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GENOCIDE DENIAL AND THE LAW:
A CRITICAL APPRAISAL

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Genocide denial carries particular relevance for international law: it is the negation of international crimes, and it can prepare the ground for new crimes of this kind. But its criminalization raises concerns as well. The danger of a clash with human rights, particularly with the freedom of expression, cannot be dismissed lightly. This article explores reasons for and repercussions of the criminalization of denial. It also investigates alternatives, including the use of truth and reconciliation, and evaluates methods that focus on direct confrontation of the deniers.

INTRODUCTION

One of the most famous cases in which a court had to discuss allegations of Holocaust denial was unusual in many regards. It was not a case in which a denier stood in the dock—it was not even a trial in a country that criminalized denial. It was the 2000 case brought by the author David Irving against the U.S. academic, Deborah Lipstadt, after she had portrayed him in a book as a Holocaust denier.1 The trial, in which Irving sought to receive compensation for Lipstadt’s alleged libel, resulted in his defeat. The Judge called Irving “anti-semitic” and a “racist,”2 and noted that it seemed “incontrovertible” that Irving “qualifie[d] as a Holocaust denier.”3

Nearly six years later, Irving found himself in another courtroom—this time, as a defendant in criminal proceedings. Before the regional court of Vienna, he stood accused of denying the Holocaust,4 conduct that is criminalized under Austrian law.5 But even before the trial began, Irving’s old adversary Lipstadt, made a statement which took some observers by surprise: when he had been in investigative custody for some time, Lipstadt called for his release, noting that the author had “spent enough time in

3. Id. at ¶ 13.95.
5. Verbotsegetz [VerbotsG] [Prohibition Act], 1947, StGBI Nr 13/1945, Art. 1, § 3(h), available at http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10000207 (Ger.).
prison." Ultimately, this did not help Irving, who, in February 2006, was sentenced to three years imprisonment (a sentence which was reduced on appeal). From Lipstadt's perspective, her statement was not inconsistent with the position she had taken in 2000. As she put it, in 2000, Irving had tried to "curtail [her] freedom of speech," and in 2006, her main objection to Irving's treatment appeared to be based on the impression that he had been arrested for the exercise of the same right.

And yet, Austria is not the only country that has resorted to sanctions of the criminal justice system in an attempt to deal with Holocaust and genocide denial. This raises questions about the rationale underlying these laws and the hopes with which the legislator associates them. It also allows for an inquiry into their suitability for the achievement of the stated aims. But the criminalization of genocide denial also raises specific concerns regarding its compatibility with international law—in particular, with the human rights commitments of a State resorting to measures of this kind. In that regard, the right to which Lipstadt referred in 2006—freedom of expression—is not the only right which may face restrictions if a State resorts to the instruments of criminal law in order to counter activities of denial.

This article seeks to explore these points by providing, in its first part, a critique of the reasons for criminalization and by investigating in particular their compatibility with international human rights standards and the efficiency of legislation of this kind. But it also looks, in a second part, at


7. Markus Huber, Die Läuterung wird David Irving nicht abgenommen, STUTTGARTER ZEITUNG, Feb. 21, 2006, (Ger.).

8. In December 2006, the Higher Regional Court of Vienna converted the remainder of Irving's prison sentence to a sentence on probation; Irving was consequently released. Holocaust-Leugner Irving in Wien kommt auf freien Fuß, AGENCE FRANCE-PRESSE – GERMAN, Dec. 20, 2006, (Ger.).


several alternatives to laws on denial in its "basic form," including modifications to the legal approach, but also the possibility of truth and reconciliation commissions and direct confrontation with the deniers. The final part of this article offers concluding thoughts on the risks that attach to criminalization and on the efficiency of alternative approaches.

In the context of this article, the term "denialism" is employed to refer both to the conduct of outright negation and to revisionism. It thus encompasses falsification of information and misinformation about the factual events underlying the relevant genocide.

While the most prominent targets of legislation on denial are statements negating the Holocaust, some legislative instruments have made reference to more recent events (such as denial of the 1994 massacres in Rwanda). This article incorporates a reflection on denialism referring to these events where this is indicated.

In the context of this article, unless otherwise indicated, the term "genocide" refers to the social concept of this term. It is thus primarily understood as the historical macro-phenomenon, rather than the conduct of an individual perpetrator, which formed the basis for the definition of the crime in the Genocide Convention in the statutes of the international criminal tribunals, and in the statute of the International Criminal Court. However, it is acknowledged that the very conflation of the two concepts lies at the root of some of the difficulties that have arisen in the application of criminalization.


13. On this distinction, see Stefan Kirsch, The social and the legal concept of genocide, ELEMENTS OF GENOCIDE, 7 et seq. (Paul Behrens and Ralph Henham eds., 2012).


15. An example is the Erlinder case in which the Rwandan prosecution failed to engage in a clear differentiation, see infra text accompanying note 59.
I. A CRITIQUE OF LAWS AGAINST GENOCIDE AND HOLOCAUST DENIAL

Identifying the Rationale – Questions of Harm and Morals

The very notion of "law" represents more than an accumulation of rules; if that were not the case, it would not be much different from the rules of hierarchy governing a criminal organization. Nor could any State be said to possess an effective legal system if obedience to the law relied on it being enforced every step of the way. The reason why law tends to "work" is that the population on the whole is willing to accept it, and the reason the population accepts it is because it is understood as embodying, at least on a most basic level, a moral mandate.¹⁶

That is particularly true where rules of criminal law are concerned; legal moralism represents one of the principal ways of justifying its existence.¹⁷ A system that allows for significant intrusions into a citizen’s integrity—including deprivation of his liberty, even his life—calls for a strong moral mandate as its basis. The sharp sanctions that a State feels entitled to adopt receive their justification through the fact that the perpetrator’s conduct deviated manifestly from fundamental values of society. Legal moralism has attracted criticism in the past,¹⁸ but, at the very least, it is difficult to deny that it is one of the functions of criminal law to reassert the value system which the State has established for itself.

Where criminalization of denialism is concerned, the appeal of legal moralism is apparent. From this perspective, the law conveys a message of moral character: if a society has chosen this route, it has elevated truth and the memory of the events to the level of values worthy of the protection of the criminal justice system. In States in which the perpetrators of these crimes first came to power, laws of this kind may be intended to carry a message of special meaning: not only that of renunciation of the policies of the past, but also of solidarity with the victims.

It is a different question whether these aspirations are achieved and whether criminal law is the best tool to do so. For one, it is not always clear whether the law does indeed convey a message of solidarity. Its message may go in the opposite direction: i.e., that society would not be inclined to

show solidarity were it not for the cudgel of the law. The value system that is thus promoted may look quite different to an impartial observer than to the drafters of such legislation.

Furthermore, criminalization of denial is, by necessity, exclusive; even if the message of solidarity were adequately conveyed, it would be solidarity only with victims of particular crimes.

One example is the European Framework Decision, which addresses denialism in the context of crimes against humanity, genocide, and war crimes, but only when those crimes were directed “against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin.”

The fact that victims defined, for example, by their political beliefs are not covered by the Decision, led to the somewhat embarrassing situation that the Council of the European Union, in a press release, had to assure observers that it still “deplore[d] all of these crimes.”

There is another aspect that raises questions about legal moralism as the rationale underlying criminalization. The invocation of legal moralism carries the danger that the prevailing moral framework of a particular society appears as an independent justification, separate from the value system of the international community in which the State is embedded. But a State’s incorporation into that system presupposes acceptance of the system’s fundamental values, which are thus capable of giving shape to the moral message behind the relevant legal provision and may lead to a restriction or expansion of its scope. Chief among these are the human rights whose protection the State owes to individuals under its jurisdiction. As these are questions that come into play not only where legal moralism is concerned, it appears appropriate to consider them in a separate section.


21. See infra text accompanying note 34.
Legal moralism is often joined by another consideration: the understanding that criminal law finds its rationale in the need to punish perpetrators of harm.\(^{22}\) It is a perspective whose force derives from the very foundations of civil society: the assumption of society's right to exist implies a right of protection against those engaged in harming it.

The significance of the harm principle as a rationale for the criminalization of denialism is manifested in several ways. For one, denialism has a direct impact on the surviving victims. The precise nature of that impact may vary and will in some cases include both psychological and physical damage. In all cases, however, denying or minimising the suffering of the victims targets the dignity of the survivors, and it appears appropriate in this context to consider such conduct akin to criminal insult.\(^{23}\)

But the fact has also been emphasized that the consequences of such conduct can extend beyond this. Given the frequently racist agenda that underlies denial,\(^{24}\) the possibility cannot be excluded that this activity carries a discriminatory message for the target audience—and this indeed often lies at the heart of the conduct. This was a point that the Spanish government outlined in the case of Pedro Varela Geiss, a bookseller who was charged with the distribution of material that "denied, trivialized or justified" the Holocaust.\(^{25}\) Counsel for the government pointed out that "professing [ . . . ] doctrines" of genocide denial might create an environment that "starts with legal discrimination to the access to public positions and professions," followed by the encouragement of the emigration of parts of the population, and then spreading to "all fields of human coexistence until [it reaches] the extremes of extermination and annihilation well documented by History."\(^{26}\)

Denialism, if this view were followed, carries the seed for the commission of further international crimes. It is not an entirely theoretical argument: the fact may be recalled that the Iranian President Ahmadinejad, at the 2006 "Holocaust Review Conference," to which he had invited some of

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22. See Clarkson, supra note 17.

23. See, e.g., the way in which the concept of "insults" was approached in Grigoriades v. Greece, 27 Eur. Ct. H.R. 1, 7-8, ¶24 (1997) and similarly, in Germany, Herbert Tröndle, Strafgesetzbuch und Nebengesetze, 987 at marginal 1 and 2 (1997).


26. Id. at 16.
the world’s most prominent deniers, made use of this platform to repeat his verbal aggression against Israel, stating that “the Zionist regime [will] soon be wiped out.”

From this perspective, the harm principle appears to offer a sound basis for the criminalization of denialism. At the same time, the exceptionally intrusive nature of criminal law also demands that a particularly high threshold has to be imposed on conduct which is to fall within its framework. The mere possibility of certain harm cannot suffice; what is required is that such harm is the product of this type of conduct and that such conduct indeed calls for criminalization on this basis.

This raises questions about the conduct at the root of the harm that the legislation seeks to avoid. Both in the cases of Varela Geiss and of Ahmadinejad, the argument can be advanced that the relevant conduct is not constituted solely by the activity of denial as such (termed here, “basic denial”). The reason that the relevant harm could materialize was the fact that the statements of denial were accessible to a wider audience.

If “basic denial” as such were criminalized, it would suffice that the relevant words were spoken in the privacy of the perpetrator’s living room (perchance overheard by a neighbor), or to a very limited audience that may even be opposed to the perpetrator’s views. Even in these situations harm exists if it is accepted that the dignity of a relevant group (such as the surviving victims) has come under attack. But the assumption that the law might be the appropriate means to regulate dignity has faced criticism in the past.

Knechtle, when discussing the EU Framework Decision on racism and xenophobia, and its provisions on denialism, expressed the view that dignity “comes from within—well beyond the reach of the law” and suggested that human dignity is best recognized by the State if it “respect[s] the individual’s right to speak.”

In this generalized form, this statement is open to criticism: just as a State granting unbridled liberty ends up promoting not its weakest citizens, but its greatest bullies, a State granting unbridled freedom of speech ends up supporting not those who speak the truth, but those who shout the loudest. Yet it is true that laws outlawing denial may generate a counter-

28. Id.
productive impact: instead of accepting as self-evident that victims of international crimes exist and are deserving of dignity, the message is now advanced that these facts live in such an imperiled state that they require the crutch of the law. Whether this enhances the dignity of the survivors is at best questionable.

If, on the other hand, the offensive conduct were understood in a more restrictive sense—encompassing not every form of basic denial, but at least the dissemination of this message to an audience—it would be possible to capture additional harmful consequences through the law. Even if the immediate audience did not show any direct reaction to the message, it is possible that the message has a persuasive effect upon them and that they in turn would be encouraged to engage in denialism. In this sense, denial is capable of creating secondary harm. Spreading of the word can be seen as giving rise to a wide range of consequences, from the establishment of a racist climate to the effects to which the Spanish government referred in Varela Geiss.

But the acceptance of secondary harm carries its own difficulties. The existence of a chain of causation between conduct and consequence is not always inevitable; intervening steps are often required to achieve the result that the law seeks to prevent. Criminal law, which relies on secondary harm as its rationale, is a dangerous beast: once it has been accepted as justification in one case, it may easily be employed in other contexts where the motivation behind a particular law may be based on partisan political views rather than the genuine need to prevent specified damage.

Criminalization and Human Rights

The possibility that criminalization may have a restrictive impact on human rights must be considered one of the key issues in the debate on this issue.

Freedom of expression occupies a prominent place in that discourse. While this right is incorporated in all of the leading comprehensive human

31. See infra text accompanying note 77 et seq.
33. See supra text accompanying note 26.
34. Lipstadt makes reference to the freedom of speech in her 2006 comments, a freedom which is incorporated into the freedom of expression. See supra text accompanying note 10.
Genocide Denial and the Law

rights treaties, the interpretation of its scope has triggered considerable controversy. In this context, the question in particular arises whether the denial of certain facts falls within its remit at all. The European Court of Human Rights ("ECHR") found in Lingens v. Austria that "a careful distinction needs to be made between facts and value-judgments. The existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof." That appears to be a somewhat simplified understanding, particularly in light of the difficulties that the "demonstration of facts" can occasionally encounter. One may consider a situation in which bones are unearthed amid allegations that international crimes have taken place. The need for interpretative assessment begins with the very question whether the remains are human. If uniforms are found, can they positively be said to belong to one particular party to a conflict? Can a positive assessment be made that death was caused in a violent way? And if that is done, can a positive assessment be made as to the authors of the killings? If these questions are seen "merely" as matters of fact, then a State would be entitled to regulate statements on any of these points. But the truth is that even assertions of fact presuppose assessment; and the fine distinctions that the ECHR suggested are not always easy to draw. It is therefore not surprising that not all courts have adopted the same approach.

When Ernst Zundel was charged in Canada with the offense of spreading false news after he had published a pamphlet denying the Holocaust, the Canadian Supreme Court ruled that the relevant criminal law was unconstitutional because it violated Article 2(b) of the Canadian Charter of


37. That the authorship even of mass killings remains unclear, is not an unusual occurrence, especially in civil war. For a recent example, see Oliver Holmes & Mariam Karouny, Dozens of Syrian civilians killed in Homs, The INDEPENDENT, Mar. 12, 2012, http://www.independent.co.uk/news/world/middle-east/dozens-of-syrian-civilians-killed-in-homs-7562455.html.

38. S. 181 of the Canadian Criminal Code made it an offense to wilfully publish "a statement, tale or news that [the perpetrator] knows is false and causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offense and liable to imprisonment [ . . . ]," R. v. Zundel, [1992] 2 S.C.R. 731, 732 (headnote) (Can.), http://www.iddh.ed.cr/comunidades/libertadexpresion/docs/le_otroscanada/r.%20v.%20zundel.htm [hereinafter Zundel].
Rights and Freedoms (guaranteeing “freedom of thought, belief, opinion and expression”).\textsuperscript{39} The majority opinion found that the distinction between “an assertion of fact, as opposed to an expression of opinion, is a question of great difficulty and the question of falsity of a statement is often a matter of debate.”\textsuperscript{40} But even the three dissenting judges declared that the “deliberate publication of statements known to be false, which convey meaning in a non-violent form, [fell] within the scope of s. 2(b).”\textsuperscript{41}

And when the U.S. Supreme Court in \textit{United States v. Alvarez} considered the Stolen Valor Act of 2005, a statute that made it an offense for anyone to pretend to have received certain military medals,\textsuperscript{42} it confirmed that the Act violated the First Amendment of the U.S. Constitution (protecting, \textit{inter alia}, freedom of speech).\textsuperscript{43} In his concurring opinion, Justice Breyer took exception to the argument that false factual statements should enjoy no protection at all. Breyer emphasised that these statements too can “serve useful human objectives” and referred to a number of examples, including attempts to “prevent embarrassment” and “protect privacy,” but also the promotion of “a form of thought that ultimately helps to realize the truth” through an “examination of false statements (even if made deliberately to mislead).”\textsuperscript{44}

This is a preferable approach. In the field of human rights, it is also a view that demonstrates greater compatibility with the literal understanding of the right of freedom of expression, whose protection, as enshrined in the leading human rights treaties, clearly extends beyond the freedom of expression of “opinions.”\textsuperscript{45}

That does not mean that this emerging freedom is unrestricted. The ECHR does allow for limitations which the relevant State can adopt for various reasons, including “the protection of morals” and the “protection of

\textsuperscript{39.} Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, Schedule B to the Canada Act, 1982, c.11 (Can.).
\textsuperscript{40.} 2 S.C.R. at 734.
\textsuperscript{41.} \textit{Id.} at 735.
\textsuperscript{42.} 18 U.S.C. § 704(b).
\textsuperscript{44.} \textit{Id.} at 2541 (Breyer, J., concurring).
\textsuperscript{45.} ECHR, art 10(1) \textit{supra} note 35 (protecting “freedom of expression” and stating that that right “shall include” the freedom to hold opinions); ICCPR art. 19, \textit{supra} note 35, (containing the “right to hold opinions” and the “right to freedom of expression” as separate rights [in the first two paragraphs of that article]); ACHR arts. 13(1), 13(3), \textit{supra} note 35 (Article 13[1] merely referring to “freedom of thought and expression”; the freedom to hold opinions is implied in Article 13(3), which prohibits the restriction of the right of expression through "any [ . . . ] means tending to impede the communication and circulation of ideas and opinions.").
the reputation or rights of others. The same exceptions are envisaged in the ICCPR and the ACHR. Criminalization is therefore still possible, but it has to comply with the specific conditions that attach to measures of this kind. In particular, limitations of freedom of expression are not justified if they are not necessary to safeguard the protected interest. This introduces a consideration of proportionality, and laws on denialism therefore have to take the various barriers this principle imposes. A law is thus not “necessary” in view of its declared aim if it is not a suitable means to achieve that aim in the first place, and it is also not “necessary” if there were alternatives, which would have been equally (or more) effective but would have imposed less of a restriction on the affected human right.

Laws against denialism raise questions in both regards, and the criticism which they trigger becomes clearer when these aspects are discussed in more detail. The question of efficiency will be addressed in the next subsection, and available alternative options will be discussed in Section II.

Freedom of expression is not the only human right that criminalization may affect. A recent case in Rwanda demonstrated that, in certain circumstances, legislation of this kind might impact on the rights of defendants in a criminal trial. The case concerned the American lawyer Peter Erlinder, who was defense counsel for Aloys Ntabakuze before the International Criminal Tribunal for Rwanda (ICTR). Erlinder had also intended to work on the defense team for Victoire Umuhoza, a Rwandan opposition leader, who had been arrested on the charge of promoting genocide ideology. When Erlinder arrived in Rwanda to take up his work for Umuhoza, he himself was arrested on charges of genocide denial.

46. ECHR art. 10(2), supra note 35.
47. ICCPR art. 19(3), supra note 35.
48. ACHR art. 13(2), supra note 35.
49. ECHR art. 10(2), supra note 35 (requiring such limitations to be “necessary in a democratic society”); ICCPR art. 19, supra note 35 (merely stipulating that the limitations be necessary); ACHR art. 13, supra note 35 (stating that the limitations can only be imposed “to the extent necessary” to protect the competing rights).
51. See Paul Behrens, Diplomatic Interference and Competing Interests in International Law, 82 BYIL 226 et seq. (2012).
54. Id.
Following the genocide of 1994, Rwanda engaged in a campaign against conduct that it considered to fall under the headings of “divisionism” or “genocide ideology,” culminating in Law No. 18/2008 on the punishment of genocide ideology. The law made reference to various forms of conduct under the crime of “genocide ideology,” including the creation of “confusion aiming at negating the genocide which occurred.” It faced considerable criticism for the vague language it employed and for the consequences of its application, including its perceived use to muzzle political opposition.

In the case of Erlinder, the Rwandan prosecution authorities, arguing their case before the High Court in Gasabo, specifically referred to his work at the ICTR and reportedly said that “Carl Peter Erlinder denied and minimized the genocide by stating that the soldiers he was defending neither planned nor carried out the genocide.”

Erlinder’s arrest evoked strong criticism—the ICTR requested his immediate release, and the American Bar Association called upon Rwanda to observe the UN Basic Principles on the Role of Lawyers, which impose on governments the obligation to ensure that lawyers are “able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference.”

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57. *See Law and Reality: Progress of judicial reform in Rwanda*, HUMAN RIGHTS WATCH, July 26, 2008, http://www.hrw.org/reports/2008/07/25/law-and-reality; *see also AMNESTY INTERNATIONAL, supra* note 55, at 14 (documenting the fact that the law employs terms such as “[m]arginalising, laughing at one’s misfortune, defaming, mocking, boasting, despising” to describe conduct which fulfilled the characteristics of “genocide ideology”).


60. *Id.*


The arrest also raised particular concerns in relation to human rights—including not only those of Erlinder, but also those of his clients at the ICTR.

If genocide denial laws could be applied in on-going criminal trials to the effect that defendants charged with genocide could not assert their innocence, the consequences would be staggering: laws of this kind would make a mockery of the presumption of innocence, which all leading human rights treaties seek to protect. The possibility that the criminalization of genocide denial could result in trials in which the only option for the accused is a guilty plea conjures up an image of Kafkaesque (or Cardassian) justice that must, at the very least, be considered deeply troubling.

The Efficiency of Laws Against Genocide and Holocaust Denial

A particular criticism with regard to criminalization is founded on the consideration that such legislation is not efficient if measured by its stated aims. The effect may indeed go in the opposite direction: in the court case of the Canadian Holocaust denier Keegstra, the dissenting justices pointed out that the criminal trial process not only attracts “extensive media coverage and confer[s] on the accused publicity for his dubious causes, it may even bring him sympathy.”

It is true that leaders of the movement are often motivated by different reasons than their disciples. But where the efficiency of criminalization is concerned, questions can be raised about the impact that such legislation has on either group.

Where the prominent faces in the field of denialism are concerned, the evidence is not encouraging. David Irving’s spell in prison did not seem to have led to a significant change in his views: upon his return, he reportedly stated that he had been “obliged to show remorse” during his trial, but had now decided he had “no need any longer to show remorse.” And in Octo-

63. *Id.* at 23 (The UN Basic Principles emphasise that lawyers “like other citizens are entitled to freedom of expression, belief, association and assembly[ . . . ].”).

The UN Basic Principles emphasise that lawyers “like other citizens are entitled to freedom of expression, belief, association and assembly[ . . . ].” *Id.* at 23.

64. ECHR art. 6(2), *supra* note 35; ICCPR art. 14(2), *supra* note 35; ACHR art. 8(2), *supra* note 35.

65. *Star Trek: Deep Space Nine: Tribunal* (Paramount television broadcast 1994) (Cardassia Prime is a fictitious world in whose justice system defendants are presumed guilty from the outset and in which the purpose of a trial is “to demonstrate the futility of behaviour contrary to good order.”).


ber 2006, when the French denier Faurisson, received a suspended prison sentence, this sanction did little to deter him from attending, two months later, the Iranian conference on “Review of the Holocaust.”

It is a fallacy to believe that criminal sanctions are capable of changing the opinions of those who must be held responsible for the creation of denialism. The fact that the State has resorted to instruments of criminal justice rather plays into their belief system, in which they stand at the receiving end of a conspiracy to suppress their version about the underlying international crimes.

Even where followers of the movement are concerned, supporters of criminalization have yet to furnish proof for the efficiency of legal sanctions. At least where prison sentences are concerned, the effect of the sanctions may well go in the opposite direction. In some prisons, deniers have a good chance of being exposed to (continued) propaganda from the extreme right: in the German State of Brandenburg, for instance, it was reported in 2012 that some 25 to 30% of prisoners in young offender institutions veered towards the mindset of the extreme right.

And extremist organizations are keen to stay in touch with their imprisoned members, thus strengthening the ideological commitment of the latter and ensuring their continued integration in that scene (the “White Prisoner and Supporter Day,” for instance, aims to offer worldwide assistance to prisoners of the extreme right). Furthermore, there is evidence that to those who already are in the extremist camp, imprisonment may

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70. *Deutscher Bundestag: Drucksache und Protokolle [BT] 17/8983, 2* (Ger.) (in the young offender institution in Halle (Saxony-Anhalt, Germany), some 20% of inmates were estimated to fall in this category); see also Werner Nickolai, *Bericht über eine Fahrt nach Auschwitz mit rechtsradikalen jugendlichen Strafgefangenen, Auf dem Weg zur Nation? Über deutsche Identität nach Auschwitz* 123 (Hajo Funke & Dietrich Neuhaus eds., 1989).


appear not so much as a deterring experience, but as a further step on the “career ladder” of their peer group.\footnote{73}{See Werner Nickolai, Warum den Rechtsextremisten mit Strafvollzug nicht zu begegnen ist, Sozialer Ausschluss durch Einschluss 183 (Werner Nickolai & Richard Reindl eds., 2001).}

Weaver, Delpierre, and Boissier, speaking about the French Loi Gayssot (a statute dealing with denialism), concede that the law is unlikely to change the mindset of the deniers, but express the hope that it would “affect those who might be tempted to join the Holocaust deniers.”\footnote{74}{Weaver, supra note 24, at 495. On the Loi Gayssot, see The Gayssot Act, supra note 20.} In other words, the underlying intention of a law of that kind might be directed at general, rather than specific, deterrence.

But even in that regard, it is difficult to measure the success rate of criminalization. If the general public refrains from denialism, does it do so because of the threat of criminal sanctions or because the actual facts are overwhelming? And even if the law were the reason for this attitude, can it be said that its aims have indeed reached the man on the Clapham omnibus? Is it respect for the victims that make him guard his language, or respect for the law?

The most significant concern, however, is based upon the fact that some of the difficulties that attach to specific deterrence, apply to general deterrence as well: in particular, the consideration that laws of this kind may have the very effect which criminalization seeks to prevent. In her 2006 interview, Lipstadt voiced the concern that criminalization turns “Holocaust denial into forbidden fruit, and make[s] it more attractive to people who want to [ . . . ] challenge the system.”\footnote{75}{O’Neill, supra note 6.} But it is the very characteristic of forbidden fruit that it tempts not only those who want to challenge the system anyway, but even those who would be perfectly content to refrain from such experiments, were it not for the lure of the taboo.

II. ALTERNATIVES TO THE CRIMINALIZATION OF “BASIC DENIAL”

A Modified Legal Approach

If criminalization of “basic denial” has shortcomings, the question arises whether viable alternatives exist to tackle denialism. The extensive nature of some laws on revision and denial\footnote{76}{For the Rwandan example, supra text accompanying note 55 et seq.} suggests that a modification of
the legal approach might offer a way forward: in particular, by restricting
the scope while retaining the advantages of the legal sanction.\textsuperscript{77}

Such limitations have been suggested in the past. Knechtle, for one,
proposed the restriction of the applicability of such laws to societies in
which they can be expected to have particular relevance ("subject socie-
ties").\textsuperscript{78} Criminalization of Holocaust denial would thus be suitable for Ger-
many, but inappropriate for Indonesia; criminalization of the denial of the
crimes committed during the occupation of East Timor would be "appropri-
ate for Indonesia and/or East Timor, but not Germany."\textsuperscript{79}

It is an approach, however, that comes with certain weaknesses. For
one, it is not always easy to determine what exactly a "subject society" is.
The society from which the perpetrator came will often be located in a
different State from that of the victim society. The place of the commission
of the crime will often be the latter State, but it may be a strange (and
insulting) suggestion that it is these communities that need a law against
denial.

The State of the perpetrator might be a questionable starting point as
well. Given the increased significance of international mercenaries and
soldiers of fortune, the "State of the perpetrator" may well be a State whose
population shares the citizenship of the perpetrator, but had no real link to
the crimes and was in fact fundamentally opposed to them.\textsuperscript{80}

Secondly, the fact that certain atrocities may be of particular relevance
to certain societies does not yet answer the question whether laws on deni-
alism are appropriate or indeed necessary. Much in this regard depends
upon the way in which the relevant society has dealt with the memory of
the atrocities, including the recognition given to the suffering of the victims
and the acknowledgment or lack of acknowledgment generally accorded to
deniers.

Thirdly, why should denial of the suffering of the East Timorese not be
a crime in Germany? Why should Holocaust denial not be a crime in Indo-
nesia? The understanding that some forms of conduct are of concern to the
total international community has been a cornerstone of international crim-

\textsuperscript{77} For a discussion of the perceived advantages, see supra text accompanying
note 18, and after note 28.
\textsuperscript{78} Knechtle, supra note 30, at 52.
\textsuperscript{79} Id. at 52-53.
\textsuperscript{80} The Ruggiu case may be recalled: Ruggiu was a Belgian journalist, who
worked for the RTLM (Radio-Télévision Libre de Milles Collines) in Rwanda in
1994—a station, which exhorted the Hutus to actions against the Tutsis. In 2000, Ruggiu
was found guilty of direct and public incitement to genocide and the crime against
humanity of persecution. Prosecutor v. Ruggiu, Case No. ICTR-97-32-I (June 1, 2000),
VI. Verdict.
inal justice since Nuremberg. From this perspective, the suggestion that the protection of the dignity and the memory of the survivors should be a matter of relevance only to "subject societies" is not a solution; it is an unjustifiably retrograde development.

If this approach remains open to criticism, the question can be asked whether restrictions to the substance of the law offer a better option.

This is a path that several States have adopted in their legislation. Section 130(3) of the German Criminal Code does address denialism, but there are additional elements: such conduct must have been carried out "publicly or in a meeting," and it must have been committed "in a manner capable of disturbing the public peace." It is an option that appears more feasible than the criminalization of some forms of speech per se. In Alvarez, Justice Breyer accepted that certain laws prohibiting false statements did exist in the United States, but added that they tended to "limit the scope of their application, sometimes by requiring proof of specific harm to identifiable victims," sometimes by "limiting the prohibited lies to those that are particularly likely to produce harm." Examples he cited were statutes on defamation, fraud, and perjury.

This approach carries certain advantages. The element of harm would certainly be easier to identify in this scenario than in cases of "basic denial"; and this in turn facilitates a justification of criminalization that emphasises the "need" for laws of this kind.

But it is worth noting that even laws in which the actus reus is extended to cover additional harm have not always found favour in the courts. In Zundel, the Canadian law (which likewise required additional elements of the crime) was still held to violate the constitutional guarantee of freedom of expression, although it must be said that the particularly vague way in which the provision had been phrased contributed to its downfall.

The restriction of the scope of the law certainly does not relieve the lawmaker from the need to comply with the requirements of human rights, of which specificity of the restricting law is one. It also remains necessary to examine the various rights that may be affected by laws of this kind. In

81. See supra note 11.
82. Id. at 130(3); see also Framwork Decision art. 1(1)(c), (d), supra note 19. The Canadian provision in the Zundel case likewise referred to the publication of such statements as an additional requirement. Zundel, 2 S.C.R. at 732, headnote.
83. Alvarez, 132 S. Ct. at 2541 (Breyer, J., concurring).
84. Id.; see also Zundel, 2 S.C.R. at 736 (Gonthier, Cory and Iacobucci JJ., dissenting).
85. See supra note 38.
86. Zundel, 2 S.C.R. at 734.
87. See, e.g., Grigoriades, para. 37.
cases like that of Erlinder,88 it might well be possible that a defense counsel’s statement that his clients did not commit genocide causes a public disturbance in a State whose population had been affected by the crimes in question. Yet, it is his positive duty to act in this manner if his client wishes to assert his innocence. The framers of criminal law thus have to ensure that the substance of these fundamental rights of defendants and defense counsels is preserved.

Subject to these caveats, however, laws that extend the actus reus to cover additional harm have a greater capacity of avoiding the human rights concerns which were outlined above.

At the same time, their core character is different from that of the criminalization of “basic denial.” The protection of memory and dignity of the victims becomes a secondary aspect. These measures are, in essence, laws on public order offenses.

Truth and Reconciliation

The establishment of truth and reconciliation commissions has frequently taken place in communities recently emerged from situations in which international crimes were committed on a large scale (South Africa being the most prominent example),89 and they are thus chiefly considered in the context of transitional justice. However, given the particular focus on the establishment of “truth,” it is also possible to understand these mechanisms as alternatives to the criminalization of denialism. In this context, truth and reconciliation has certain advantages over the legal option.

For one, these commissions represent a community effort at identifying the historical record. As institutions which involve both victims and perpetrators in their work and typically operate on a large scale,90 they stand a good chance of exercising an impact on society as a whole. They thus offer a basis for the internalization of the memory of these events and enable the community to reach acceptance on the record of the relevant situation.91

What is more: society has the opportunity of hearing a first-hand account of the events (as opposed to only specific elements of the crimes) from the perpetrators themselves. The weakness of denialism tends to be

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88. See supra text accompanying note 52 et seq.
90. See id. at 61.
91. See John Shamsey, 80 Years Too Late: The International Criminal Court And The 20th Century’s First Genocide, 11 J. TRANSNAT’L. L. & POL’Y 378 (2002).
Genocide Denial and the Law

particularly apparent where its supporters have to deal with statements made by the authors of the underlying crimes.

At the same time, this particular aspect might prove to be a double-edged sword. At least in situations where the South African model is taken as a template, testimony provided by perpetrators might still be open to attack for the very reason that amnesty was available to some of those who made "full disclosure" of their deeds.\textsuperscript{92} In those circumstances, the question will unavoidably arise whether the perpetrators' statements were deliberately phrased in a way that they considered to be in compliance with the expectations of the commission.\textsuperscript{93}

Even the "community effort" underlying truth and reconciliation raises questions. It was one of the defining features of the South African model that victims participated in the sessions and recounted their sufferings.\textsuperscript{94} That, however, presupposes an initiative on the part of the victims, which cannot always be expected. In situations of past genocides, it would not be difficult to understand the refusal of victims to participate in the same institution as their former oppressors. One of the identified purposes of criminalization—the expression of society's solidarity with the victims—may here appear to be relegated to second place: it is the attempt to reconstruct society and effect "healing," which takes centre stage.

A further problem arises from the fact that not all States emerging from international crimes allow for a clear distinction between "victim societies" and "perpetrator societies." In the modern age, the underlying crimes are often the last stage in a long-standing civil war in which the allocation of the roles of victim and perpetrator might depend on little more than military fortune. But if that is the case, the determination of the "accurate" historical record can be difficult: the danger exists that perpetrators instead seek to convey their understanding of "truth,"\textsuperscript{95} and that the proceedings become a political battleground, leaving a dispassionate seeker of truth with little more than the question of Pilate.\textsuperscript{96}

\begin{itemize}
  \item \textsuperscript{92} Lin, supra note 89, at 60.
  \item \textsuperscript{93} See id. at 66.
  \item \textsuperscript{94} See id. at 60.
  \item \textsuperscript{96} "What is truth?" John 18:38. The South African Truth and Reconciliation Commission showed awareness of the existence of different meanings of truth. See Richard A Wilson, \textit{The Politics of Truth and Reconciliation in South Africa} 36 (2001).
\end{itemize}
Yet for all the difficulties it has to negotiate, the concept of truth and reconciliation must be credited with the fact that it appreciates the significance of truth not only for individual victims, but for society as a whole. It is a direct approach, which, by confronting perpetrators with the accounts of victims, does not offer them an easy flight into the realm of denial.

Confronting the Deniers

It would be wrong to say that academic experts and survivors of the relevant crimes have always eschewed direct confrontation with deniers. Nor could it be said that these approaches are without merit. It is one of the weaknesses of criminalization that it seemingly lends force to the deniers who argue that the other side has no reasons to advance and is afraid to join the discussion.

But not everybody agrees on the usefulness of this approach. Lipstadt’s statement that debating deniers “would be like trying to nail a glob of jelly to the wall,” has gained some popularity in this context. The apparent problem lies in the fact that, if a partner in conversation refuses to acknowledge logical reasoning—or even to listen to the other side—the very foundations of meaningful discourse are missing.

Lipstadt highlights a different approach—to her, it is more helpful to address the general public and to engage in educational efforts. While this is certainly an indispensable aspect of any comprehensive effort to deal with genocide denial, the question remains whether one method need exclude the other. Some initiatives have adopted a combined approach; “The Nizkor Project” for instance, offers a huge online archive on documents on the Holocaust and on the activities of deniers, and thus represents an important educational effort. But it also engages directly with the deniers: it features an extensive section that provides a point-by-point response to the main questions raised by the Institute for Historical Review (one of the

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97. See for instance the debate between the historian Robert Gerwarth and David Irving on Irish television; John Lawrence, Irving speech to college society cancelled, THE IRISH TIMES, March 8, 2008. See also Lipstadt, supra note 1, at 138-41 (referring to an instance of survivors confronting deniers with evidence).
98. Cf. Knechtle, supra note 30, at 64.
99. Lipstadt, supra note 1, at 221.
100. Id. at 222.
prominent organizations in the denialist movement\(^{103}\), and members of the Nizkor team have directly corresponded with deniers and challenged their views.\(^{104}\)

Whether such approaches are efficient is a different matter. In this context, it is useful to return to the distinction between leaders and followers of the denialist movement.\(^{105}\) Where the leaders are concerned, the confrontational approach, due to their particular motivations, less likely to achieve significant results: a denier with political reasons stands to gain little by accepting the truth, and a denier who seeks publicity stands to lose everything.

Even there, exceptions exist. In 2010, when Rabbi Jack Bemporad and American law professor, Marshall Breger, organized a visit of several imams and Muslim scholars to the Auschwitz concentration camp, the participation of Yasir Qadhi, Dean of Academics at the Al Maghrib Institute in New Haven, triggered criticism:\(^{106}\) Qadhi had told an audience in 2001, that Hitler “never intended to mass-destroy the Jews” and encouraged them to read a book about the “hoax” of the Holocaust.\(^{107}\) But the journey appears to have had a profound effect on Qadhi, who afterwards declared, in response to the criticism, that “[i]t was even more necessary for me to go and see how wrong I was.”\(^{108}\)

The motivation of the followers of the denialist movement justifies a greater emphasis on the confrontational approach. A follower who repeats phrases of denial under the influence of a group of like-minded people might act differently if removed from his peers and in the context of a serious conversation. A follower who accepts statements of denial because he believes them to be true shows that, on a basic level, truth still has value to him; and confrontation with evidence might not be an entirely fruitless undertaking.

And initiatives have come into existence whose work carries an impact in this context. Some of these are dedicated to offering affected persons a way out of adherence to the extreme right (where Holocaust denial has traditionally found a strong base). In Sweden and Germany, for instance, the

\(^{103}\) For more detail, see Lipstadt, \textit{supra} note 1, at 137.


\(^{105}\) See \textit{supra} text after note 66 et seq.


\(^{108}\) Krieger, \textit{supra} note 106.
“Exit” programme helps members of these groups leave their communities.109 In Denmark, the project “Deradicalisation – Targeted Intervention,” run by the Ministry of Social Affairs, seeks to help young people quit environments that are extremist in nature.110 These initiatives have shown some success: five years after the German version of “Exit” had been established, its director stated that the project had helped 225 persons to leave environments of this kind.111 These projects, however, are not specifically designed as options for dealing with denialism, although debating the “ideology” of these groups is often part of the programme.112

A more direct approach is taken by the German society, “Für die Zukunft lernen” (Learning for the Future).113 For the past twenty years, its president, Werner Nickolai, has been involved in a project that seeks to inform young people about the Holocaust. Every year, Nickolai, a professor at the Catholic University of Applied Sciences in Freiburg, embarks on a ten-day journey to the Auschwitz concentration camp, along with young people from the extreme right, including juvenile prisoners.114 During their stay, they engage in maintenance work at the remains of the camp, but also


111. Märtens, supra note 109.

112. Cf. DANISH MINISTRY FOR REFUGEE, IMMIGRATION AND INTEGRATION AFFAIRS, supra note 110, at 12, 18, 26.


meet survivors of the Holocaust.115 As in most of the other projects, participation is a voluntary commitment.116

Prior to his academic career, Nickolai had been a social worker in a juvenile prison117—an experience which may have helped him keep his expectations on a realistic plane. He is aware of the limitations of the project and points out that the young people with whom he travels do not necessarily understand the link between the mistreatment of Jews at Auschwitz and the mistreatment of minorities today.118 But there is one tangible result: Nickolai notes that there had not been a single case in which the persons accompanying him still adhered to Holocaust denial after former concentration camp prisoners had personally told them about the gas chambers.119

It would appear that personal confrontation with the facts was instrumental for this result—as, arguably, was the encounter with inescapable visual evidence. It is of importance to Nickolai that “all senses” of the young people are addressed,120 and the experience of Yasir Qadhi appears to underline this aspect of the confrontational approach. After his journey to the death camp, Qadhi stated that every denier should be given a free ticket to visit Auschwitz “because seeing is just not the same as reading about it.”121

The confrontational approach, then, is not devoid of merit. But it requires accurate distinctions if it is to lead to convincing results. Even where followers of the movement are concerned, the efficiency of, for example, a debate on the underlying crimes can be questioned, if the audience is still embedded in their peer groups and generally accepting of their influence.

A direct encounter with visual evidence and a meeting with survivors may be a more persuasive option. Taking young extremists out of their comfort zone—which was, after all, defined by parameters set by their particular background—may well have been a significant contributory factor in the success of the Nickolai project in spite of its avowed intention to inform, rather than to shock.122

115. Werner, supra note 114.
116. Id.
117. Nickolai, supra note 114.
118. Werner, supra note 114.
119. Spalinger, supra note 114.
120. Werner, supra, note 114.
122. Werner, supra note 114.
CONCLUDING CONSIDERATIONS

The fact that criminalization has become a popular option to counter denialism is not difficult to understand. In the presence of deeply offensive statements about the suffering of millions, the call for retribution is not unexpected.

But the legal sanction has shortcomings that cannot be ignored; prominently, the possibility of a clash with human rights, including freedom of expression, but possibly also with other rights that the leading human rights treaties seek to protect. And criminalization tends to have a segregating effect: by targeting statements about certain crimes at the expense of others, it engages in the questionable business of constructing a hierarchy of suffering.

The alleged efficiency of criminalization is a further point allowing for critical assessment. The danger exists that the exclusionary effect of criminalization plays rather into the mind-set of the movement; it is one of the cornerstones of the denialist ideology that its supporters are seen as martyrs who resist the "conformist conspiracy" of mainstream history.

If the law is not the solution, alternatives must be considered which promise greater efficiency. Various options have been explored in this article, but the most convincing approach may well require a combination of several methods. It is suggested that the following aspects have an impact on this consideration.

Firstly, genocide and Holocaust denial take place in different societies and in different contexts. The identification of the most appropriate ratio of methods to counter denialism is therefore strongly dependent on situational parameters. The urgency and widespread nature of denial in some societies may require more of a communal effort, including heightened emphasis on public education and the establishment of dedicated institutions, which are capable of reaching members of all strands of society. If denialism is promoted merely by a minority, the focus might shift to dealing with the leaders and followers of that movement.

Secondly, not all deniers are cut from the same cloth. The leaders and creators of denialism act from motivations that differ markedly from those at the bottom of the movement. Genuine curiosity may occasionally be encountered in the latter group, but is nearly always absent in the former, and the appropriate methods of dealing with the conduct of deniers thus have to vary accordingly.

Thirdly, even within a particular target group, a careful assessment of the available methods is indispensable. The impact of an academic article on a juvenile delinquent with extremist right-wing tendencies may be doubted; the showing of a film on the atrocities might be more effective;
confrontation with actual physical evidence of international crimes and meetings with survivors have carried a convincing measure of success in the past. Fine-tuning these approaches is key to the development of a persuasive response, and that, in turn, requires a certain insight into the psychological conditioning of the perpetrator. Since the disassociation from “mainstream society” is often a core aspect of the ideology of deniers, the success of any option to counter denialism cannot be measured by the degree to which their exclusion from the community has been achieved—rather by the degree to which society has been able to effect their reintegration.

Applying these considerations may seem a fair amount of effort—more perhaps than an increased focus on education of the general public would require, and the question may arise whether people who indulge in denialism “deserve” this amount of consideration.

But this view fails to appreciate the context of these measures and their consequences. Their primary objective is still the countering of denial, and their principal thrust is unchanged: it lies in the protection of truth, of memory, and of the dignity of the survivors of crimes whose gravity is not subject to reasonable doubt.