

On the Outlawing of Genocide Denial

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In honour of my friend Hans Warendorf (b. 1934) with whom I have discussed most of the topics outlined in this text.

I. By way of introduction

This article, originally a lecture on the topic for the CEJI, constitutes a contribution to the discussion on the EU Framework Decision on combating racism and xenophobia, which was published on April, 20th. According to this decision, ‘Public [dis-]approval, denial or gross trivialisation of genocide, crimes against humanity and war crimes will be criminalised if the crime is directed against a group of persons because of their race, colour, religion, descent or national or ethnic origin.’ It is the combination of genocide denial and other forms of denial with the racist or xenophobic agitation that is criminalized, not the denial of genocide in itself.

The discussion of this topic will not subside for the time being, because the European Parliament has to be consulted. The Council will subsequently assess the observations of the parliament before the Framework Decision is formally adopted. The provisions of this Framework Decision do not apply directly; rather, Member States must implement them into their national law.¹

Since 1989 I have worked as a historian of the Holocaust, and since 2002 I have a chair at the University of Amsterdam in the field of Holocaust and Genocide studies. This is a chair in the Faculty of the Humanities. It is not in the Faculty of Law. I do hope, however, that I am aware of some of the legal issues concerning genocide and genocide denial, but please do not expect too much of me in that field.

¹ News Alert of the German Presidency, Common Criminal Provisions against Racism and Xenophobia, April, 20, 2007. *De Volkskrant*, ‘Maximumstraf in EU voor aanzetten tot haat of geweld’, 20 April 2007.

As you know, history does not deal with the past in its entirety. Historians are not antiquarians.² We do not collect facts like a botanist would collect plants or seeds. We select historical phenomena for our research because we think that they are interesting to ourselves and to others as well.

History, to quote Johan Huizinga, by far the best Dutch historian of the XXth Century, is the mental form in which a society accounts for its past.³ The selection process of the historian thus takes place in a given social environment.

Recent developments can, therefore, radically change historical perspectives. Please allow me to give you an example from Denmark. During the wars of Yugoslav succession in the beginning of the nineteen-nineties the Danes had a bataillon there. More or less by accident men from this bataillon killed 300 Serbs in a single stroke.

This development made the Danish military rather nervous. They doubted whether killing 300 Serbs would increase their popularity at home. So their Information Department decreased the number of Serbian dead to three. Then it became apparent that the Danish media reacted very positively to killing Serbs, so the number of Serbian casualties was again raised to 300.

The Danish Prime Minister sensed this change, and he proclaimed that Danes historically were brave soldiers, and that, with the benefit of hindsight, the Danish policy of neutrality in the era between the world wars was an aberration. He set up a research project to prove that the Danish track record during the Third Reich was morally dubious. As you know, in 1940 the Danish army fought the Nazi's for a small number of hours. After taking very few casualties, they surrendered. Now, new generations of Danes will learn that their true past is not a past of neutrality and collaboration, but that their true past is a bellicose past, a past of heroic combat.⁴

Most of you perhaps view the Dutch as a nation of bankers and merchants. But our Republic in the XVIIth Century was a result of a revolt against Spain. The Dutch Republic was born in

² M. Bloch, *Apologie pour l'Histoire ou Metier d'historien* (Paris, 2004), p. 63. I thank my colleague dr Joel S. Fishman (Jerusalem) for this footnote.

³ In 1926 Huizinga wrote that "geschiedenis de geestelijke vorm is waarin een cultuur zich rekenschap geeft van haar verleden."

shining armour, even if we paid foreigners – Germans and Swiss - to do the actual fighting for us.⁵ We, the Dutch, have successfully repressed these memories of warfare, as adamantly as the Danes have discovered their new past.

To drive this point home: history is like a wishing well. The sounds we hear from the well are our own sounds. Because society expects from us, the historians, that we deal in hard facts, we present our findings as such. But, in reality, there are but very few facts that are not subject to interpretation in one way or another.

II. What constitutes Genocide?

So, to give you one last practical example. Some historians have labelled the XXth Century the “Century of Genocide”, and on good grounds, for many millions have died as a consequence of genocide. But I would not argue with a colleague from another field, who would maintain that the XXth Century rather was the Century of Free Elections, of the Liberation of Women, of the Expansion of Higher Education, or of the European Union for that matter. All these phenomena were typical of the XXth Century as well.

It has now become common place to view genocide as the general phenomenon and the Holocaust as one particular genocide amongst others.

I do have to stress, however, that this view does not have a long tradition. A quarter of a century ago the historical position that was taken by most of my colleagues was that the Holocaust was unique. Nothing could compare with the Holocaust, the premeditated and highly industrialized murder of the Jews in Europe. During the nineteen-eighties German historians and philosophers as Jürgen Habermas engaged in a fierce debate, the so-called *Historikerstreit*, which was all about this question, whether the Holocaust was unique. This debate ended in a clear victory for those historians and philosophers who considered the Holocaust as unique.⁶

⁴ I am grateful to my colleague, Prof.dr Uffe Ostergardt, formerly of the Danish Institute for International Studies, for sharing this story with an audience in Amsterdam, September 8th, 2005.

⁵ J. Huizinga, *Nederland's Beschaving in de zeventiende eeuw*, in: *Verzamelde Werken, vol. II* (Haarlem, 1948), p. 437.

How much has changed? Now, no more than twenty years later, the number of scholars that maintain that the Holocaust is unique is very small indeed.⁷ They are fighting a lost battle, and they know it. A more frequently held view is that the Holocaust, while not unique, is ‘singular’⁸ (Christian Meier) or ‘unprecedented’ (Yehuda Bauer).⁹

This last word, ‘unprecedented’ originally was coined by Raul Hilberg for the death camps of Treblinka, Belzec and Sobibor, because the Nazi combination of gas with concentration camps was without precedent. ‘Never before in history had people been killed on an assembly-line basis.’¹⁰ Recent developments have changed this historical perspective as well, and now very many of my colleagues would agree with the German scholar Christian Meier that it is not the Holocaust that is unique. What is unique, is the intensity with which we still remember the Holocaust.¹¹

For history is the history of bloodshed, and history is traditionally written by the victorious powers, not by the vanquished. Entire peoples and entire civilizations have vanished from the face of the earth, and only the names of the victorious powers (Persians, Greeks, Romans, Portuguese, Spaniards, Dutchmen etc) come to our minds. Those who have lost, those who were wiped out, very frequently are forgotten. As a policy, genocidal policies can be highly effective.

Not many youngsters who grow up in Adana, in Turkey, know that their city was to a large extent built by Greeks. The kurdified third-generation Bulgarians who now populate Diyarbekir in Eastern Turkey live in houses built by Armenian Christians, but they are unaware of this. During the Cold War the memory of the Holocaust was successfully repressed in the Eastern Bloc, to give you another example. Bosnian schoolchildren of Serbian descent are not taught that Srebrenica was a genocide, rather that there was a civil war, and that the Muslim population of Srebrenica is to be blamed for a defeat of its own making.

⁶ The best single book on this topic is: C.S. Maier, *The Unmasterable Past: History, Holocaust, and German Nationalism* (Cambridge, Mass., 1988).

⁷ For an exceptional standpoint, see: S.T. Katz, *The Holocaust in Historical Context. The Holocaust and Mass Death before the Modern Age* (New York, 1994).

⁸ Ch. Meier, *Vierzig Jahre nach Auschwitz. Deutsche Geschichtserinnerung heute* (München, 2. Auflage 1990), p. 47, 51.

⁹ Y. Bauer, *Rethinking the Holocaust*, (New Haven/London, 2001).

¹⁰ R. Hilberg, *The Destruction of the European Jews* (New York/London, 1985), vol. III, p. 863.

¹¹ See footnote 8.

One of the reasons that the vanquished are forgotten, is that the survivors usually flee from the regions of their destructions, if they can. In some cases there are no survivors. The Inca's and Aztecs perished as a result of the flu and the common cold their Spanish masters infected them with, telling their contemporaries that these peoples, who sacrificed their children to their Gods, were not human anyway.

If there are survivors, they stay clear of the sites of their destruction. The majority of Polish survivors left Poland after 1946. Vienna is a provincial town, since the Jews were thrown out in 1938. The Jews, the highly assimilated German Jews that is, did not return to Germany after the Holocaust. The Armenians have not returned to Turkey. The widows of Srebrenica remain in Tuzla.

Survivors of genocide and ethnic cleansing leave, not to return.¹² They adapt to their new surroundings. They assimilate and then they vanish. Only if they have no other option, if their poverty forces them to, survivors live together with the executioners of their families, in Rwanda, for instance, or in Cambodia. In some exceptional cases survivors of genocide manage to catch the public eye. If they promote themselves as spokespersons for a lost culture they usually are more effective than in their role as genocide victims.

The Holocaust is unique, because it still figures so prominently in the European collective memory of the XXth Century. Perhaps this is an understatement. Perhaps Europe has but very few collective memories. European history is the history of the European wars. One of the very few memories that unite Europeans are the memories of National Socialism, of the Third Reich of Adolf Hitler, and of the killing of the Jews. This memory has remained, because post-war generations made a conscious effort to remember. I think that the German expression, which is *Erinnerungsarbeit*, the labour of remembrance, is apt. The necessity to remember the Holocaust, in Eastern as well as in Western Europe, is enshrined in the Stockholm Declaration (2000) and in a new international organization, The Task Force for Holocaust Education, Remembrance and Research, which now counts twenty-four member states. In my view, this example proves that states do take sides in historical debates.¹³ Holocaust education is an obligatory part of the high school curriculum in a many European states, and in the most densely populated states of the U.S.A. as well.

¹² N. Naimark, *Fires of Hatred. Ethnic Cleansing in twentieth-century Europe* (Cambridge, Mass., 2001), p. 184.

¹³ For more information see the website of the Task Force.

Now, in my modest opinion, civilizations are not unlike schoolchildren. They remember the events which are of some use to them. In my view nobody phrased the importance of the unprecedented Holocaust better than Sir Isaiah Berlin. According to Berlin, in the post-Holocaust era awareness of the necessity of a moral law is sustained no longer by belief in reason but by the memory of horror. To quote the biographer of Berlin, Michael Ignatieff: 'The Holocaust demonstrates both the prudential necessity of human rights and their ultimate fragility.'¹⁴

I have just mentioned Rwanda and Srebrenica. I think that these – legally acknowledged – genocides have dealt a devastating blow to the belief that the Holocaust was unique. Perhaps, it is useful to let me explain why the impact of Rwanda and up to a point of Srebrenica as well has been so huge.

These events occurred in a highly optimistic period of European and world history, after the Fall of the Wall. The Fall of the Iron Curtain opened huge opportunities for the creation of a new world order, in very much the same way that the defeat of Hitler's Germany and of Imperial Japan in 1945 created such an opportunity. The aftermath of the Second World War resulted in the creation of the UN, the Declaration of Human Rights, the Genocide Convention and the International Military Tribunal of Nuremberg. The aftermath of the Cold War resulted in the International Tribunals and in UN peace keeping missions in the beginning of the nineties which were essentially arrogant and pedantic. These peace keeping missions ended in total failures in Rwanda in 1994 and in Srebrenica in 1995.¹⁵

After Rwanda it was difficult to maintain that the Holocaust was unique. In fact, during the last decade the number of historical massive human right abuses and mass killings has increased enormously, because politicians, parliaments, historians and other scholars have decided to change their verdicts, as it were. The awareness of the Armenian genocide¹⁶ has increased, thanks to American and French politicians and European institutions. This genocide was recognized by the US House of Representatives on September, 12, 1984, by the European parliament on June, 18, 1987 and by the Council of Europe on April, 24, 1998. The

¹⁴ M. Ignatieff, *Human Rights as Politics and Idolatry* (Princeton/Oxford, 2001), p. 81.

¹⁵ M. Ignatieff, *The Warrior's Honor. Ethnic War and the Modern Conscience* (London, 1998), p. 89-105.

French parliament has passed a law of recognition on January, 29, 2001 and a law on denial of the Armenian genocide on October, 12, 2006.

The German Cabinet Minister for Development, Madame H. Wiczeorek-Zeul one century after the fact has acknowledged that the killing of the Herero's in Namibia constituted a genocide in August, 2004. The US Secretary of State Colin Powell has said in the U.S. Senate that the killings in Darfur constituted a genocide on September, 9, 2004. In the parliament of Ukraine, the former allies of Mr. Yuschenko recently passed a law concerning the man-made famine by Stalin in Ukraine in the thirties, labelling the "Holodomor" a genocide, on November, 28, 2006 to be precise, in a move that angered Russia. The Polish parliament agreed with this point of view some weeks later.¹⁷

Sometimes politicians head the genocide trail. In other cases legal experts do, and sometimes, not always, they follow the politicians. The UN-Tribunal on Rwanda (ICTR) has ruled Rwanda a genocide, the UN Tribunal on former Yugoslavia (ICTY) has considered Srebrenica a genocide,¹⁸ and so did the International Court of Justice (ICJ), very recently.¹⁹ Undoubtedly, the Tribunal for Cambodia, if it ever will start its work, will consider the killings of Vietnamese, Buddhist Monks and the Cham by the *Khmer Rouge* as cases of genocide.²⁰

And in other cases, those of Bangla Desh (1971), Eastern Timor (1975-1979), or of the famine under Chairman Mao, historians and or social scientists plea for the verdict of genocide.²¹ I have colleagues who refer to slavery in America as to the 'Black Holocaust'. In Australia, the Aborigines now refer to themselves as Koorie's and believe that they are the victims of a genocide.²² German right-wingers sometimes label the ferocious attack on

¹⁶ The most important recent book on the Armenian genocide is: T. Akcam, *A Shameful Act. The Armenian Genocide and the Question of Turkish Responsibility* (New York, 2006).

¹⁷ Because all of this can be easily found on the internet, I have refrained from writing footnotes. Furthermore, the political dimensions of these decisions and laws can be best evaluated by reading them on the net.

¹⁸ See the websites of the ICTR and the ICTY. One of the best contributions on the topic is: M. Mennecke and E. Markusen, 'The International Criminal Tribunal for the Former Yugoslavia and the Crime of Genocide', in: S.L.B. Jensen (ed.), *Genocide: Cases, Comparisons and Contemporary Debates* (Copenhagen, 2003), p. 293-359.

¹⁹ International Court of Justice, *Case Concerning the Application of the Convention on the Prevention and the Punishment of the Crime of Genocide* [Bosnia vs. Serbia], February 26, 2007, paragraph 297.

²⁰ See: B. Kiernan, *The Pol Pot Regime. Race, Power and Genocide in Cambodia under the Khmer Rouge, 1975-1979* (New Haven/London, 2002, second Edition), p. 456-465.

²¹ See the contested Wikipedia-article, 'Genocide'.

²² A. Grosser, *Verbrechen und Erinnerung* (München, 1993), p. 55-65.

Dresden, which took place in February 1945, as a genocide. This label has been applied as well, when ‘referring to racial integration, methadone maintenance programs, certain features of the medical treatment of Irish Catholics, and the closing of synagogues in the Soviet Union.’²³

In my view we have now reached a point, in the spread of the concept of genocide, and in the political use and misuse of that concept, that we have to make an effort to make some distinctions. The word genocide is an invention of a Polish-Jewish legal expert by the name of Raphael Lemkin. It is combination of two words, the Greek word *genos* (in Dutch and German: *volk* or *Volk*) and the Latin word *cidere* (which means to kill).²⁴ The criminality of genocide is laid down in the U.N. Genocide Convention of 1948 (which was implemented by the Dutch government in 1964). This treaty outlaws genocide. It was, however, primarily drafted as an instrument to punish perpetrators of genocide.

I will now quote from the Convention of 1948, which is verbally repeated in the other core legal texts such as the Rome Statute of the International Criminal Court and the Rules on grave breaches of international humanitarian law, the International Crimes Act, which became law in the Dutch state on June, 19, 2003.²⁵

“Anyone who intentionally commits any of the following acts with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group: killing members of the group, causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children of the group to another group is guilty of genocide and liable to life imprisonment” or to a prison term not exceeding twenty years.

Genocide – in the view of the International Court of Justice - is all about genocidal intent to destroy the members of a group, a national, ethnic, racial or religious group, as such, in whole or in part, because of the positive characteristics of that group, the intent being the main thing

²³ Mennecke and Markusen, ‘The ICTY’, p. 296.

²⁴ S. Power, “A Problem from Hell”. *America and the Age of Genocide* (London, 2003), p. 17-70.

²⁵ Rules on grave breaches of international humanitarian law (International Crimes Act). See the website of the Dutch Ministry of Foreign Affairs.

(and not the result). Naturally, ‘Great care must be taken in finding in the facts a sufficiently clear manifestation of that intent.’

If a political group is destroyed (say the kulaks, the richer farmers in Stalin’s Russia), this is not genocide. As the ICJ has recently pointed out, negative characteristics (i.e. non-Serbs or non-Allies for that matter, in the case of Dresden) are not sufficient. The attack on Dresden in this view was a war crime, during an inhumane war fought by the Allies to topple a genocidal regime.²⁶

This genocidal intent (*dolus specialis*) has to be specific and direct, as both the ICJ and the ICTY have ruled. This rules out ethnic cleansing (the intent of which is removal, not destruction)²⁷ and man-made famines, because these famines lack directness. The purpose of slavery is exploitation, not destruction. Slavery, in fact, is all about keeping people alive. The killing of the Herero’s in my view was a war crime as well, in the context of a colonial war.

On the basis of these legal criteria, the number of genocides that have been recognized as such is limited. I hope that I can make this statement of fact, without being guilty of genocide denial in numerous other cases. Casting doubt upon claims of genocide in itself, in my mind, is not criminal. I do it all the time.

In some cases, casting doubt can produce something good. In 1977, before he had denied the Holocaust, the British historian David Irving went on American television, live. In that broadcast he provocatively promised to pay anyone \$ 10,000 who could show him a document signed by Hitler, in which Hitler ordered the destruction of the Jews. This led to a highly valuable scientific debate which lasted more than ten years on decision-making processes in the context of the Holocaust.²⁸ I will not bore you with the outcome, but, please do believe me when I state that scholars need debates, and that provocations can be useful.

²⁶ F. Taylor, *Dresden: Tuesday, February 13, 1945* (London, 2004). In my view the counter-argument that all wars are inhumane is not convincing. Some types of warfare are more inhumane than others. There are just wars. For this last view, see M. Walzer, *Just and Unjust Wars. A Moral Argument With Historical Illustrations* (New York, 1977, third Edition).

²⁷ International Court of Justice, *Case Concerning the Application*, paragraphs 187-188, 189, 190 and 193. Some other legal experts, however, see this as a *dolus generalis*.

²⁸ Two excellent contributions are: P. Longerich, *Politik der Vernichtung: eine Gesamtdarstellung der nationalsozialistischen Judenverfolgung* (München/Zürich, 1998) and C.R. Browning, *Nazi Policy, Jewish Workers, German Killers* (Cambridge, 2000), p. 26-57.

I think, however, that legal verdicts are of the essence in determining what constitutes genocide. The Prosecutors of the ICTR and the ICTY have proven genocides in Rwanda and Srebrenica. The ICJ has found that Srebrenica was a genocide. A local Swiss Court in Lausanne has found a Turkish politician guilty of denial of the Armenian Genocide.²⁹ So this short list consists of the Holocaust, Rwanda, Srebrenica, and, perhaps, if we take the local Swiss Court seriously, the Armenian Genocide. I do think that the quality of the judges in international courts is impressive, if we compare these international courts to national courts. The procedures of international courts tend to be the most transparent of legal procedures.

I think that this process of judicial discussions has been of an enormous influence. Perhaps EU proposals to outlaw genocide denial could have a similar and equally beneficial influence.

I am certainly not a propagandist of international criminal law per se, in all aspects that is. I am aware – with the legal expert Lawrence Douglas - of some of the drawbacks, in particular in so far as they concern the concept of national sovereignty (the state usually being the prosecutor of crimes, not the defendant, as – up to a point - Hitler's Third Reich in Neurenberg). And I seriously doubt whether the rights of the defendant are still sufficiently protected, whether Tribunals do not go too far, especially in their acceptance of a wide range of types of evidence. And perhaps prosecutors are pushing things too far, if they use a concept like “Joint Criminal Enterprise” (which enables judges to convict a defendant for crimes he has not committed in person).³⁰

All of that being said, I think that recent experiences with these Tribunals have been positive, even if some political and other leaders consider them too costly and too time-consuming. But these considerations, too, are practical in nature.³¹ I think one of the most important advantages of the Tribunals is their pedagogical use, as the case against Adolf Eichmann in Jerusalem has dramatically shown. These court cases can do what nobody else can: they can bring the crime and the victims together in the dramatic setting of a court. In creating this directness they can create media explosions. The ICTY-case against Slobodan Milosevic has

²⁹ See www.swissinfo (10 Mars 2007) and article 261bis of the Swiss penal code.

³⁰ This is a direct echo of remarks made by Lawrence Douglas during the Yad Vashem international conference, December 19-21, 2006, ‘*Justice and the Holocaust: Post World War II Trials, Representations, Awareness and Memory*’.

³¹ Staunch defenders of Truth and Reconciliation Commissions as ICTJ-founder Alex Boraine are keen on making this point. For an example, see: N. Adler (ed.), *Genocide and Accountability. Three public lectures by Simone Veil, Geoffrey Nice and Alex Boraine* (Amsterdam, 2004).

very much proven that these cases are high-risk enterprises, for the very same reasons. Eichmann, in comparison, was a very simple defendant to deal with.³² He did not put up much of a fight. In my view it is highly unlikely that the ICTY would have considered Milosevic, had he lived, guilty of the genocidal event in Srebrenica. And this would have been a terrible defeat for Mrs. Carla del Ponte and a huge victory for Mr. Milosevic.

I do not think that court cases against the perpetrators of genocide are useful in a deterrent sense. Perpetrators of genocide kill for ideological reasons. They believe in all sincerity that they give orders to kill the internal enemies of their state. They truly think that they are acting in self-defense, that killing the enemy inside is not a breach of the law, but rather that killing this enemy is a moral imperative.³³

Now, because a strict legal definition has been interpreted in the sense of specific genocidal intent by both the ICTY and the ICJ, I think that it is possible and perhaps even wise to discuss whether it is possible to outlaw the denial of genocide, in the light of the existence and successful promotion of Holocaust education, and in the light of the educational use of International Tribunals.

III. Outlawing Genocide Denial?

Please allow me to devote the rest of my contribution to this topic, how perhaps to outlaw genocide denial. I will not repeat the different arguments against such a law. In my view my countryman A.L.J. Janssens of the Law Faculty of Groningen University has addressed these questions in an admirable way, in an article which can easily be found on the internet. I will merely summarize his criticism of a Dutch draft law here.

I think the criticism is fivefold.

- According to Dutch law, there is nothing much wrong with insulting fellow human beings provided there is no damage done to one's dignity in a social sense. Judges can evaluate that social damage, they can evaluate whether an insult involves contempt or discrimination, they,

³² During their panel session at this Yad Vashem conference (see footnote 30) my impression was that Lawrence Douglas and Michael J. Bazyler agreed upon this.

³³ O. Bartov, *Mirrors of Destruction. War, Genocide and Modern Identity* (New York, 2000), p. 152-165.

however, can not assess the psychological impact of an insult. They are judges, not psychoanalysts.

- Janssens asks what actual damage denial does. In his view the damage is done in particular in Germany and in Austria, i.e.. in states in which the now dominant political culture is closely connected to acceptance of the Holocaust.

- The third point is that of the freedom of expression and/or speech.

- The fourth point is that Janssens doubts whether such a legal project would prove effective. He does not believe that a law on denial will work as a deterrent.

- the fifth point deals with the question what we do with other genocides, or rather with alleged genocides. Janssens does not believe that judges, as paid agents of states, should be responsible for rulings which would state that crime A (for instance the Holocaust) constituted a genocide, whereas crime B (for instance the Allied bombing of Dresden) was not to be considered as a genocide.³⁴

As a citizen of the Dutch democracy, I am in full agreement with Janssens, in particular when he defends the freedom of expression and speech. Democratic states allow their citizens to speak their minds. Non-democratic states tend to do away with freedom of speech.

Many Holocaust deniers, by the way, do not discriminate Jews, even if the act of Holocaust denial is immoral and offensive. The point is made by Janssens, but perhaps more adequately by Richard J. Evans, the principal witness for the defense in the most famous Holocaust court case since the Eichmann trial, the libel suit brought before the High Court in London in 2000 by David Irving against Penguin Books UK and Deborah Lipstadt.

Evans, in summarizing earlier work on Holocaust denial, wrote that, quote, ‘in reducing them all to a lowest common denominator, it seemed clear that Holocaust denial involved the minimum following beliefs:

³⁴ A.L.J. Janssens, *De loochenaars van Auschwitz; de ongewenstheid van strafbaarstelling*. See <http://rechten.eldoc.ub.rug.nl>

- (a) The number of Jews killed by the Nazis was far less than 6 million; it amounted to only a few hundred thousand, and was thus similar to, or less than, the number of German civilians killed in Allied bombing raids.
- (b) Gas Chambers were not used to kill large numbers of Jews at any time.
- (c) Neither Hitler nor the Nazi leadership in general had a program of exterminating Europe's Jews; all they wished to do was to deport them to Eastern Europe.
- (d) "The Holocaust" was a myth invented by Allied propaganda during the war and sustained since then by Jews who wished to use it to gain political and financial support for the state of Israel or for themselves. The supposed evidence for the Nazi's wartime mass murder of millions of Jews by gassing and other means was fabricated after the war.'³⁵

End of quote. Evidently, although 'a good deal of [the deniers] can be linked to racial hatred and antisemitic animosity',³⁶ the purpose of deniers often is to blame the Allies for the death of (German) civilians and to exculpate Hitler and the rest of the Nazi leadership.

Because Evans concedes in a footnote that not all Holocaust deniers permanently agree with the statement under (d), it is in my view – following Janssens - very likely that a law that would combine, in a strict way, Holocaust denial with discrimination or incitement to racism and/or xenophobia as a prerequisite for punishment, would not regard very many of those who deny the Holocaust as guilty.

As far as the ability of judges is concerned to decide what constitutes genocide and what does not, I beg to differ with Janssens. I think the Framework Decision at hand deals with this problem by focussing on verdicts by courts, and I have already said that I think this is wise. There is, furthermore, no doubt that national courts which reside in the more than 100 different states that have ratified the Statute of Rome for the establishment of the International Criminal Court (ICC), could turn out verdicts on genocide in the future.³⁷ The court case in The Hague against a war merchant, a Dutch national named Van Anraat, who sold chemicals for the production of poison gas to Saddam Hussein is a case in point, and so naturally is the court case against Saddam Hussein itself.

³⁵ R.J. Evans, *Lying about Hitler. History, Holocaust and the David Irving Trial* (New York, 2001), p. 110, 283.

³⁶ Evans, *Lying about Hitler*, p. 109.

³⁷ See footnote 25.

Now, I think that there is a case to be made for outlawing genocide denial, provided that this punishable denial involves denial of the verdicts of the ICTY, ICTR and the ICJ, and of future verdicts of the ICC and national courts as well.

I would like to make this point in a non-legal way, by trying to describe what the motives are behind genocide awareness and behind genocide denial.

As I have said earlier, genocide awareness historically speaking is a recent invention. Or, to put it in another way, there simply does not exist a direct connection between human rights abuses and the awareness of these abuses in the public sphere. The Portuguese, to give another example of this, were far more important slave traders than the Dutch, but that does not seem to worry them. The Dutch did not trade that many slaves, but because our society is inhabited by descendants of slaves, the slave trade is a cause of concern for the Dutch.

In contrast to the reaction of the Portuguese stands the reaction of one of the Dukes of Alva, a Spanish duke who nowadays stills feels guilty about the actions of the former Duke in the Netherlands in 1580. He invites scholars to his castle on a regular basis, and before the scholars discuss the wrongs of this predecessor he duly apologizes for these wrongdoings.

You can easily imagine what the life of genocide scholars would be, if everybody would behave in this highly laudable way. Unfortunately, genocide awareness by perpetrators is highly exceptional, because the perpetrators feel that they were doing the right thing, that is protecting the best interest interests of their states by killing dangerous opposition to the national interests.

Perhaps the true problem of genocide denial is not that individuals deny a particular genocide. The problem more generally, as many victims know from their first-hand experience, is that perpetrators frequently are in denial. Serbia, the Republica Srpska and the current government of Turkey are not exceptions.

The continuity of political regimes makes it difficult to concede that a genocide has taken place. As a product of Vichy, Francois Mitterand found it difficult to admit that the French

state was co-responsible for the anti-Jewish policies of the Vichy government.³⁸ Jacques Chirac in France and Gunnar Persson in Sweden could admit co-responsibility because they personally were not connected to the previous political elites, in the same way as Konrad Adenauer or Willy Brandt were not connected to the political elite of the Third Reich.

Awareness of genocide usually occurs only after a drastic political change. A change of regime does not, however, in itself, create a situation in which genocide or other grave abuses of human rights are acknowledged. Two examples may suffice.

The current government of Turkey strongly identifies with Atatürk, not with the government that ordered the deportations of the Armenians in 1915-1917, and nevertheless finds it difficult to recognize this genocide.

After 1945, many European states that had been liberated by the American and British forces prosecuted war crimes. But the crimes that were punished were the crimes committed by the German Army and the *Waffen-SS*. These often concerned the executions of civilians. The involvement of Dutch, French or Belgian prominent civil servants in the persecution and mass arrests of Jews during Nazi occupation was, on the other hand, not often punished.³⁹ Very often the police chiefs responsible were even not fired, but stayed in office. In this respect the Polish and Ukrainian examples and experiences of today resemble those of Western Europe after 1945.

No state ever has suffered such a loss of international credibility because of gross human rights abuses as Germany. Awareness of genocide up to a point is political justice, the use of justice for political ends that is.⁴⁰ One of the most convincing ways to argue that a former regime was criminal in nature is to maintain that it has committed genocide.

The German Federal Republic which succeeded the Third Reich of Adolf Hitler, and that is my point, promoted Holocaust awareness because it could do so without compromising itself.

³⁸ For France, see: E. Conan et H. Rousso, *Vichy, Une Passé qui ne passe pas* (Paris, 1994).

³⁹ For an example, see: A.D. Belinfante, *In plaats van Bijltesdag. De geschiedenis van de Bijzondere Rechtspleging* (Assen, 1974).

⁴⁰ The classical work on this topic is: O. Kirchheimer, *Politische Justiz. Verwendung juristischer Verfahrensmöglichkeiten zu politischen Zwecken* (Frankfurt am Main, 1981).

This same essentially is true in Iraq, because the current Iraqi government also views itself as a state that is a liberated one, and not merely as a vanquished power.

Perpetrator states do not admit genocide, unless there is foreign pressure as well. Even the most willing and the most cooperative of defendants, the at the same time vanquished and liberated Federal Republic of Germany that is, had to be persuaded to admit guilt.⁴¹

History in my view has also demonstrated that Holocaust awareness, or genocide Awareness for that matter, need not depend upon perpetrators. Holocaust awareness and its promotion were characteristics of that part of the world, which was called the Free West during the Cold War. In that period, Holocaust awareness effectively was limited to the Free West.

It was not a coincidence that the first free parliament of the German Democratic Republic acknowledged the Holocaust.⁴² Since the Fall of the Wall, Holocaust education has become obligatory in large parts of Eastern Europe, also thanks to the Task Force. I do not think this has to lead to a reduction of the freedom of speech or the freedom of expression.

IV. Summary

So let me now sum up and conclude.

History is full of massive abuses of human rights. Most of them are forgotten. Awareness of such abuses is exceptional. This is strictly a post-Second World War phenomenon. As a lesson in political morality the unprecedented Holocaust demonstrates both the prudential necessity of human rights and their ultimate fragility.

Outlawing genocide denial will result in an increase of foreign pressure on perpetrators, such as Serbia, the Republika Srpska and Turkey.

In my view the outlawing of genocide denial is sound, provided courts have first established that there was a case of genocide (and genocidal intent).

⁴¹ Meier, *Vierzig Jahre*, p. 64, 53.

⁴² Grosser, *Verbrechen und Erinnerung*, p. 279.

The verdicts of international tribunals would be preferable to rulings of national courts. The decisions that in the future might be given under the Rome Statute for the establishment of the International Criminal Court (ICC) could give rise to more verdicts on genocide of national courts in the future. Recent developments do point in that direction.

Such verdicts will intensify public debates on genocide and other gross abuses of human rights. Such debates are needed by historians who cannot fulfil their tasks without such debates. History, after all, is about accounting for the past.

I fail to see why freedom of speech and expression should be at stake when denial of genocide will constitute a criminal offence. Many governments promote Holocaust education as part of their educational policies and encourage other governments to do the same. This means that states are not neutral, as far as the past is concerned, and that they do take sides, without effectively limiting or impeding the freedom of speech and expression.

V. Outlook

On the other hand, if only non-democratic states limit such freedom of speech and expression, this could be a reason not to punish genocide denial by law. There are certainly ways to alleviate the plight of survivors other than by punishing a denial of genocide as a criminal offence.

For survivors and their dependents it would be beneficial if there was an official international institution which could establish that certain events constitute genocides. Such a public law institution could best be established by the international community, which would thereby create a possibility for officially acknowledging historical genocides in cases where there are no defendants to be put in the dock.

In my view, the recent verdict of the ICJ in the case of *Bosnia v. Serbia*, holding that Srebrenica was a genocide, was essentially such a historical ruling. If a court can pass a verdict on genocidal events which took place more than a decade ago, (or, as German courts frequently have done, on events which happened up to fifty years ago), evidently the difference between rulings on actual genocides and rulings on historical genocides is not a matter of principle.

A decision of such a public law institution certifying that events constitute genocide could be especially useful if a denial of genocide by individuals or by perpetrators is to be outlawed. It would also assist national courts who try perpetrators and accomplices of genocide in cases where the means and expertise for establishing whether genocide has taken place are lacking. This would reduce the courts' workload up to a point as they must still judge the culpability of individual perpetrators and their accomplices.

A public law institution which could establish genocide could arrive at its decisions in a way comparable to that of International Tribunals and the ICJ and as the new International Criminal Court in The Hague will be doing shortly.

If such a public law institution is established, the perpetrator – or perhaps a “perpetrator state” - could refute that it had genocidal intent. In such cases this would probably give rise to plea bargaining by perpetrator states. Such plea bargaining is, in my view, what the Serbian law team did in the recent ICJ-case.

If states consider it to be their more or less universal duty to try perpetrators of genocide, perhaps they will also consider it their more or less universal moral obligation to worry about the victims of genocide as well.

The states that establish a public law institution could also form a fund out of which compensation could be paid, perhaps in particular to those who live in third-world states. Now victims have to make do with Truth and Reconciliation Commissions, essentially because the state cannot afford to compensate them. Lower administrative tribunals could deal with the division of the funds later on, perhaps for funding remembrance and educational purposes.

Such an institution could be an offshoot of the International Criminal Court in The Hague, which has created a department, under the leadership of *Madame la Ministre* Simone Veil, to watch over the interests of the victims.