

## International Holocaust Remembrance Alliance Memory Laws Project Preliminary Recommendations December 2019

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So-called Holocaust denial or *memory laws* have their origins in anti-fascist regulations that first appeared in Austria, and then West Germany. Their primary purpose was to ensure the suppression of elements that sought to rehabilitate National Socialism and related ideologies. Over time, as observers noted a growing threat from those who sought to diminish or deny the historical reality of the Holocaust, policymakers sought more focused regulations. France's Gayssot Law of 1990 initiated a new era for such legislation by not only asserting the value of an honest approach to history, but also by making it a criminal offense to deny the Holocaust or "glorify war crimes, crimes against humanity, or crimes and offenses of collaboration with the enemy." It did so by making specific reference to the crimes outlined in Article 6 of the Charter of the International Military Tribunal (IMT) of 1945, as annexed in Article 2 of the London Agreement of 8 August 1945, which included many of the crimes associated today with the Holocaust. The Gayssot Law, in turn, became a standard for regulations that appeared across Europe after 1990, insofar as many of these laws reference Article 6 of the IMT Charter and clearly seek to protect historical facts against misuse and incitement to hate.<sup>1</sup>

These laws reflect a growing international understanding that denial and distortion of the Holocaust subverts "the fight against racism and anti-Semitism ... [and is] a serious threat to public order."<sup>2</sup> Subsequent decisions by the European Court of Human Rights affirm that the risks posed by Holocaust denial and distortion are often sufficient to allow for the application of Article 17 of the European Convention on Human Rights, the so-called abuse clause, in a manner that does not impinge upon reasonably acceptable freedoms of speech and expression.<sup>3</sup> The European Union added weight to such rulings in 2008 by passing the Council Framework Decision "on combating certain forms and expressions of racism and xenophobia by means of criminal law." This decision called upon Member States to take measures to implement regulations to punish denial of genocide, crimes against humanity and war crimes as defined by Articles 6, 7, and 8 of the Statute of the International Criminal Court and Article 6 of the Charter of the International Military Tribunal (annexed to the London Agreement of 8 August 1945), "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 when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group."<sup>4</sup>

Within the International Holocaust Remembrance Alliance (IHRA), 16 countries have laws under which Holocaust denial is a criminal or civil offense, a further four have hate speech provisions that cover the

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<sup>1</sup> Some existing laws connect to efforts to combat neo-Nazism, while others relate closer to hate speech regulations in certain countries.

<sup>2</sup> ECtHR, *Garaudy v. France*, Appl. No. 65831/01, 24 June 2003, as at <http://hudoc.echr.coe.int/eng-press?i=003-788339-805233>, last accessed 11 September 2019.

<sup>3</sup> See, for example, ECtHR, *M'Bala M'Bala v. France*, Appl. No. 25239/13, 10 April 2013, as at <http://hudoc.echr.coe.int/eng?i=001-158752>, last accessed 11 September 2019; ECtHR, *Williamson v. Germany*, Appl. No. 64496/17, 8 January 2019, as at <http://hudoc.echr.coe.int/eng?i=001-189777>, last accessed 11 September 2019; or *Pastörs v. Germany*, Appl. No. 55225/14, 3 October 2019, as at <http://hudoc.echr.coe.int/eng?i=001-196148>, last accessed 4 October 2019. See also Paolo Loba, "Holocaust Denial before the European Court of Human Rights: Evolution of an Exceptional Regime," *The European Journal of International Law* 26:1 (2015), 237-253, esp. 239. On distinctions between denial in national contexts and the particular use of Holocaust denial as a form of hatred, please see the decision in ECtHR, *Perincek v. Switzerland*, Appl. No. 27510/08, 15 October 2015, as at <http://hudoc.echr.coe.int/eng?i=001-158235>, last accessed 11 September 2019. One should note, however, that only a part of the ECtHR's jurisprudence on Holocaust denial relies on article 17.

<sup>4</sup> Council Framework Decision 2008/913/JHA, 28 November 2008, Official Journal of the European Union, L 328/55, Art. 1(1) c, d., as at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32008F0913&from=EN>, last accessed 11 September 2019.

phenomenon, and one IHRA liaison country and two IHRA observer countries have Holocaust denial laws. 21 EU member countries have transposed the Framework Decision through specific legislation on Holocaust denial. Outside of the IHRA and EU, Andorra, Liechtenstein, Montenegro, and Russia have similar regulations.

### *State of the Problem*

Experts in the field question whether these laws are effective counters to hate speech. Similarly, neither experts nor policymakers know if these laws help inform an understanding of history that leads to healthy democracies and civil society, or if these laws are part of a larger matrix that could include civil law, education, cultural programs, and other mechanisms of public outreach by the state that counter Holocaust denial and distortion in a more holistic manner. Some experts find it more problematic that the implementation of certain national memory laws has served to protect particular historical interpretations and/or national and cultural mythologies, rather than protect verifiable and source-based historical facts from being misused as forms of hate speech. Questions remain about the applicability of these laws to other forms of denialism, particularly denial or distortion of crimes of genocide that do not include the Holocaust. There is a tension between regulations that focus on protecting Holocaust narratives from distortion and expanding these regulations to other mass atrocities in ways that may lead to an artificial hierarchy of victims. Finally, the use of these laws can be inconsistent, occasionally ad hoc, threatening to freedoms of speech and of expression, and could be subject to politicization.

### *Recommendations*

With these lingering questions, and following the outcome of an inaugural review by several of the world's leading experts on these regulations, the International Holocaust Remembrance Alliance expert corps presents the following preliminary recommendations for consideration by the IHRA and its member state governments:

1. Develop resources for the public and for professionals that explain case law, existing regulations, and other responses to Holocaust denial and distortion within particular national contexts.
2. Launch formal and regular training programs on such laws or related legal mechanisms for law enforcement, the judiciary, and prosecutors, as well as similar programs for civil society stakeholders, e.g., journalists and educators.
3. Support IHRA work on the creation of materials that may better inform national and international bodies on the development, enactment, and interpretation of these laws.
4. Provide and affirm protections for scholars, educators, journalists, writers, and general researchers who engage in, present, and publish bona fide, data-driven research on Holocaust-era crimes.
5. Build dialogue within international bodies, including the IHRA, the EU and the UN, as well as within national communities on matters related to denial and distortion of Holocaust-era crimes.