

# Genocide Denial and Freedom of Speech

Comments on the Spanish Constitutional Court's Judgment 235/2007, November 7th

Pablo Salvador Coderch  
Antoni Rubí Puig

School of Law  
Universitat Pompeu Fabra

## *Abstract*

*The Spanish Criminal Code of 1995 criminalized the dissemination by any means of ideas and doctrines denying or justifying genocide. Recently, the Spanish Constitutional Court, prompted by a referral of the Barcelona Court of Appeals, ruled in Judgment 235/2007, November 17th on the compatibility of this crime with the freedom of speech clause of the Spanish Constitution in the setting of the prosecution of a neo-Nazi activist and owner of a shop in the business of selling and distributing books, tracts and leaflets in many of them the Holocaust was, as a historical fact, denied, trivialized or justified.*

*This article, on occasion of the Constitutional Court's Judgment, focuses on the grounds that justify analyzing the intersections between genocide denial and freedom of speech and seeks for explanations to the majority's ruling according to which simple denials of genocide fall under the umbrella of freedom of speech and only positive value statements, that is to say, utterances extolling genocide or minimizing or trivializing its consequences might be punished.*

*Keywords:* Genocide Denial; Freedom of Speech; Spanish Criminal Code; Spanish Constitutional Court; European Court of Human Rights' Case-law

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## 1. Introduction: Mass Killing in History and Genocide Definitions

### 1.1. Mass Killing in History and a List of Possible Genocides

Mass or selective annihilation of the inhabitants of a town, region or country – e. g., mass killing of men and enslavement of (raped) women and children, the so-called “gendercide” – has been pervasive in the Antiquity, the Middle Ages and Modern Times.

Even though inconclusive, a list of possible –and, in some cases, controversial– genocides might include the following examples:

- Midianites (Bible, Numbers 31<sup>1</sup>).
- Battle of Melos (415 BC)<sup>2</sup>.
- Carthage after the Third Punic War (149-146 BC)<sup>3</sup>.
- The Siege and Conquest of Jerusalem during the First Crusade (Godfrey of Bouillon, July 5<sup>th</sup> 1099)<sup>4</sup>.
- Genghis Khan and the Mongol Conquests (1190-1400)<sup>5</sup>.
- Americas’ Conquest by the Spanish *Conquistadores* (after 1492)<sup>6</sup>.

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<sup>1</sup> “1 And the Lord spake unto Moses, saying, 2 Avenge the children of Israel of the Midianites: afterward shalt thou be gathered unto thy people. 3 And Moses spake unto the people, saying, Arm some of yourselves unto the war, and let them go against the Midianites, and avenge the Lord of Midian [...]. 7 And they warred against the Midianites, as the Lord commanded Moses; and they slew all the males. 8 And they slew the kings of Midian, beside the rest of them that were slain [...]. 9 And the children of Israel took all the women of Midian captives, and their little ones, and took the spoil of all their cattle, and all their flocks, and all their goods. 10 And they burnt all their cities wherein they dwelt, and all their goodly castles, with fire. 11 And they took all the spoil, and all the prey, both of men and of beasts. 12 And they brought the captives, and the prey, and the spoil, unto Moses, and Eleazar the priest, and unto the congregation of the children of Israel, unto the camp at the plains of Moab, which are by Jordan near Jericho. [...] 17 [And Moses said unto them] Now therefore kill every male among the little ones, and kill every woman that hath known man by lying with him. 18 But all the women children, that have not known a man by lying with him, keep alive for yourselves. 19 And do ye abide without the camp seven days: whosoever hath killed any person, and whosoever hath touched any slain, purify both yourselves and your captives on the third day, and on the seventh day. 20 And purify all your raiment, and all that is made of skins, and all work of goats' hair, and all things made of wood [...]” (*King James Version*).

<sup>2</sup> See the Melian Dialogue at THUCYDIDES, *History of the Peloponnesian War*, Book V: “[...]the Melians, left to themselves, came to a decision corresponding with what they had maintained in the discussion, and answered: "Our resolution, Athenians, is the same as it was at first. We will not in a moment deprive of freedom a city that has been inhabited these seven hundred years; but we put our trust in the fortune by which the gods have preserved it until now, and in the help of men, that is, of the Lacedaemonians; and so we will try and save ourselves. Meanwhile we invite you to allow us to be friends to you and foes to neither party, and to retire from our country after making such a treaty as shall seem fit to us both. [...]Reinforcements afterwards arriving from Athens in consequence, under the command of Philocrates, son of Demeas, the siege was now pressed vigorously; and some treachery taking place inside, the Melians surrendered at discretion to the Athenians, who put to death all the grown men whom they took, and sold the women and children for slaves, and subsequently sent out five hundred colonists and inhabited the place themselves”.

<sup>3</sup> See POLYBIUS, *The Histories*, Book XXXIX and Nigel BAGNALL, *The Punic Wars: Rome, Carthage, and the Struggle for the Mediterranean*, St. Martins Press, New York, 2005.

<sup>4</sup> See Steven RUNCIMAN, *The First Crusade*, Cambridge University Press, Cambridge, 1980.

<sup>5</sup> See Stephen TURNBULL, *Genghis Kahn and the Mongol Conquests 1190-1400*, Osprey Publishing, Oxford, 2003.

- Atlantic Slavery (1500-1890)<sup>7</sup>.
- The Vendee's Uprising during the French Revolution (1793-94)<sup>8</sup>.
- Africa's Partition after the Congress of Berlin (1884-85) (Conrad's *Heart of Darkness*, 1890). Belgian King Leopold II's dominion of the Congo (1885-1908)<sup>9</sup>.
- The Herero in Southwest Africa (1904-1907)<sup>10</sup>.
- Deportation of the Armenians by the Ottoman Empire, during WWI (1915-16)<sup>11</sup>.
- The Stalin's Terror: The Great Purge (1937-38)<sup>12</sup>.
- The Holocaust, *Shoah*, during WWII (1939-45)<sup>13</sup>.
- Mass deportations during and after WWII with the result of a significant proportion of casualties in the populations involved (The seven nations deported during the war by Stalin (1943-44): Balkars, Chechens, Crimean Tatars, Ingushi, Karachai, Klmyks, Meskhetians). Translocations of people of German ascent from Poland, Czechoslovakia, Hungary, etc. at the end and immediately after the war (*Die vertriebene*: 14 million of expellees)<sup>14</sup>.
- Bangladesh (1971): targeting the Hindu community of East Pakistan<sup>15</sup>.
- Cambodian Khmer Rouges (1975-78)<sup>16</sup>.
- Kurdish region of Iraq (1988): Halabji, near the Iranian border<sup>17</sup>.
- The Dissolution of Yugoslavia (1991-99)<sup>18</sup>.

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<sup>6</sup> One of the first denouncements against plundering and ravaging in the Americas is Fray Bartolomé de las Casas' *Brevísima relación de la destrucción de las Indias* (1542) (English edition: *The Devastation of the Indies. A Brief Account*, The John Hopkins University Press, 1992).

<sup>7</sup> Killing slaves is not in the interest of slave owners, but it is perhaps indifferent to slave traders if they can maximize the profits of transportation and trade itself. See Herbert S. KLEIN, *The Atlantic Slave Trade. New Approaches to the Americas*, Cambridge University Press, Cambridge, 1999.

<sup>8</sup> See Simon SCHAMA, *Citizens. A Chronicle of the French Revolution*, Vintage Books, New York, 1990.

<sup>9</sup> See Adam HOCHSCHILD, *King Leopold's Ghost. A Story of Greed, Terror, and Heroism in Colonial Africa*, Mariner Books, New York, 1999.

<sup>10</sup> See Jon BRIDGMAN, *The Revolt of the Hereros*, California University Press, Berkeley, 1981.

<sup>11</sup> See Donald BLOXHAM, *The Great Game of Genocide. Imperialism, Nationalism and the Destruction of the Ottoman Armenians*, Oxford University Press, Oxford, 2005.

<sup>12</sup> See Vasily GROSSMAN, *Жизнь и судьба*, 1959 (English edition: *Life and Fate*, Harper Collins, New York, 1986).

<sup>13</sup> See Steven T. KATZ, *The Holocaust in Historical Perspective*, Vol. I, Oxford University Press, Oxford, 1994.

<sup>14</sup> See Wikipedia, "Population transfer in the Soviet Union" ([http://en.wikipedia.org/wiki/Population\\_transfer\\_in\\_the\\_Soviet\\_Union](http://en.wikipedia.org/wiki/Population_transfer_in_the_Soviet_Union)).

<sup>15</sup> See Rudolph J. RUMMEL, *Statistics of Democide: Genocide and Mass Murder Since 1900*, Chapter 8 (<http://www.hawaii.edu/powerkills/NOTE5.HTM>).

<sup>16</sup> See Ben KIEMAN, *The Pol Pot Regime. Race, Power, and Genocide in Cambodia under the Khmer Rouge, 1975-1979*, 2<sup>nd</sup> ed., Yale University Press, New Haven, 2002; and Philip SHORT, *Pol Pot. Anatomy of a Nightmare*, John McRae Books, New York, 2004.

<sup>17</sup> See Efraim KARSH, *The Iran-Iraq War. 1980-1988*, Osprey Publishing, Oxford, 2002.

- Rwanda (1994)<sup>19</sup>.
- Darfur (2003-2008)<sup>20</sup>.

In fact, the unraveling of the conditions that drive to collective killing or to wrongful death of entire communities has been soon pervasive in human history – even in Prehistory: sometimes it is asked why the Neanderthal species extinguished –, that **picking up such or such cases as specifically unworthy, when discarding others that might be reasonably compared with the former, has been a matter of factual and normative controversy and, most probably, will remain so, at least for a long time.** *This is, by the way, one of the first grounds that justify analyzing the concepts of genocide and freedom of speech.*

## 1.2. Constructing Genocide

### 1.2.1 Raphael Lemkin (1900-1959)

Anyway, the word “genocide” is a fairly recent one: its current meaning was stone-carved by Raphael Lemkin (1900-1959), a Polish Jewish lawyer, who, appalled by the fate of Jews in his country of birth, and then in Nazi Germany’s occupied Europe, lobbied the legal community for decades and wrote *Axis Rule in Occupied Europe* (1944). In this book, a first definition of genocide appears:

“[...] By “genocide” we mean the destruction of a nation or of an ethnic group. [...]A coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. [...] Genocide is directed against the national group as an entity. [...] Genocide has two phases: one, destruction of the national pattern of the oppressed group; the other, the imposition of the national pattern of the oppressor”<sup>21</sup>.

As the outstanding lawyer he was, Lemkin presented his case selectively in order to prevail: he focused on planned mass killing of ethnic and national groups. And when doing so, he discarded **political groups**, because he knew too well that in the 40’s this enlargement of the concept would make him lose his case. The same could perhaps be said about **deportations of entire communities**, a general political arrangement during and after WWII in Eastern and Central Europe. However, it may be taken into account that, at the time Lemkin was

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<sup>18</sup> See Alastair FINLAN, *The Collapse of Yugoslavia. 1991-1999*, Osprey Publishing, Oxford, 2004.

<sup>19</sup> See Jared DIAMOND, *Collapse. How Societies Choose to Fail or Succeed*, Ch. 8, Viking, New York, 2005.

<sup>20</sup> See M.W. DALY, *Darfur’s Sorrow. A History of Destruction and Genocide*, Cambridge University Press, New York, 2007.

Recently, on the 14<sup>th</sup> of July 2008, the International Criminal Court’s chief prosecutor on Darfur, Luis Moreno-Ocampo, announced the filing of charges against Sudan’s President Omar al-Bashir and other Sudanese leaders on the counts of genocide, war crimes and crimes against humanity.

<sup>21</sup> Raphael LEMKIN, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, Carnegie Endowment for International Peace, Washington, 1944, p. 79.

campaigning, deportations were already prosecutable as crimes against humanity. *This is, again, one second ground that justifies analyzing the concepts of genocide and freedom of speech: denying that prosecution and killing of political groups or that deportation is genocide is, at least, not unfair to the original definition of “genocide”.*

Lemkin succeeded and became one of the most brilliant legal entrepreneurs of the 20<sup>th</sup> Century, but not without costs.

### **1.2.2. The UN 1948 Convention on the Prevention and Punishment of the Crime of Genocide**

In December 9<sup>th</sup> 1948, the General Assembly of the United Nations approved and proposed for signature and ratification the Convention on the Prevention and Punishment of the Crime of Genocide (UN Resolution 260 A (III)), which entered into force on January 12<sup>th</sup>, 1951.

The Convention embodies in its article 2 a concept of genocide, highly influenced by Lemkin's zealous campaigning efforts:

#### *Article 1*

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

#### *Article 2*

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

#### *Article 3*

The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.

Notice that Lemkin's definition of genocide and the Convention's one, although coined in the 20<sup>th</sup> century, are indebted to 19<sup>th</sup> century's Romantic *Weltanschauungen*, that is, to the idea that collective identities are based on nationality, ethnicity or religion.

More recently, the Rome Statute of the International Criminal Court of July 17<sup>th</sup>, 1998 (entry into force: July 1<sup>st</sup>, 2002) has included this same concept of genocide as one of the crimes within the jurisdiction of the Court.

The failure to include political groups in the Convention has been strongly criticized. In this vein, Leo KUPER wrote:

"[...] I believe a major omission to be in the exclusion of political groups from the list of groups protected. In the contemporary world, political differences are at the very least as significant a basis for massacre and annihilation as racial, national, ethnic or religious differences. Then too, the genocides against racial, national ethnic or religious groups are generally a consequence of, or intimately related to, political conflict"<sup>22</sup>.

"Governments engage in large-scale genocidal massacres not only against racial, ethnic and religious groups. The liquidation of political groups is a speciality of governments, though not their exclusive prerogative. [...] However, there are significant differences which do warrant some separate treatment. The liquidation of political groups may, but does not generally, take the form of root and branch extermination, expressed in the slaughter of men, women and children"<sup>23</sup>.

Nonetheless, acts against political groups and deportations are internationally prosecutable as crimes against humanity or, in some cases, as war crimes (see *infra* 2.3.).

## 2. Distinguishing Genocide from Other Crimes

### 2.1. Genocide Features in the Secondary Literature: Adam Jones' Contribution

Adam JONES, in *Genocide. A Comprehensive Introduction*<sup>24</sup>, writes that "**the elements of definition may be divided into 'harder' and 'softer' positions -paralleling the international-legal distinction between hard and soft law**, quoting Christopher Rudolf ("Constructing an Atrocities Regime: The Politics of War Crime", *International Organization*, 55: 3 (summer 2001), p. 659)-: **the former are very strict and discard many possible historical cases of genocide, while the latter are much more inclusive** -one that perhaps even risks trivializing the whole category-".

<sup>22</sup> Leo KUPER, *Genocide: Its Political Use in the Twentieth Century*, Yale University Press, New Haven, 1981, p. 39. See also Leo KUPER, *The Prevention of Genocide*, Yale University Press, New Haven, 1985.

<sup>23</sup> *Ibidem*, p. 55-56.

<sup>24</sup> Adam JONES, *Genocide. A Comprehensive Introduction*, Routledge, London and New York, 2006, p. 19 and ff.



*This is, certainly, a good third ground to protect good faith debate on genocide under the umbrella of freedom of speech.*

Steven T. KATZ<sup>25</sup> presents a hard definition:

“[Genocide is] the actualization of the intent, however successfully carried out, to murder in its totality any national, ethnic, racial, religious, political, social, gender or economic group, as these groups are defined by the perpetrator, by whatever means”.

In 2000, JONES modified the definition in order to make it more operational –more inclusive–: “murder in whole or part”.

Recurring features of genocide, according to Jones, would be the following<sup>26</sup>:

- **Agents:** state and official authorities (controversial: paramilitary groups, colonialist settlers).
- **Victims:** social minorities.
- **Goals:** destruction or eradication of the victim group or its culture.
- **Scale:** ranges from “targeting the group in its totality” (Jews, Tutsi), “in whole or in part”, “mass murder”, “substantial casualties”...
- **Strategies and Intent:** the requirement of “coordinated plan” to achieve some or all the above-mentioned goals; “reasonable expectation”, “awareness of consequences”.

## 2.2. Genocide, Democide, Gendercide and Eliticide

### a) Democide

In another well-known book, *Death by Government*, Rudolph Joseph RUMMEL<sup>27</sup> defined and constructed the concept of **democide** developing the idea that “Power kills; absolute power kills absolutely”:

“The more power a government has, the more it can act arbitrarily ... The more constrained the power of governments, the more power is diffuse, checked, and balanced, the less it will aggress and commit democide [“government mass murder”].

<sup>25</sup> Steven T. KATZ, *The Holocaust in Historical Perspective*, Vol. I, Oxford University Press, Oxford, 1994 (Quoted by Adam JONES, *Genocide*, cit., p. 18).

<sup>26</sup> Adam JONES, *Genocide*, cit., p. 19 and ff.

<sup>27</sup> Rudolph J. RUMMEL, *Death by Government*, Transaction Publishers, New Brunswick, NJ, 1994, p. 1-2.

The Soviet Union, communist China, Germany under the Third Reich, Nationalist China, Cambodia under the Khmer Rouge (Democratic Kampuchea), Turkey under the Young Turks and Kemal Atatürk, Croatia 1941-45...

Jones writes that “revolutionary one-party states are the likeliest offenders” (p. 309), but, in Spain, many would say that civil wars victors are cheerful candidates as well.

### **b) Gendercide**

Historically, sex -or gender- selective killing has followed a pattern: killing adult men, raping and enslaving women and enslaving children. More recently, feminist literature has emphasized women’s rape by conquering soldiers as a condoned consequence of victory: the so-called Rape of Nanking in 1937 China by the Japanese army; massive rapes by the Red Army in Germany at the end of WWII, and more recently in former Yugoslavia and Congo are among the most obvious examples.

### **c) Eliticide**

The Russian Revolution (1917), The Spanish Civil War (1936-39) and its aftermath, Poland’s elites ravaged by Nazis and Soviets (1939-1945): Katyn.

**Whether there is or not a continuum along the lines of genocide, democide, gendercide, eliticide seems to be a legitimate matter of debate**, and therefore, *a fourth ground why freedom of research and speech should be applied in this field.*

## **2.3. Genocide, Crimes against Humanity and War Crimes**

Besides genocide, other international similar criminal offences are prosecutable, particularly, crimes against humanity and war crimes. Their contours are not always crystal-clear since some punishable behaviors overlap.

*The need for legal interpretation in this field provides a fifth ground to support applying freedom of research and speech to these topics<sup>28</sup>.*

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<sup>28</sup> An instance open to discussion is provided by the conflict that outburst in Darfur (Sudan) in February 2003. On the 18<sup>th</sup> of September 2004, the UN Security Council passed Resolution 1564 (2004), which, among other goals, called for a Commission of Inquiry on Darfur to evaluate the scope of the conflict. Afterwards, on the 25<sup>th</sup> of January 2005, the Commission released a report to the Secretary General ([http://www.un.org/News/dh/sudan/com\\_inq\\_darfur.pdf#search=%22un%20report%20darfur%20genocide%22](http://www.un.org/News/dh/sudan/com_inq_darfur.pdf#search=%22un%20report%20darfur%20genocide%22)) in which it was stated that mass murders and rapes in Sudan could not be labeled as genocide since they lacked intent to destroy, in whole or in part, a social group. By contrast, the United States Government reposes the crimes in Darfur as genocide (see <http://www.state.gov/p/af/rls/rm/82941.htm>).

### a) Crimes against Humanity

Crimes against humanity, whether committed in peace or during war time, were firstly defined in the London Charter of the International Military Tribunal, Nuremberg of August 8<sup>th</sup>, 1945, a decree that established the rules and procedures by which the Nuremberg trials (1945-49) were to be conducted, which was confirmed by Resolutions 3(I) of February 13<sup>th</sup>, 1946 and 95 (I) of December 11<sup>th</sup>, 1946 of the General Assembly of the United Nations.

Article 6 of the Charter established that the International Military Tribunal had the power to try and punish persons who, acting in the interests of the European Axis countries, committed crimes against peace, war crimes or crimes against humanity, being the latter defined as:

“[...] murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated”.

More recently, article 7.1 of the Rome Statute of the International Criminal Court of July 17<sup>th</sup>, 1998 defined crimes against humanity as well<sup>29</sup>.

### b) War crimes

Article 6(b) of the London Charter of the International Military Tribunal defines war crimes as:

“[...] violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war

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<sup>29</sup> “1. For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health”.

or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity”.

As far as the notion of «war crimes» include grave breaches of the Geneva Conventions of August 12<sup>th</sup>, 1949<sup>30</sup>, a dose of ambiguity is involved. See, for instance, article 8 of the Rome Statute of the International Criminal Court of July 17<sup>th</sup>, 1998<sup>31</sup>.

### *3. The Spanish Genocide Denial Case: Constitutional Court, Judgment 235/2007, November 7<sup>th</sup> (Plenary Sitting)*

#### **3.1. Issue**

In November the 7<sup>th</sup> 2007, the Spanish Constitutional Case decided a case in which some of the most relevant interactions between genocide and freedom of speech were tackled. The question brought before the Court was whether criminal liability for denying or justifying genocide set forth in section 607.2 of the Spanish Criminal Code (1995) was compatible with freedom of speech as recognized in article 20 of the Spanish Constitution (1978).

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<sup>30</sup> The Geneva Conventions of 12 August 1949 and additional protocols are: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Convention (III) relative to the Treatment of Prisoners of War; Convention (IV) relative to the Protection of Civilian Persons in Time of War; Protocol relating to the Protection of Victims of International Armed Conflicts (Protocol I, 8 June 1977); Protocol relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II, 8 June 1977); and Protocol relating to the Adoption of an Additional Distinctive Emblem (Protocol III, 8 December 2005).

<sup>31</sup> “1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, ‘war crimes’ means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(i) Wilful killing;

(ii) Torture or inhuman treatment, including biological experiments;

(iii) Wilfully causing great suffering, or serious injury to body or health;

(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(vii) Unlawful deportation or transfer or unlawful confinement;

(viii) Taking of hostages.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law [...].

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949 [...].

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law [...].”

*Excursus: an institutional outline of the Spanish Constitutional Court*

The Constitutional Court in Spain, as in many European countries, is a second Supreme Court with venue for constitutionality issues. The Constitutional Court has exclusive jurisdiction on constitutionality matters: only the Constitutional Court may decide a constitutional case. That is a strong difference with the American tradition of diffused jurisdiction.

The Constitutional Court performs its tasks on top of the Cassation Court. In fact, the Constitutional Court is not part of the court system.

The Constitutional Court is ruled by articles 159-165 of the Spanish Constitution and the Constitutional Court Act (*Ley Orgánica 2/1979, de 3 de octubre, del Tribunal Constitucional* -LOTC). The Spanish Constitutional Court is political by design. As it happened before in Italy and, to a lesser extent, in Germany after WWII, the judiciary personnel were not depurated after Franco's Dictatorship and were thus untrustworthy to assure basic democratic entitlements. Therefore, its twelve members are appointed by the Government (2), the Low Chamber (4), the Senate (4) and the General Council of the Judiciary (2) for nine-year terms.

The Spanish Constitutional Court is overwhelmed by successive floods of cases it cannot cope with. Moreover, the Court lacks power to discreetly select which cases it will rule upon as such of the US Supreme Court when deciding to grant a writ of certiorari. In 2007, 10,013 new applications were brought before the Constitutional Court. At the end of 2007, 14,952 applications were pending.

### 3.2. Facts and Proceedings

#### 3.2.1. Facts

According to section 607.2 of the Spanish Criminal Code (1995), the [intentional] dissemination by any means of ideas and doctrines that deny or justify genocide is punishable by imprisonment for 1 to 2 years:

“Dissemination by any means of ideas and doctrines that deny or justify the crimes set forth in the precedent epigraph of this section [acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group] or that aim at reinstating regimes or institutions that shelter practices contributive of those crimes is punishable with imprisonment from one to two years”<sup>32</sup>.

The public prosecutor filed charges for the aforementioned crime, along with other related criminal offences, against Mr. Pedro Varela Geiss, a neo-Nazi activist and owner of a bookshop, who was in the business of selling and distributing books, tracts and leaflets in many of them the *Holocaust* was, as a historical fact, denied, trivialized or justified.

<sup>32</sup> “La difusión por cualquier medio de ideas o doctrinas que nieguen o justifiquen los delitos tipificados en el apartado anterior de este artículo, o pretendan la rehabilitación de regímenes o instituciones que amparen prácticas generadoras de los mismos, se castigará con la pena de prisión de uno a dos años”.



Pedro Varela's bookshop "Libreria Europa"

The Israeli Community in Barcelona and two non-governmental organizations against discrimination, «ATID» and «SOS Racisme», acted as private prosecutors and brought similar charges against the defendant.

### 3.2.2. Proceedings before the Trial Court

On November 16<sup>th</sup> 1998, the Trial Court (*Juez de lo Penal* nr. 3 of Barcelona) found the defendant guilty for the counts of genocide denial or justification (sec. 607.2 Spanish Criminal Code) condemning him to serve two years of imprisonment and another 3-year term for a related crime (incitement to discrimination, racial hate and violence against groups or entities by racist and anti-Semitic motives, sec. 510.1).

### 3.2.3. Proceedings before the Appellate Court

On appeal, the Appellate Court (Third Chamber, Barcelona) stated (*Providencia*, May 7<sup>th</sup>, 1999) that given sec. 18 of the Spanish Penal Code reposes direct incitement to commit a crime, as far as it sets a probable danger, already a crime, it must be decided about the constitutionality of punishing denial or justification of genocide, absent clear and present danger.

### 3.2.4. Referrals to the Constitutional Court for a Constitutionality Ruling on the Subject

Therefore, on June 9<sup>th</sup> 1999, the Appellate Court suspended the proceedings and referred to the Spanish Constitutional Court (*cuestión de inconstitucionalidad*, Section 163 of the Spanish Constitution) a preliminary ruling upon whether punishing denial or justification of genocide, absent clear and present danger, infringed the freedom of speech provisions of the Spanish Constitution<sup>33</sup>:

“Punished behavior consists of spreading those doctrines and ideas”.

“The legal interests protected by section 607 of the Penal Code are very diffuse (=vague) (...) [that is to say] avoiding the creation of a climate favorable to discriminatory conduct”  
(*Antecedente 3º*, ATC 24/2000)

Nevertheless, this first referral was rejected by the Constitutional Court on procedural grounds (section 35.2 LOTC<sup>34</sup>).

On September 14<sup>th</sup> 2000, the Appellate Court referred the same question to the Constitutional Court for the second time and on the same material grounds, and in this occasion the Court took the case (*Providencia* October 31<sup>st</sup>, 2000).

### 3.2.5. Proceedings before the Constitutional Court

#### a) Pleadings submitted by the Legal Counsel for the Government

For the Government, the Legal Counsel before the Constitutional Court opposed the referral on three grounds:

##### *State's Self-Defense*

First, section 607 was to be considered as a “legitimate defense means of minorities”.

##### *Deference to the Legislative*

Second, its aim was avoiding “carrying out behavior that the Legislative has evaluated as causes of the most direct thrust (or impulse) to the commitment of serious offences that harm the most essential interests of human coexistence (togetherness) and this causal

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<sup>33</sup> Article 20.1 Spanish Constitution (1978): “The following rights are recognized and protected: 1. the right to freely express and spread thoughts, ideas and opinions through words, in writing or by any other means of reproduction. 2 .the right to literary, artistic, scientific and technical production and creation. 3.the right to academic freedom. 4. the right to freely communicate or receive truthful information by any means of dissemination whatsoever. The law shall regulate the right to the clause of conscience and professional secrecy in the exercise of these freedoms”.

<sup>34</sup> According to Spanish Law, referrals to the Constitutional Court shall be brought at the end of the proceedings just before the Court is to issue its decision.

connection (...) is neither occasional or sudden legislative caprice, nor any unreasonable or excessive presumption, but the product (consequence) of painful historic experiences (...)"

#### *Slippery Slope*

Moreover, "professing ideas or doctrines denying genocide (...) might incentivate still not well known psychosociological means, and create a social atmosphere that, as the Nazi Germany developments show, starts with legal discrimination to the access to public positions and professions, follows with the encouragement (stimulus) to the emigration of a chunk of the population, and spreads and intensifies to all fields of human coexistence until the extremes of extermination and annihilation well documented by History" (Finding 7).

#### **b) Pleadings submitted by the General Public Prosecutor**

For the Government as well, the General Public Prosecutor supported two grounds:

#### *Offensive Speech*

Distinguishing between "Simple statements, doubts or opinions about the Jewish Holocaust", that were to be protected by the Freedom of Speech clause of the Spanish Constitution, and "opinions that include offensive value judgments, imputations made in dispute or contempt of the victims themselves" that were not (Finding 8).

#### *Incitement*

The rule aims not to "the simple spreading of ideas or opinions, but (...) to the protection of society from behaviors that, with systematic psychological preparation of the whole population, through propaganda, would generate a climate of violence and hostility that, in an indirect way, could materialize in specific acts of racial, ethnic or religious discrimination". So understood (or constructed) Section 607 was to be constructed as an "(abstract) endangerment crime" (*delito de peligro abstracto*).

### **3.3. The Ruling: the Illegitimacy of Simple Genocide Denial as a Crime (Opinion for the majority delivered by Associate Justice Eugeni Gay Montalvo)**

The issue, according to the Court as stated in finding 3<sup>rd</sup>, is whether the criminalization in sec. 607.2 of the Criminal Code of plain dissemination of ideas and doctrines denying or justifying genocide infringes or not the freedom of speech protected by sec. 20.1 of the Constitution:

"This Court notices an evident clash between sections 607.2 and 20.1. We have said in Judgments 214/1991, November 11<sup>th</sup>, and 176/1995, December 11<sup>th</sup>, that sec. 20.1 protects subjective and biased opinions on pacific historical facts even though they are mistaken or



lacking justification, unless they involve either contempt towards human dignity or a risk to pacific coexistence among citizenry”.

The test is, therefore, that under the constitutional protection of freedom of speech individuals would be free to utter opinions denying or justifying genocide unless they offend human dignity or create actual danger to public peace. This is nonetheless a controversial finding.

#### **a) Historical debates or discussions**

In finding 4<sup>th</sup> of the opinion, the Court, after quoting the ECHR case-law<sup>35</sup>, states that:

“[T]he search of historical truth is protected by freedom of speech and Courts shall not be competent to settle historical controversies”.

#### **b) Simple or plain denial**

According to the Court:

“The issue upon we shall rule is whether denial of facts that might be reputed as barbarous acts or its justification might enter in the field of the free public debate protected by sec. 20 of the Constitution or, on the contrary, might be subjected to punitive government action since they affect protected constitutional entitlements”.

To assess this issue the Court insisted, in finding 4<sup>th</sup>, in the dual grounding of freedom of speech as both an individual freedom to foster personal projects, lifestyles and human projects in interactions with other human beings and a basic communitarian guarantee for the formation of better public discourse in a democratic system<sup>36</sup>:

“Rights protected by sec. 20.1 of the Spanish Constitution entail not only a basic individual freedom, but also a substantial shaping element of our democratic political system”.

Beyond the individual foundation of freedom of speech, the emerging holistic ground provides an institutional approach in which pluralism and tolerance to offensive ideas are embodied:

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<sup>35</sup> See *Chauvy v. France* (ECHR Judgment of June 29<sup>th</sup> 2004; no violation of freedom of speech by fines and damage award resulting from publication of a book in which the author cast some doubts on responsibility of member of French Resistance, Raymond Aubrac’s, for the detention and torture of Jean Moulin by Klaus Barbie, head of the local Gestapo in Lyon) and *Monnat v. Switzerland* (ECHR Judgment of September 21<sup>st</sup> 2006; violation of freedom of speech by legal embargo upon a documentary in which Switzerland Government and elites’ relations with Nazi Germany during WWII and attitudes towards Jews were described).

<sup>36</sup> In this same vein, see the ECHR decisions: *Handyside v. UK* (ECHR Judgement of December 7<sup>th</sup> 1976); *Castells v. Spain* (ECHR Judgment of April 23<sup>rd</sup> 1992) and *Fuentes Bobo v. Spain* (ECHR Judgment of February 29<sup>th</sup> 2000).

“[...] In this vein, we have always said that, under the shelter of freedom of speech, any opinion is protected, even though the audience might find it unreasonable or dangerous and also when the utterance attacks the democratic system itself. The Constitution also protects who rejects it [...]. That is to say, freedom of speech works not only for the dissemination of facts or opinions well-received, inoffensive or indifferent, but also for those ones that are against, shock or disturb the government or a part of the population [...]”.

“By historical reasons, our constitutional ordering lies on the widest guarantee of fundamental rights, which may no be limited on the grounds that they are used to further unconstitutional goals. As it is known, in our system –not so in other systems of our legal environment–, there is no room for a model of «militant democracy», that is to say, a model in which not only respect but loyal adherence to law and, above all, to the Constitution is ordered [...]. This notion, doubtlessly, comes into sight with remarkable intensity in the constitutional regulation of free thought, free participation in public affairs, free expression and free information [...], because it entails the urgent need of setting clear boundaries between behaviors that do not merit protection and the very dissemination of ideas and ideologies [...]”.

“Therefore, the constitutional scope of freedom of speech shall not be abridged when it is used to advance dissemination of ideas or opinions against the core of the Constitution itself [...] unless they actually infringe rights or entitlements of constitutional relevance”.

“Assertions, suspicions and opinions about the Nazi actions against Jews and about concentration camps, regardless of how reprehensible and distorted they may be –and actually they are by denying evidence– are protected by freedom of speech”.

According to the Constitutional Court, the simple denial of genocide as a historical fact without adding any subjective value judgment whatsoever is speech protected by the Constitution. However, the Court seems to contradict itself:

“[...] Even if tolerance is one of the basic principles of coexistence [...], its value might not be easily identified with leniency towards discourses disgusting for any conscience conscientious of the atrocities committed by the totalitarian systems of our age”.

By contrast, positive value judgments, denials of wrongfulness of the deed –that is, publication of ideas or doctrines that praise the wrong or extol the wrongdoer–, or imminent incitement giving support to its correctness may be criminally punished (Finding 5<sup>th</sup>)<sup>37</sup>:

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<sup>37</sup> In order to support its grounds, the Court recalls the ECHR’s case-law on Holocaust denial and, in particular, it refers to the Strasbourg Court’s judgments in *Lehideux and Isorni v. France* (Grand Chamber Judgment of September 23<sup>rd</sup> 1998) and in *Garaudy v. France* (Inadmissibility Decision of July 7<sup>th</sup> 2003). See *infra* epigraph 4.

### c) Disdaining the victims

“[...] Free flow of ideas is not an absolute right. Categorically, dissemination of outrageous and offensive utterances unnecessary for the expression of ideas and opinions fall outside the right’s scope of protection [...]. Particularly, concerning racist or xenophobic ideas, utterances or campaigns, sec. 20.1 of the Constitution does not guarantee the right to express and disseminate a particular conception of history and the world with the willful intention of disdaining or discriminating individuals or groups on personal, ethnic or social grounds. [...]”.

### d) Glorifying genociders

“Constitutional recognition of human dignity frames the conditions in which fundamental rights shall be exercised and grants no constitutional coverage to praising tyrants, glorifying their publicity or justifying their actions if they entail humiliation to their victims [...as it occurs with] offensive valuations against the Jewish People, uttered in the context of denying the Nazi genocide”.

### e) Inciting violence

“These limits are essentially coincident with those recognized by the European Court of Human Rights. [...] Freedom of speech does not cover the so-called «hate speech», that is, speech that involves direct incitement to violence against citizens or against particular racial or ideological groups”.

## 3.4. Dissenting Opinions

### 3.4.1. Roberto García-Calvo: Denial as an Abstract Endangerment Crime and Slippery Slope

Associate Justice Roberto García-Calvo follows the line of argument submitted by the legal counsel for the Government according to which genocide denial is an abstract endangerment crime (“*delito de peligro abstracto*”), different from “the concrete danger represented by the shot in the back of the neck, the car bomb or the expelling of specific groups of people from a territory”.

Criminalization of genocide denial aims at preventing “the furthering of psycho-sociological resorts, not adequately known, and the enhancement of a social atmosphere that, as shown by developments in the Nazi Germany, begins with legal discrimination in the access to public and professional positions, follows with stimuli to immigration of particular parts of the population and reaches all community spaces up to the destruction and extermination, as engraved in History”.

### 3.4.2. Jorge Rodríguez-Zapata: Condoning Denial Implies Falling from an Honor List

Associate Justice Rodríguez-Zapata regrets that Spain falls from the honor list composed by many EU members and Israel that have made genocide denial a crime. However, as he asserts, the exception list includes the United Kingdom and the Scandinavian countries.

Besides, he believes that sec. 607.2 of the Spanish Criminal Code aims at preventing anti-pluralism, which “might nowadays entail «a clear and present danger»” that ground, among other rationales, the criminalization across Europe of denial and grossly trivialization of genocides, as suggested by the Proposal for a Council Framework Decision on combating racism and xenophobia (April 20<sup>th</sup> 2007). By the way he mentions that this possibility lies in the differences between the European culture of freedom of speech and the American one.

### 3.4.3. Ramón Rodríguez Arribas: Permitting Denial as Democracy Self-defeating

Associate Justice Rodríguez Arribas believes that denying genocide is always a form of negationism that *per se* involves contempt for its victims. He does not mean to “promote a form of «militant democracy» but to “prevent «naïve democracy», in which the supreme value of coexistence protects those who seek to demolish it”.

### 3.4.4. Pascual Sala Sánchez: Excusing Denial Might Violate Future European Union Legal Developments

Associate Justice Sala Sánchez supports the constitutionality of sec. 607.2 of the Spanish Criminal Code: denial, as embodied in the aforementioned section, goes beyond “the aseptic factual denial” –that is, the scope of interpretation given by the Constitutional Court–, and requires indirect incitement to hatred. In this vein, to be punishable, denial should include a value judgment.

Moreover, he believes that interpretation of sec. 607.2 must be put in relation with the meaning embodied in the Proposal for a Council Framework Decision on combating racism and xenophobia (April 20<sup>th</sup> 2007), which requires, in order to be prosecutable, that denial or grossly trivialization of genocides involve incitement to violence or hatred against some social groups.

## 3.5. Comments on the Ruling of the Majority

According to the ruling of the majority, simple denials of genocide, even in the case of the Holocaust, may not be criminally prosecuted and punished as a statutory crime because such utterances are protected by the freedom of speech clause of the Spanish Constitution. Only positive value judgments on genocide, that is to say, statements either glorifying or extolling it or minimizing or trivializing its consequences, might be punished as, indeed, they are in accordance with the provisions of the Spanish Criminal Code.

At first view, this ruling is rather startling because in the freedom of speech tradition, from John MILTON (1608-1674) to John Stuart MILL (1806-1873) and from Oliver W. HOLMES, Jr. (1841-1935) to Alexander MEIKLEJOHN (1872-1964), opinions have always been much more protected than false statements of fact: opinions are free but lies have no constitutional value (E.g. U.S.S.C. in *Gertz v. Robert Welch Inc.* (418 U.S. 323 (1973)))<sup>38</sup>.

Moreover, statements of fact tend to be empirically testable, that is to say, assessable in terms of truth and falsity whilst opinions are not<sup>39</sup>. At first glance, it seems weird to contradict a well-received tradition which has passed the test of time. False statements of fact are worthless and, sometimes, even dangerous. By contrast, the radical opinions of yesterday can be orthodox these days and the other way round. Ideas as such are harmful only in the minds of those who think they have the monopoly over ideological correctness. At least, if we can manage operative tests good enough to distinguish between ideas and incitements to act.

Therefore, we should further ask why the Court decided as it did. Before rushing up to criticize the ruling, we should make our best efforts to seek for any possible good grounds justifying it and, indeed, there are some perhaps:

- Historical genocides have never been neither geographically, nor culturally universal. Even in the worst cases, the deeds have been temporally and geographically localized. As far as we know, there has not been any universal genocide. The Holocaust, the Cambodia genocide or the Rwanda one, to take three generally accepted instances, happened in well definite times and places: in the territories occupied by Nazi Germans during WWII, in Cambodia from 1975 to 1978 when it was ruled by Pol Pot's Regime, and in Rwanda between April and Mid-July 1994.
- Of course, it is not just a matter of time or geography. It is culture and living conditions as well: these three cases of undeniable genocide were embedded in definite cultural frames: Nazi's Germany and occupation of foreign territories in war time, Khmer Rouge Cambodia and interethnic strife in an unbalanced country ravaged by poorness, hunger and havoc. From a worldwide perspective, it is perhaps well-grounded to punish and prosecute genocide denials in places and cultures that nurtured it but not indiscriminately all over the world. So the decision not to prosecute statements of fact even if they are false or inextricably misguided does not necessarily make sense when applied to a country where nobody ever committed similar deeds. Therefore, the Court's

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<sup>38</sup> The underlying idea would be that opinions say nothing about reality but much about the speaker. Opinions are free because they basically inform about the speaker, which is not really important for an individual in gathering information about the state of affairs. The crucial concern is to distinguish opinions from insults, threats and incitements.

On the other hand, lies misinform about reality and about the speaker. Anyway, an important distinction must be traced among lies, silence – the right no to declare against oneself – and secrets: lies, as a matter of fact, tend to be worthless; silence is usually worthy and, in any case, a basic entitlement in a free society; and secrets are a necessity in diplomatic matters, if not in all valuable trades.

<sup>39</sup> At least if you are not a moral cognitivist.

ruling might well be right. As it happens with individuals, each and every culture has sinned in its own way. Prosecuting genocide denial as blasphemy makes only sense in cultures that have suffered it.

- Then, permitting genocide denial under the umbrella of freedom of speech might be tolerable when one pauses to think that, as we have discussed before, the larger notions of genocide are too wide to be compatible with the rule of law. So, making genocide denial a universal crime would not only be most simply unfeasible but it would also empower any jurisdiction with venue to decide whether dozens or perhaps hundreds of historical facts could be taken as a ground enough to prosecute crazy people who perhaps even in good faith rebuffed this or that fact as genocidal. Eccentricity, weirdness, even craziness can be silly and in many cases a disgrace but not a felony. Again we strongly feel almost obliged to raise the following questions: who makes the list? Who writes the canon? May we substitute religion for history? Priests for judges? Silence for debate?
- Moreover, perhaps implicitly, the Spanish Constitutional Court posits itself in the line of thought that flatly denies the inherited wisdom according to which statements of fact are testable in terms of truth but normative or value judgments are not. Indeed, it is well known that social constructivism and post modernism, which thrived in the 70s and 80s, strongly defended that every discourse is constructed, that language belongs to reality and, therefore, words and utterances may well be so harmful and spears or stones. So, the simple utterance of words should be criminally prosecuted in the same way as physically striking somebody usually is. The authors of this short essay are legal scholars, neither psychologists nor criminologists, and we would not dare to deny that, at least in some occasions, words can be indeed as harmful as punching somebody. We acknowledge that it also belongs to the doctrinal tradition of freedom of speech the tenet according to which insulting and offending speech is not protected.
- Nevertheless, at the very end, we agree with the ruling embraced by the majority of the Spanish Constitutional Court. The Court stops short of candidly but dangerously generalizing that speech denying genocide is always, without exceptions, harmful and thus punishable. The Court explicitly states that if the denial is accompanied by insult, contempt or even disdain, then it may be punished as a criminal offence. What the majority defends is that there is a difference between denying on the one hand and denying and insulting on the other: it was the burden for the minority to show that this was not the case. If this was so and at least in this occasion, the minority judges missed the chance of producing persuasive evidence enough to show beyond any reasonable doubt that the majority was flatly wrong. So at least in this case, radical social constructivism was duly rejected by the majority, whose ruling seems to us to be good for freedom of speech in debate and not necessarily bad for those like us who think that genocide is the utmost dark deed.

### 3.6. Aftermath: Barcelona Court of Appeals Judgment of March 3rd, 2008

On March 3rd, 2008, the Court of Appeals of Barcelona delivered its final judgment in the *Pedro Varela* case in which reversed the Trial Court's conviction and lowered the defendant's criminal liability.

The Court of Appeals found Mr. Varela guilty of the crime of justifying genocide set forth in sec. 607.2 of the Criminal Code and condemned him to serve 7 months of imprisonment. In this vein, the Court considered that the Trial Court had erred in qualifying the defendant's behavior as a continuous crime and regarded undue delay in the procedure as an extenuating circumstance to mitigate punishment (art. 21.6 Criminal Code).

## 4. ECHR's Leading Cases on Holocaust Denial

The Spanish Constitutional Court refers to the European Court of Human Rights (ECHR)'s case law on Holocaust denial as authorities to support its grounds. Before analyzing the two leading cases on the subject – *Lehideux and Isorni v. France* and *Garaudy v. France* –, some hints about the ECHR institutional settings are introduced.

#### *Excursus: an institutional outline of the ECHR*

The ECHR was established under the European Convention of Human Rights of 1950 or Rome Convention (signed and opened to signature on November 4<sup>th</sup> 1950) to control compliance by signatory countries. In its origins, the Court was primarily a legal weapon to contain communism spread in Europe. Nowadays, it works rather well as a filter in checking the rule of law in matters affecting human rights, not without flaws anyway.

Besides articles 19-51 of the Rome Convention, the ECHR is governed by the Rules of Court and the protocols to the Rome Convention, especially, Protocol No. 11, which came into force on 1 November 1998, and replaced the existing part-time Court and Commission by a single full-time Court.

The post-Protocol No. 11 ECHR resembles more of an assembly rather than a real court since it is comprised by a number of judges equal to that of the Signatory countries (currently, forty-seven), regardless of demographic, geographic and economic differences between countries (Russia and Andorra have both one appointed judge). Judges are elected by the Parliamentary Assembly of the Council of Europe, which votes on a shortlist of three candidates put forward by Governments. The term of office is six years, and judges may be re-elected. Their terms of office expire when judges reach the age of seventy. So, without raising a strong critique, we might think of the members of the Court as Ambassador-Judges.

Under the Rules of Court, every judge is assigned to one of the five Sections, whose composition is geographically and gender balanced and takes account of the different legal systems of the signatory countries. The composition of the Sections is determined by the Plenary Court, which elects as well the Section Presidents. The great majority of the ECHR judgments are given by Chambers, which comprise

seven judges and are constituted within each Section. The judge elected in respect of the respondent state sit in each case as an *ex officio* member.

Committees of three judges are set up within each Section for twelve-month periods. Their function is to dispose of applications that are clearly inadmissible. According to article 35 of the Rome Convention, the filtering works aims at checking specifically whether:

- 1) The applicant exhausted all domestic remedies.
- 2) The application was filed within a period of six months from the date on which the domestic final decision was taken.
- 3) The application is not anonymous.
- 4) The application raises questions already covered by well-established ECHR case-law.
- 5) The application is incompatible with the provisions of the Convention, ill-founded or an abuse of the right of application.

Moreover, article 12 of Protocol No 14 of May, 13<sup>th</sup> 2004 (not yet in force due to lack of signature by Russia) states that the Court shall declare inadmissible any individual application if the applicant had not suffered a significant disadvantage.

In 2007, the ECHR received 54,000 new applications. At the end of 2007, 103,850 applications were pending before the court (significantly, in 26% of them the respondent State is Russia).

The Grand Chamber of the Court comprises seventeen judges, who include, as *ex officio members*, the President, Vice-Presidents and Section Presidents (all of them elected by the Plenary Court). The Grand Chamber deals with cases that raise a serious question of interpretation or application of the Convention, or a serious issue of general importance. A Chamber may relinquish jurisdiction in a case to the Grand Chamber at any stage in the procedure before judgment, as long as both parties consent (article 30 of the Rome Convention). Besides, either party may, within a period of three months, request referral of the case to the Grand Chamber once a judgment has been delivered in a case (article 43 of the Rome Convention).

#### 4.1. Extolling the Wrongdoers: *Lehideux and Isorni v. France* (Grand Chamber Judgement of September 23<sup>rd</sup> 1998)

The ECHR's leading case on tyrants' praise is *Lehideux and Isorni v. France*. On July the 13<sup>th</sup> 1984, the applicants, Mr. François Lehideux –President of the Association for the Defence of the Memory of Marshal Philippe Pétain and Minister for Industrial Production in the Vichy Regime between 1940 and 1942– and Mr. Jacques Isorni –legal counsel who defended Marshal Pétain before the French High Court of Justice– along with others published an advertisement in *Le Monde*, a French national newspaper, in which the public figure of Marshal Philippe Pétain (1856-1951), First World War (1914-1918) military hero and later Chief of State of Vichy France's, was eulogized. The advertisement also criticized the High Court of Justice's judgment from August the 14<sup>th</sup> 1945 that sentenced Marshal Pétain to death for collusion with Nazi Germany with a view to furthering the designs of the enemy, a sentence which was commuted to life imprisonment by President Charles de Gaulle because of Pétain's age and his contributions during WWI.



The National Association of Former Members of the Resistance filed a criminal complaint against the advertisement's authors for aiding and abetting a public defence of the crimes of collaboration with the enemy (apologia).

The Court of Appeals and the Court of Cassation found the defendants guilty.

Mr. Lehideux and Mr. Isorni applied to the ECHR and alleged a breach of article 10 of the Rome Convention (freedom of expression).

The Court holds by fifteen votes to six that there has been a breach of article 10 of the Convention. For the Court, presenting Philippe Pétain in an entirely favorable light and silencing any of the offences for which he was sentenced to death by the High Court of Justice are protected statements by freedom of speech that form "part of the efforts that every country must make to debate its own history openly and dispassionately". The Court notices that the historical debate is still open among historians: "it does not belong to the category of clearly established historical facts – such as the Holocaust – whose negation or revision would be removed from the protection of Article 10". Actually, the authors of the text did refer to "Nazi barbarism" and "Nazi atrocities and persecutions", without adding that the Vichy Regime contributed to them.

#### **4.2. Disdaining the Victims: Garaudy v. France (Inadmissibility Decision of July 7th 2003)**

The ECHR, in its inadmissibility decision of July 7<sup>th</sup> 2003 in *Garaudy v. France*, outlined the boundaries that apply to the dissemination of some utterances such as those concerning the Holocaust and the Jewish Community. The applicant, Mr. Roger Garaudy, a well-known leftist activist and writer converted into Islam, published a book entitled *The Founding Myths of Modern Israel* in which the Holocaust was minimized and trivialized along with passages in which the State of Israel policies and the Jewish Community were criticized.

Five separate sets of criminal proceedings were brought under the Freedom of the Press Act of 29 July 1881. The applicant applied unsuccessfully for them to be joined. In five judgments of 16 December 1998, the Paris Court of Appeal found Mr. Garaudy guilty of disputing the existence of crimes against humanity, public defamation of a group of people – namely the Jewish community – and incitement to discrimination and racial hatred. The convictions were upheld by the Court of Cassation in five judgments of 12 September 2000<sup>40</sup>.

The applicant complained, among others, under Article 10 of the Rome Convention (freedom of speech). The ECHR declares the complaint inadmissible. Concerning the Holocaust trivialization, the Court clearly states that "[t]here can be no doubt that denying the reality of clearly

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<sup>40</sup> It is noticeable that Mr. Roger Garaudy's lawyer was Jacques Vergès (1925), a famous French attorney known for having defended both right and left-wing militants, among others, Klaus Barbie, Slobodan Milošević, Ilich Ramírez Sánchez a.k.a. Carlos the Jackal and some leaders of Khmer Rouge as well. After Milošević rejected any legal counsel before the International Criminal Tribunal for the former Yugoslavia, Vergès published his pleadings in a book entitled *Justice pour le peuple serbe*, in which the Srebrenica's massacre was minimized. See Jacques Vergès, *Justice pour le peuple serbe. La plaidoirie que j'aurais prononcée devant le tribunal pénal international*, Éditions L'Age d'Homme, Paris, 2003.

established historical facts, such as the Holocaust, as the applicant does in his book, does not constitute historical research akin to a quest for the truth. The aim and the result of that approach are completely different, the real purpose being to rehabilitate the National-Socialist regime and, as a consequence, accuse the victims themselves of falsifying history. Denying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order”.

Besides, in December, the 10<sup>th</sup> 2007, after the Constitutional Court ruled on the *Pedro Varela* case, the ECHR Grand Chamber delivered its judgment in the case of *Stoll v. Switzerland* which included some relevant remarks about how information on the Holocaust should be made public. The Court held that there were no violation of Swiss journalist Martin Stoll’s freedom of expression by the sentencing of the applicant to payment of a fine for having disclosed in the press a confidential report by the Swiss ambassador in the US relating to the Swiss Government role in the negotiations between Swiss banks and the World Jewish Congress on the subject of compensation due to Holocaust victims for unclaimed assets deposited in Swiss bank accounts. Although the case is not specifically on revisionism or genocide denial, the Court assesses the style of the publication and states that “the applicant, in capricious fashion, started a rumour which related directly to one of the very phenomena at the root of the issue of unclaimed assets, namely the atrocities committed against the Jewish community during the Second World War. The Court reiterates the need to deal firmly with allegations and/or insinuations of that nature” (§ 148).

## 5. Concluding Remarks

As a matter of fact, denial is paradigmatically associated with Holocaust denial because the Jewish culture and community have been historically and systematically persecuted – in Spain, Russia, Central Europe and, conceivably, in the near future if stable peace is not achieved in the Middle East –. However, denial and revisionism are not exclusive of the Holocaust.

Moreover, defining “denial” is a daunting task as Adam Jones has shown, since it may entail different degrees:

- Rejecting historical facts: “Nobody died”.
- Discussing the degree of the deed: “Almost anybody died, not six million in any case”.
- Disregarding or multiplying causes: “Wartime conditions and various illnesses caused most deaths”; “smallpox killed Amerindians, not conquerors”.
- Disagreeing about intent or central planning: “Anomy or anarchy – created by war – killed, not the State”, “*descontrolados*”, “unorganized and spontaneous violence”, ...
- Denying genocide while praising or condoning massive killings as revolutionary endeavors: “That was revolution, not genocide”.
- Asserting self-defense: “It was either they or us”.

- Alleging reciprocity: “tit for tat”, “Mutual Assured Destruction”.
- Claiming for exclusivity: “Only us were genocide victims”.
- Advocating for a short list of historical genocides, while excluding other possible candidates: “Jews in WWII, but not Armenians in WWI”.
- Opposing bills revising or qualifying History<sup>41</sup>.
- Urging abrogation of (criminal) statutes about genocide.

For some, if not many, genocide denial is viewed as a final stage of genocide implying that the deeds are coming back. According to Roger Smith, Eric Markusen and Robert Jay Lifton, “[d]enial contributes to genocide at least in two ways. First of all, genocide does not end with its last human victim: denial continues the process ... [Second] denial may increase the risk of future outbreaks of genocidal killing”<sup>42</sup>. Therefore, criminalizing denial is seen a preemptive strategy. However, this conclusion prompts an analytical and normative discussion:

- a) Non sequitur? Does the deed follow any denial whatsoever or only some forms of speech uttered, written or broadcasted in some circumstances (that is the old well-known test of “time, manner and place)? Besides, only if there is clear and imminent danger following incitement as with the broadcastings of *Radio Télévision Libre des Mille Collines* in Rwanda in 1994?
- b) Attempts to prevent genocide by policing and criminally prosecuting the culprits or, more precisely, prohibiting totalitarian ideologies that in the recent past have denied or incited or were directly involved in genocidal practices have proven, to put it candidly, inconclusive. In this vein, from an empirical standpoint, would the Yugoslavia WWII and its aftermath history of prosecution of genocidal pro-Nazis –Croatian militia– help to explain what happened in the 80’s and 90’s with some of the most flagrant examples of genocidal practices as the Srebrenica massacre (July 1995)?
- c) Is denial a reasonable explanation or simple speculation? Is it -plainly stated- in all cultures and times normatively wrong?
- d) Do traditional –John Stuart Mill- justifications of free speech work in denial cases? “Free speech is only valuable at the margins”.
- e) Is any flat denial an insult? “I honestly do not believe that such historical event be Genocide, with full respect of contrary opinions”.
- f) Does denial generate fruitful research? “Backlash better than punishment”.
- g) Who makes the list? Who writes history? Who freezes the Canon? *Quis custodiet custodies?*

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<sup>41</sup> In January 30<sup>th</sup> 2007, a resolution (H.Res. 106) that labels the deaths of Ottoman Armenians during WWI as genocide was submitted to the US House of Representatives. By mid-October, many Republican and Democratic Congressmen, urged by President George W. Bush and eight former Secretaries of State, withdrew their support to the resolution (See *The Economist*, October 18<sup>th</sup> 2007).

<sup>42</sup> Roger SMITH, Eric MARKUSEN and Robert Jay LIFTON, “Professional Ethics and the Denial of the Armenian Genocide”, in Richard HOVASSINIAN (Ed.), *Remembrance and Denial: The Case of the Armenian Genocide*, Wayne State University Press, Detroit, MI, 1999, p. 287 (quoted by Jones, 355).

Taking into account the inherited wisdom and some remarkable works as Adam JONES' book, which is the backbone of this essay, and other remarkable contributions, such as Jared DIAMOND'S *Collapse*<sup>43</sup> and Paul COLLIER'S *The Bottom Billion*<sup>44</sup>, we perhaps can advance a bunch of settings that may be fertile grounds in which the likelihood of civil conflict, havoc and then genocide might increase.

Some years ago, Jared DIAMOND in *Collapse* showed how the Rwanda genocide was an announced tragedy.

In a very recent book, Paul COLLIER –*The Bottom Billion*– offers a new statistically-funded approach to identifying the prior conditions of prospective genocidal practices. This series of factors, specifically if they occur simultaneously, seem to increase the development if not the risk of unraveling genocide:

- a) Multiethnic societies and a tradition of multiethnic conflict: India, Kenia, Rwanda, Sudan...
- b) Severe economic crisis.
- c) Institutionalized discrimination and power monopolized by one group.
- d) One-party state.
- e) Destruction of the State system: paralegal and paramilitary encouraged by the Government (Spain, Yugoslavia, ...).
- f) Hate propaganda and lack of decentralized independent-owned and strong channels of free speech.
- g) Systematic repression unchecked by an independent judiciary.
- h) Denial of habeas corpus
- i) Infringement of freedom of residence as a first stage to deportation.

It is very frequently said that education, even indoctrination, is a good way to prevent future genocides. This way of thought has its roots in the famous idea of knowledge as good. However, the authors of this short essay remain rather skeptical. History of genocide in the last century shows how some genociders have had the best educations in their respective societies. After WWII, the notorious leader of Khmer Rouge and the very avatar of mass-killing, Pol Pot, attended one of the most distinguished Universities in Paris, as it happened with other leaders of the Cambodian genocide.

Finally, any thinkable freedom of speech scholar should quote the common sense statement rendered by an old judge, whose long life underwent at least the horrors of the American Civil

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<sup>43</sup> Jared DIAMOND, *Collapse. How Societies Choose to Fail or Succeed*, Viking, New York, 2005.

<sup>44</sup> Paul COLLIER, *The Bottom Billion. Why the Poorest Countries are Failing and What Can Be Done About It*, Oxford University Press, New York, 2007.

War: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic"<sup>45</sup>.

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<sup>45</sup> *Schenck v. United States* (249 U.S. 47 (1919)).

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