the ECtHR, firstly served as an indicator of the presence of the need for the democratic state to restrict the freedom of speech. In the first such cases before the Commission for Human Rights, only expressions containing serious racial discrimination were considered the abuse of rights from Article 17.[39] Later on, the abuse of rights clause enveloped anti-semitic denialism as well.[40] The Court accepted the jurisdiction and admissibility of such complaints, proceeded on to the proceedings *in meritum*, and used Article 17 as the interpretative clause of the contents of the freedom of expression from Article 10.[41]

In the cases of *Witzsch v. Germany*[42] and *Schimanek v. Austria*,[43] it is visible that the Court carefully analyses the content of the expressions prohibited by the democratic state to conclude whether there really was a need for its protection from the abuse, especially concerning their capability to incite hatred or violence. Thus, the acts of denial, minimization, and even approval of the Holocaust, committed by the citizens of these states by sending letters

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[39] EcommHR, *Glimmerveen and Hagenbeek v. the Netherlands,* Appl. No. 8348/78 & 8406/78, Decision of 11 October 1979.

[40] EcommHR, *Lowes v. UK*, Appl. No. 13214/87, Decision of 9 December 1988.

[41] ECtHR, *Lehideux and Isorni v. France*, Appl. No. 24662/94, Judgment of 23 September 1998, para. 47.

[42] ECtHR, *Witzsch v. Germany,* Appl. No. 41448/98, Judgment of 20 April 1999.

[43] ECtHR, *Schimanek v. Austria,* Appl. No. 32307/96, Judgment of 1 February 2000.

to influential political figures claiming that the gas chambers are just a product of propaganda intended to smear the German nation's honor, are placed outside of the scope of the ECHR's protection.

The next phase in the Court's use of the abuse of rights clause became visible in the *Garaudy v. France* case,[44] where the Court changed the way it looks at Article 17, now no longer as a simple interpretative clause, but as a procedural tool. From then on, the Court started denying the admissibility of complaints claiming the breach of Article 10 rights if the case at hand involves negation of the Holocaust. Garaudy, as a citizen of France, thus is found to be outside the Convention's protection when he publicly asserted that the whole state of Israel is based on the "Holocaust myth", or the "Nuremberg myth". The Court did not perform any kind of material analysis of the content of Garaudy's claims, regarding the mere act of the Holocaust denial as the act capable of "destructing rights and freedoms" contained in the ECHR. The doctrine labels this approach of the Court as the "procedural guillotine" (Cohen-Jonatan 2001, 680), and it is true that the Holocaust thus becomes a taboo topic of the democratic society, the holy cow that is out of reach of any discussion, and any negationist expression concerning aspects of the Holocaust renders its author a threat to democracy. The Council of Europe definitively endorsed such an approach of the Court when it claimed that any speech that sheds doubt on definitive historical facts, such as the Holocaust, automatically represents an abuse of rights from Article 17 ECHR (Wojcik 2019, 34).

The Court justifies the special status of the Holocaust because its social consequences are not identical to those of other crimes.[45] The Court concludes from its practice that cases of Holocaust negationism are always inspired by the Nazi ideology, antisemitism, or xenophobia, which makes them inseparable from an attack on the Jewish community. In addition, the Court believes that the Holocaust is "the common European experience", meaning that in the past the majority of European states experienced regimes that collaborated with the Nazis on their territories in the pursuit of the Holocaust aims. Kahn (2011, 85–86) offers an especially powerful argument concerning this when he claims that the Holocaust has a genealogical connection with hate speech.

[44] ECtHR, *Garaudy v. France*, Appl. No. 65831/01, Judgment of 24 June 2003.

[45] ECtHR, *Perinçek v. Switzerland*, Grand Chamber, Appl. No. 27510/08, Judgment of 15 October 2015, para. 243.

Put into the context of the Western Balkans history, thus, the negation of some Holocaust-related crimes, such as the deportation of Jews by collaborators of Nazi Germany from the territory of the Kingdom of Yugoslavia to the concentration camp in Auschwitz, or their mass executions in gas vans (Byford 2010, 5–47), or stationary gas chambers and labor camps such as Topovske Šupe and Staro Sajmište in Belgrade, no matter how well-researched and no matter the lack of intention on the part of the author to incite hatred or violence against the Jews, would represent an abuse of rights expression by ECtHR standards and the negator would not enjoy its protection.

3.3. Negation of "Ordinary" Atrocities

The situation is rather more complicated when it comes to historical crimes other than the Holocaust, even those closely related to it. It seems only some general directions can be deduced from the Court's practice when it comes to material limitations of expressions negating "ordinary atrocities", however, any analysis is highly contextual.

Firstly, the form of expression plays a relevant role. In the *Lehideux and Isorni v. France* case,[46] the applicants were two editors that published a proclamation on behalf of some civil societies in France demanding the rehabilitation of Marshall Phillipe Pétain, a convicted French war criminal, and a Nazi collaborator during the occupation. The ECtHR found a breach of Article 10 since it claimed that the evaluation of the historical role of Marshall Pétain was still an object of discussion, regardless of his judicial conviction and the work of the majority of historians both in France and abroad. The reason for their conviction was based on the part about Pétain's true historical role that they failed to mention – his complicity in the process that led to the Holocaust. However, the Court interpreted the meaning of Article 10 to protect not only the contents of the expression but also its form, which means that if one intentionally overlooks a fact, it does not automatically mean one is abusing one's freedom of expression. Such an approach is immoral but not illegal.

[46] ECtHR, *Lehideux and Isorni v. France*, Appl. No. 24662/94, Judgement of 23 September 1998.

If compared to a prominent collaborationist politician from the period of Nazi occupation of Serbia, Milan Nedić, this would mean that public expressions of praise for his historical role, even if they would intentionally overlook his contribution to the previously mentioned deportations and executions of Jews, would not constitute an abuse of the Convention rights.

Secondly, the deeper an event is situated in the past, the less inclined the Court is to find negationist discussion about it abusive. In *Lehideux and Isorni v. France,* a mitigating circumstance for the applicant's behavior was found in the fact that they were discussing events that happened over 40 years ago. This fact meant there was no "pressing social need" for the state to repress the denial of Pétain's crimes, however atrocious they happened to be.[47] The same conclusion was reached in the *Monnat v. Switzerland* case.[48] This, "passage of time" argument might be used in connection with the legitimacy of the so-called "Incko's law" in Bosnia and Herzegovina, which was discussed in the introduction. The fact that it was adopted 25 years after the end of hostilities in this country, while the negationism of certain crimes committed during the civil war started immediately after they were disclosed, and never really stopped afterward, and despite that negationism never really inciting any social conflicts, makes it dubious if there really is a "pressing social need" for its adoption.

Thirdly, the Court is more likely to find the abuse of rights if the historical actors in question are still alive. This is clearly visible from the *Chauvy and Others v. France* case.[49] Furthermore, cases have started appearing before the Court where survivors of historical atrocities claim the breach of their right to private life (Article 8 ECHR) by the negationist acts.[50] Although this is a new and different problem in the legal treatment of negationism, it might play a role in future Court decisions regarding its limitations when it is targeting historical actors that are still alive and can enjoy their Convention guaranteed rights.

Fourthly, the negator's research method is relevant for the delimitation of legitimate historical revisionism and punishable negationism. As noted by Kaminski (2020, 82), when the discussion is of a historical nature and

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[47] *Ibid*, paras. 57 and 67.

[48] ECtHR, *Monnat v. Switzerland*, Appl. No. 73604/01, Judgment of 21 September 2006, para. 64

[49] ECtHR, *Chauvy and Others v. France*, Appl. No. 64915/01, Judgment of 29 June 2004, para. 69.

[50] ECtHR, *Aba Lewit v. Austria*, Appl. No. 4782/18, Judgment of 10 October 2019.

it fails to adequately use legitimate historical sources, this would certainly be an indicator of bad faith on the part of the historian negating a given crime. Some objective ties between negator' beliefs and political activities might serve as an indication of racist or other discriminatory intent. The justification of the criminalization of negationism does not lie so much in the existence of the undisputable historical fact, but in the fact that negationism, although presented as impartial historical research, obviously represents an undemocratic ideology or anti-semitism.[51]

Fifthly, the number and frequency of expressions is relevant for the evaluation of the gravity of the case. The Court in *Perinçek* concluded that there were just three instances where the applicant publicly related his arguments.[52] Wojcik (2020, 108) is right when criticizing this approach as out of tune with a modern informational society, where one digital expression in the form of a post on a social network can reach millions of people easily and quickly through reposting. However, this conclusion is also highly contextual and it seems it depends on the audience that was primarily intended to receive the expression. In *Witzsch v. Germany* the negationist act consisted of a single private letter, sent to an influential politician and a researcher.[53] The social influence of the audience strengthens the capability of the expression to cause negative consequences for a targeted individual or a group.

Sixthly, the past of a certain society influences the limits of the freedom of expression allowed, which touches upon controversial events from that past. For example, The Court did not find any tensions in Swiss society between the Turks and Armenians, although sizable minorities of both nations lived in Switzerland at the time of the writings by a Swiss citizen that negated the genocide against Armenians.[54] In the Court's opinion, Switzerland did not have any connection to the events that occurred on the territory of contemporary Turkey during the First World War.

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[51] ECtHR, *Perinçek v. Switzerland*, Appl. No. 27510/08, Judgment of 15 October 2015, para. 243.

[52] *Ibid*, para. 244.

[53] ECtHR, *Witzsch v. Germany* Appl. No. 41448/98, Judgment of 20 April 1999.

[54] ECtHR, *Perinçek v. Switzerland*, Appl. No. 27510/08, Judgment of 15 October 2015, para. 255.

3.4. The *Perinçek* Case Controversy

The seminal case for the purpose of delineating freedom of expression from the abuse of rights, regarding the negation of international crimes other than the Holocaust, is *Perinçek v. Switzerland*.[55] The first time the ECtHR tackled the issue of negation of a genocide that is not the Holocaust (Krstić 2020c, 114–116). The applicant was a journalist and a lawyer of Turkish ethnic origin, who publicly denied that the massacre committed by the Ottoman authorities during the First World War against Armenians was genocide.

The massacre against Armenians is rather well documented in historical sources. There is not much disagreement on the fact that during 1915 and 1916 the Ottoman government forcefully deported several hundred thousand ethnic Armenians, allegedly because of the needs of the war effort and their collaboration with the Russian Empire (Bilali 2013, 16–19). Traversing the country in harsh weather conditions, with inadequate access to food, water, and shelter, exposed to constant harassment, indiscriminate killings, rape, and looting by the Turkish troops, the number of displaced Armenians dwindled from approximately 2.5 million to 1.5 million people after the war ended. No judicial proceedings were ever instituted on the international plane for these events, however, around 30 countries qualify these events in their political declarations as genocide. In his published writings, Perinçek disputed precisely this qualification, claiming that the story about genocide was a product of international conspiration of imperialistic powers against the Turkish people, the same powers that were primarily responsible for the conflict between the Turks and the Armenians. He was tried and convicted under the Swiss Criminal Code, since Swiss courts concluded that the genocide against Armenians is a well-known fact, citing in support of this argument works of historians from various countries, in addition these political declarations.[56]

The Court, once it received Perinçek's complaint under Article 10, pointedly proceeded to the meritum, without using its Article 17 "guillotine", although the subject matter was alleged genocide. This prompted some authors to conclude that the Court created an unjustified "hierarchy of memories", with the Holocaust at the top of the pyramid (Wojcik 2020, 98) and other crimes of genocidal nature becoming less privileged (Lobba 2014, 65). I might

[55] ECtHR, *Perinçek v. Switzerland*, Appl. No. 27510/08, Judgment of 15 October 2015.

[56] Tribunal fédéral (Switzerland), ATF 6B_398/2007, 12 December 2007, para. 4.2.

remark, on this matter, that it is in the nature of any legal act that creates official memory, be it a law or a court's judgment, to approach the history selectively, since its endorsement of a particular event, or the interpretation of such event, puts this event or its particular interpretation in a more privileged position in comparison with other events or other interpretations of the same event that have been left out of legal protection. Nevertheless, the Court firmly confirmed in the most recent case that "states that have experienced the Nazi horrors [...] [have] a special moral responsibility to distance themselves from the mass atrocities perpetrated by the Nazis."[57]

Anyway, the ECtHR now had to decide whether Perinçek's genocide denial conformed with its test on the limitations of the freedom of expression, or to put it another way, whether the Swiss court rightly concluded that its conviction of Perinçek was based on the law, had a legitimate aim and was necessary to protect Swiss democracy. The Court argued that the protection of the dignity of the Armenian victims, and the contemporary identity of Armenian people, for which the memory of the genocide is a constitutive element, would be a legitimate aim. However, the Court opined that Perinçek did not insult the dignity of the Armenian people since he had not negated the crimes that occurred against them, but merely gave another legal qualification of these crimes. His expression could not incite hatred against Armenians in such away. Additionally, the focus of his denialism was directed towards the foreign imperial powers, which in his view construed the genocide dogma, and not against the Armenian people. Paragraph 117 of the judgment deserves to be cited in full:

"In any event, it is even doubtful that there can be a "general consensus", particularly among academics, about events such as those in issue in the present case, given that historical research is by definition subject to controversy and dispute and does not really lend itself to definitive conclusions or the assertion of objective and absolute truths (see, to similar effect, the Spanish Constitutional Court's judgment No. 235/2007, referred to in paragraphs 38–40 above). In this connection, a clear distinction can be made between the present case and cases concerning denial of crimes relating to the Holocaust (see, for example, the case of Robert Faurisson v. France, determined by the UN Human Rights Committee on 8 November 1996, Communication No. 550/1993, doc. CCPR/C/58/D/550/1993 (1996)). Firstly, the applicants in those cases had not disputed the mere legal characterisation of a crime but had denied historical facts, sometimes very concrete ones, such as the existence of gas chambers. Secondly, their

[57] ECtHR, *Pastörs v. Germany*, Appl. No.: 55225/14, Judgment of 3 October 2019.

denial concerned crimes perpetrated by the Nazi regime that had resulted in convictions with a clear legal basis, namely Article 6, sub-paragraph (c), of the Charter of the (Nuremberg) International Military Tribunal, annexed to the London Agreement of 8 August 1945 (see paragraph 19 above). Thirdly, the historical facts challenged by the applicants in those cases had been found by an international court to be clearly established."

Finally, the Court concluded that no existing international treaties obligated Switzerland to criminalize genocide denialism, and more generally, that such an obligation does not exist on the level of general customary international law (para. 266), which is a confirmation of our survey of general international law from part 2.

The importance of the decision in *Perinçek* cannot be overstated. If the Court stays true to its interpretation of the Convention in this case in future instances as well, this would imply that it would be very difficult to defend any law criminalizing negation of genocide other than the Holocaust as being in accordance with the ECHR.

4. CONCLUSIONS

Crime negationism is regulated indirectly at the international level, through legal instruments dealing with the freedom of expression. Of all the analyzed general international legal instruments, none prohibits any form of negationism *per se*, the only prohibited act is the negation capable of incitement to hatred or violence against an individual or a social group targeted by a negationist act. On the European level, it is obvious that the tragic historical experience of the Holocaust has prompted the European Union and its member states to directly address this matter. The differences in the regulation between various European states testify that every society has to come up with its own adequate legal solution. Some commonalities consist in specifying the requirement that the prohibited negationist act has the capacity to incite hatred or violence. The EU attempted to address these differences through its Framework Decision, however, some member states evaded implementing it fully, and those that opted to do so, inserted qualifications of incitement to hatred or violence, or even the existence of a court decision, international or national, as proof of the commission of the crime, with the idea to prevent mere denialism from becoming a criminal act. This analysis has proven the first hypothesis of this article – that negationism is prohibited in international law only as a form of hate speech.

This article's overview of cases involving negationism before the ECtHR shows that in practice it is very difficult to ascertain the hateful intent behind the negationist act, which might make the interference of memorial laws with the freedom of expression wider than intended. Therefore, the practice of the EctHR might serve as a general referential framework for their application. However, this jurisprudence is constantly evolving and depends on the context of the cases being adjudicated. Therefore, only partial conclusions about this referential framework can be reached so far.

The Holocaust, as a form of genocide that is inherently against democratic values, that is confirmed through abundant historical literature and decisions of an international court that enjoyed the wide support of the international community, deserves special protection, and any form of its denial is not protected by the freedom of expression, regardless of its potential to incite hatred or violence.

Negation of other historical genocides and atrocities generally cannot *per se* be considered as against the law, and various contextual elements have to be taken into consideration. Firstly, if the intention to incite hatred or violence towards a targeted individual or a group is found to exist it definitely makes a negationist act illegal. In case the intention is lacking or is difficult to ascertain subjectively, the string of objective contextual elements defines the limit of the freedom of expression in any particular case, as shown in section 3.3. of the article.

All these factors must be carefully taken into consideration to delimit freedom of expression from its abuse. As noted by Górski (2020, 57), the path that threads these limits is "slippery and narrow". However, international law has still not come up with better solutions to fill in the gaping void between the two opposite notions of total freedom of expression and total ban on any kind of atrocities negationism.

The *Perinçek* case confirms the restrictive approach of the Court when accepting limitations to the freedom of expression for crimes other than the Holocaust. It seems that the Court would not be willing to accept any historically disputable crime as a taboo topic, regardless of the existence of numerous material evidence, historical research, and political declarations that create its official history. It is yet to be seen, if and when one of the cases dealing with the negation of the crimes established by an international criminal court comes before the ECtHR, say for example a complaint by a citizen of Bosnia and Herzegovina against the application of newly amended criminal provisions of this state, if the judicial quality of truth would prove to be a more decisive factor for the ECtHR's analysis.

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