

The Honourable Federal Justice Minister Brigitte Zypries  
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European Union Commissioner Frattini  
European Commission  
B-1049 Brussels  
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**Re: Proposed EU ban on Genocide trivialisation**

London, 12 February 2007

Dear Minister Zypries, dear Commissioner Frattini,

I am writing to you on the matter of Federal Justice Minister Brigitte Zypries' remarks to the effect that Germany intends to push for an EU-wide ban on denying or trivialising the Holocaust, other genocides and a range of other war crimes, and Commissioner Frattini's expression of support for these proposals. ARTICLE 19 believes that this would be a mistake and that such a ban would pose a threat to the right to freedom of expression.

ARTICLE 19 is a leading international human rights organisation based in London, defending the right to freedom of expression. We are well known for our legal expertise and have close relations with all of the key intergovernmental organisations which defend freedom of expression, including the UN, Council of Europe and OSCE. We recognise the importance of the fight against racism and support efforts to undertake appropriate actions to combat this evil. At the same time, we believe that the envisaged measures are potentially incompatible with international law on freedom of expression. I am therefore writing to ask you to reconsider these proposals, as well as to offer ARTICLE 19's expertise to ensure that any eventual framework agreement on combating racism is fully consonant with this important right.

We would like to stress, at the outset, that, although certain forms of speech can promote racism, respect for freedom of expression is central to any democratic strategy for eradicating bigotry. As the four special mandates on freedom of expression at the UN, OSCE, OAS and African Commission on Human and Peoples' Rights stated in a Joint Declaration adopted on 19 December 2006:

Article 19 of the Universal Declaration of Human Rights:  
'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers'



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The exercise of freedom of expression and a free and diverse media play a very important role in promoting tolerance, diffusing tensions and providing a forum for the peaceful resolution of differences. ... Free speech is therefore a requirement for, and not an impediment to, tolerance.<sup>1</sup>

As you are no doubt well aware, European history provides ample support for these views.

ARTICLE 19 nevertheless recognises that it is legitimate to ban certain vicious forms of racist expression, and that international law actually requires this. States which have ratified the *International Covenant on Civil and Political Rights* (ICCPR),<sup>2</sup> for example, are required under Article 20 to prohibit hate speech, carefully defined as “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”. Offensive speech of a racial character that does not fall within this definition remains protected. As the European Court of Human Rights has noted, the guarantee of freedom of expression extends to statements which “shock, offend or disturb”.<sup>3</sup>

In our view, a blanket ban on denial of the Holocaust or, for that matter, any other genocide or historical event, regardless of the context or impact of such a statement, goes beyond the established international law standard of incitement to hatred by elevating a historical event to dogma and by prohibiting a category of statement. Such laws are, moreover, not necessary to combat hate speech and therefore cannot be justified as a restriction on freedom of expression. Furthermore, prosecutions under Holocaust denial laws actually augment the appeal of “revisionist historians”, providing them with high-powered platforms, and casting them as dissidents against the established order, denying the democratic State the moral high ground it ought to occupy. These twin dangers – violating international law and lending credence to Holocaust deniers – are borne out in practice.

Where instances of Holocaust denial do wilfully incite to racial hatred, general hate speech laws can be used to prosecute the perpetrators. The experience of the vast majority of the countries of the world, which do not have any form of genocide denial laws, suggests that this approach is effective and that specific Holocaust denial laws are not needed to combat incitement to hatred, even where it is framed as academic debate.

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<sup>1</sup> The mandates are: the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression.

<sup>2</sup> Adopted and opened for signature, ratification and accession by UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 3 January 1976. All of the EU’s Member States are parties to this treaty.

<sup>3</sup> See *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49 (European Court of Human Rights).

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In practice, genocide denial laws prohibit more speech than is necessary and therefore cannot be justified. The challenge of defining precisely and narrowly in law what constitutes Holocaust or genocide denial or 'trivialisation' is highly problematical. The Holocaust was a complex historical phenomenon and, while certain aspects of it have been judicially recognised by leading courts – such as the existence of the gas chambers and the genocide against the Jews – most Holocaust denial laws go beyond these key facts.

This problem is far from theoretical. France, for example, has had serious problems with its Holocaust denial law, known as the Gayssot Law. This law prohibits expressions which “deny the existence of one or more crimes against humanity as defined in Article 6 of the Statute of the [Nuremberg] Tribunal ... which have been committed ... by a person found guilty of such crimes by a French or international court.”<sup>4</sup> While clear, this is overbroad. In a case before it, several members of the UN Human Rights Committee expressed serious reservations about its scope, specifically noting that the law as framed would cover *bona fide* research and that it did “not link liability to the intent of the author”.<sup>5</sup> In a similar vein, the European Court of Human Rights found France in breach of its obligation to respect freedom of expression for convicting two citizens for contesting the legitimacy of the conviction of wartime leader Marshal Pétain for collusion with the Nazis. The Court specifically noted:

[The impugned statements form] part of the efforts that every country must make to debate its own history openly and dispassionately. The Court reiterates in that connection that ... freedom of expression is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb<sup>6</sup>

France is not alone in promoting this approach, despite its very serious problems. The last available draft of the Proposal for a Council Framework Decision on combating racism and xenophobia would require EU Member States to prohibit the denial of “crimes against humanity and

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<sup>4</sup> Translation taken from *Lehideux and Isorni v. France*, 23 September 1998, Application No. 24662/94 (European Court of Human Rights).

<sup>5</sup> *Faurisson v. France*, 8 November 1986, Communication No. 550/1993, Concurring Opinion by Evatt, Kretzmer and Klein, para. 9. Para. 10. See also the concurring decision of Lallah, paras. 6 and 9. The Committee found that Faurisson’s conviction, however, was legitimate as his statements were in fact motivated by racism and he had gone beyond ‘mere’ Holocaust denial and particularly singled out the Jews for attack.

<sup>6</sup> *Lehideux and Isorni v. France*, note 4, para. 55. Although the events took place before the Gayssot Law was passed, and so the case did not formally involve France’s Holocaust denial law, they clearly fell within its scope.

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war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court”.<sup>7</sup>

The danger of Holocaust denial laws lending prominence to racists is also very real. The arrest and conviction in Austria, just over a year ago, of British Holocaust denier David Irving gave him a level of international prominence he had not previously enjoyed. It also made him a martyr in the eyes of his followers.<sup>8</sup> In Britain itself, which does not have a Holocaust denial law, Irving had already been thoroughly and dramatically discredited when he unsuccessfully sued historian Deborah Lipstadt for describing him as a Holocaust denier in 1998. This stands as a practical case study of role of freedom of expression in combating hatred.

ARTICLE 19 welcomes the elaboration of measures to combat racism and discrimination in Europe. However, we are concerned that Holocaust denial laws potentially violate international guarantees of freedom of expression and that they do little to combat hatred and intolerance in practice. These are deeply rooted social phenomena and merely prohibiting more extreme expressions of them, while they may create a sense that the problem is being tackled, do little to resolve the underlying issues. We recommend instead that a broad plan of action be instituted to combat these social evils, focusing mainly on non-judicial measures. States should commit themselves to taking a far more proactive approach, including through publicly funded media. This has been emphasised by the special mandates on freedom of expression noted above.<sup>9</sup>

We call on the German Presidency of the EU, as well as the European Commission, to ensure that any commonly agreed standards for combating extremism in Europe strictly adhere to internationally established principles on freedom of expression and, in particular, criminalise only speech which constitutes incitement to hatred as defined in Article 20 of the ICCPR. ARTICLE 19 is more than happy to make available its expertise and advice to this end.

Yours truly,

Agnès Callamard

Executive Director

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<sup>7</sup> Draft of 27 May 2005, Article 1(1)(c). See also Article 2(vi) of the *Preliminary Draft Inter-American Convention Against Racism and all Forms of Discrimination and Intolerance* of the OAS.

<sup>8</sup> As evidenced, for example, by an Internet search on his name.

<sup>9</sup> See the Joint Statement on Racism and the Media of the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 27 February 2001. Available at:

<http://www.unhchr.ch/hurricane/hurricane.nsf/view01/A7D61155293A8200C1256A02003CD849?opendocument>.

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