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*Subject:* Opinion in response to the Call for Inputs issued by United Nations Special Rapporteur on truth, justice and reparation, Mr. Bernard Duhaime

Dear Special Rapporteur,

Following your *Call for Inputs / Challenges of denial, negationism and revisionism of serious violations of human rights and humanitarian law in transitional justice contexts*, I have the honor to send you the opinion below.

I will be pleased to provide additional explanation, if necessary.

With best wishes,

Antoon De Baets

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## Atrocity denial

Antoon De Baets

### *Definition*

“Atrocity crimes” is an umbrella term for three crimes: genocide, crimes against humanity, and war crimes, as defined most prominently in the 1998 Rome Statute of the International Criminal Court. An intriguing characteristic of most of these atrocity crimes is that their planners and executors deny them *before, during, and after* the fact: they shroud their acts in secrecy and erase evidence all the way from the earliest planning stages to the destruction of mass graves. In addition, these perpetrators – and many sharing their ideology – continue to deny the crimes long after the fact, sometimes for generations. In the twenty-first century, atrocity denial has become a proliferating online phenomenon.

The denial can consist of two types of claims: a *factual* claim that no crime has been committed at all or a *normative* claim that a given crime does not deserve the qualification of “atrocity crime.” Denying can be straightforward (“simple denial” or negation), but it is often disguised rhetorically as minimizing, condoning, justifying, or glorifying these crimes (“qualified denial”). Strictly speaking, simple factual denial is the most radical mode. However, it is usually made without much ado about arguments, complicating the detection of intent behind it. Simple normative denial and qualified denial are more elaborate, increasing the likelihood that they amount to hate speech.

### *Cases*

It is disquieting that denial is a characteristic of *most* atrocity crimes. The following examples all refer to atrocity crimes that were either recognized as such by international courts in their

final judgments or by the community of scientific experts in virtual consensus. Among *genocides*, the paradigmatic case is the denial of the Holocaust (1933–1945) by non-State actors in many countries and by some heads of state and government in the Middle East (including leaders from Iran and the Palestinian Authority). Other genocides frequently denied include the Herero and Nama genocide (1904–1908) in Germany; the Armenian genocide (1915–1917), which is officially denied in Turkey; the Holodomor in Soviet Ukraine (1932–1933), denied in the Soviet Union and again, from time to time, in Russia after 1990; the Ikiza (genocide of Hutus) (1972) in Burundi; the genocide of Tutsis and moderate Hutus (1994) in Rwanda; the Srebrenica genocide (1995), officially denied in the Republika Srpska in Bosnia and Herzegovina; and the Gaza genocide (2023–), officially denied in Israel.

*Crimes against humanity* are denied as well. They include the denial or downplaying by some of Indigenous child abuse at residential schools (1857–1996) in Canada; the denial of the crimes committed in the Congo Free State (1885–1908) in Belgium; the denial, still common in Japan, of crimes committed under the military sexual slavery system imposed by the Japanese during the Pacific War (1931–1945); the Nakba (1948) in Israel; the mass killings of suspected leftists (1965–1966) in Indonesia; the mass disappearances during the military dictatorship (1976–1983) in Argentina; or the Gukurahundi massacres (1982–1987) in Zimbabwe.

Among the *war crimes* we count, for example, the denial in Japan of war crimes committed during the Rape of Nanking by Japanese troops when occupying part of China in 1937; the denial of Soviet responsibility for the 1940 Katyń war crimes in the Soviet Union until 1990 and again in Russia in the recent decade; or the denial by some in the United States of the My Lai massacre by American troops in Vietnam in 1968.

*The perspective of the historian's ethics*

From the perspective of the historian's ethics, the lies that constitute denial violate all methodological and ethical norms of historiography. Therefore, they do not form part of any legitimate debate about history: denial is an abuse of history, a form of pseudohistory and epistemic injustice, and an attack on history. Those defending such claims are not historians, however much they like to see themselves as such. It does not matter if they co-opt scientific language and rather misleadingly call their views "historical revisionism." In fact, atrocity denial is a breach of the integrity of history so outrageous that it can be called a crime against memory and a crime against history.

*The perspective of international human rights law*

From the perspective of international human rights law, States have a human rights obligation to restrict or prohibit atrocity denial, depending on whether it is a form of free expression or of hate speech. If denial is identified as a form of free expression, it can be restricted in the name of the rights and reputations of others or in the interest of public order, following the permissible restrictions test (Section 1.1). If it is a form of hate speech, it must be prohibited by law. Hate speech is speech that advocates national, racial or religious hatred inciting to discrimination, hostility or violence. It threatens the equality and safety of the groups (minorities in particular) targeted by it.

In order to distinguish between both, it is crucial to determine when atrocity denial transcends the hate speech threshold. That threshold must be high, but will differ depending on the historical context: the denial of crimes against humanity committed by the military dictatorship in Argentina, for example, is understandably more outrageous in Argentina, and therefore the hate speech threshold is reached faster there than elsewhere (even if it is scandalous everywhere to deny these crimes). Alongside historical context, other elements

should be taken into account, such as the authority of the deniers, the precise formulation of the denial, the receptivity of the audience, the imminent risk of incitement, and the expected harm afflicted to non-discrimination, public safety, or public order.

Depending on its severity, hate speech must be prohibited under either administrative law (by means of fines for deniers), civil law (by means of reparation for their targets), or criminal law (by means of punishment for deniers). In particular, all atrocity denial that directly and publicly incites genocide, racial discrimination, or terrorist acts, or that is part of propaganda for war or of persecution (as a crime against humanity) should be punished. In all these cases, the denial must by definition refer to *past* atrocity crimes, and therefore its role in inciting *ongoing* or preparing *future* atrocity crimes, will necessarily be *implicit*. But even incitement by implication can be direct and public.

#### *Atrocity denial and censorship*

The relationship between atrocity denial and censorship is fourfold. First of all, hate speech laws can be censorship instruments if they do not meet strict human rights standards. Laws that prohibit, fine, or punish hate speech, including atrocity denial, should be drafted with precision and not affect legitimate historical debate, honest mistake, political criticism, and even offending language which does not rise to the level of hate speech – as is the case in Rwanda, where genocide denial laws, although addressing a real problem, are unfairly deployed against political opponents. Secondly, atrocity denial is a form of censorship if it is imposed as a State taboo, meaning that any references to the atrocities committed by the State or its predecessors in the past are banned. This was often the case in Turkey with respect to the Armenian genocide. Thirdly, atrocity denial is a form of censorship if it has a chilling (censorial) effect on the freedom of expression of the victims of the atrocity. In addition, it has a defamatory effect on them because the claim of denial implies that they lie about their

ordeal. Atrocity denial blames the victim. Finally, atrocity denial should not be confused with *atrocity propaganda*. Such propaganda can consist – as one of its forms – in the false claim, made by a State or group, that *bona fide* historians and others who question evidence provided by that State or group of an atrocity crime committed by a rival State or group, lie. The claim that those who debunk dubious evidence, live in denial of the crimes allegedly proved by that dubious evidence, is baseless. Nevertheless, those legitimately exposing denial are sometimes threatened with defamation suits. The use of defamation law by deniers is an instrument of censorship in disguise. It is abusive because they sue for the breach of a reputation they do not deserve – that of being a respectable historian. It is the denialists who are defamatory, not those who expose them.

Extract from Antoon De Baets, *Censorship of History* (Cambridge: Cambridge University Press, 2026, forthcoming).