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MASS KILLINGS ARE AS OLD AS HUMANITY. The first genocide of the 20th century, often overlooked, was in 1906 in what is now Namibia, Africa, when the Germans destroyed the Herero. The only person in Europe to denounce that was Rosa Luxembourg. No one cared. The real turning point, if one had to date it, was in 1915, with the genocide of the Armenians by the Turkish government.

I was born in 1933. Becoming an adult in Europe in the second half of the 20th century meant that you were bound to reflect on the meaning of totalitarianism, in its twin Nazi and Communist forms. Nazism lasted 12 years and undertook the genocide of the Jews. The Soviet regime lasted 80 years, three generations. All the elites were killed, “disappeared,” exiled.

Totalitarian regimes destroyed not only civil liberties; they destroyed private life. The Soviets invented the denunciation of parents by their children and gloried in it. The Stasi in East Germany used thousands of people to spy on one another—not just informers but family members might betray you. It caused the utter destruction of private life. By contrast, when Dostoyevsky was sent to Siberia, he went there with his servants, who gave him his tea every afternoon. The Nazi death factories and the Soviet camps were not like that.

I was for many years a member of the Conseil d’Etat, France’s supreme court for administrative law, where judicial review of administrative action involved the protection of civil liberties. During the 1950s and ’60s, there was a war in Algeria which saw atrocities and substantial restrictions of freedoms on both sides, with no adequate judicial response. It led me to reflect on the vulnerability of the liberal legal order. In the 1960s and ’70s, I studied closely the nature of Nazi totalitarianism, in particular the genocide of the Jews and how it was achieved. The reading of Hannah Arendt’s *The Origins of Totalitarianism* and *Eichmann in Jerusalem* was seminal for me. I wrote about her, published two of her books in France, and, in 1973, interviewed her for French television.

Then, the Communists: I read most of the writings of Russian, Polish, and Czechoslovak dissidents. During the spring of 1968, I visited Poland and Czechoslovakia and witnessed the hopes of the Prague Spring. From 1973 to 1977, my wife and I spent the end of each year in Prague, where we met people who had paid a heavy price to keep their integrity and self-respect in a regime that did everything to destroy both. I remember the day in January 1977 when we met people who were about to launch the Charter 77 movement: Vaclav Havel, Jan Patočka, Jan

Vladislav, among others. This led me, with Vladislav, to publish Havel’s political essays, weeks before he became President.

During my visits to Central and Eastern Europe I saw vividly how one of the aims of the Communist dictatorships was to falsify the history of the country—to create an amnesia. That is why the dissidents sought to preserve national memory, which is part of national culture and identity.

If we have learned one thing it is that freedom has enemies. It is the duty of democratic regimes to name these enemies and combat them with the law. Their aim is to destroy the very values we cherish. The rise of xenophobia and of outcries against immigrants, Muslims, and foreigners everywhere in Europe is a prime example. One criterion in judging a country is how it treats its minorities.

We see some positive developments today: the rise of constitutionalism in Europe; the creation of international courts and criminal tribunals. In courts, the law responds to realities. That is why people are indicted in the Yugoslav Criminal Tribunal in The Hague for rape, which is now a war crime, a consequence of the mass rapes in Bosnia and elsewhere. The concept was not invented abstractly in the safety of a law school; it was created because they happened, just as the Allies created the concept of genocide as a crime when they set up the tribunal in Nuremberg.

The contemporary fight against terrorism, necessary as it is, has had menacing consequences. We have seen official legal memos and law professors justifying the use of torture, and substantial public opinion condoning it. Detention without trial is becoming common. We live in dark times. Hence the paramount importance of legal oversight to avoid “black holes” in the law, to quote Lord Steyn. The liberal legal order is a fragile one; once again, we are experiencing that truth. In such critical times, the final choice for courts is not between excessive deference to politicians and “judicial activism.” It is between abdication and the exercise of the courts’ constitutional mission.

ROGER ERRERA (b. 1933) is a French legal scholar and former senior member of the Conseil d’État, France’s supreme court for administrative law. He has authored many essays and articles on Nazism, Communism, civil liberties, judicial review, aliens and refugee law, freedom of speech, privacy, religious freedom, judicial independence and accountability, as well as having served on the UN Human Rights Committee. He was a visiting professor at the Central European University, Budapest, and has taught at institutions in both France and the U.K. He is the author of an interview with Hannah Arendt, which can be found on his website: www.rogererrera.fr.