

AMERICAN UNIVERSITY OF ARMENIA

Master's Paper

**GENOCIDE DENIAL AS A FORM OF RACISM: TURKEY'S RESPONSIBILITY
UNDER PUBLIC INTERNATIONAL LAW**

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Yerevan 2012

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Introduction

After the 200 years of devastating wars between Ottoman Empire and Iran most of the historical Armenian lands came under the Turkish rule. From that time Armenians formed the largest non-Muslim population in the Ottoman Empire, where they maintained socially and legally subordinate but peaceful coexistence until the rise of Turkish nationalism in 19th century. Armenian massacres began from the late 19th century under the rule of Abdul-Hamid II, resulting in the death of nearly 100.000-300.000 Armenians. The events of World War I gave the opportunity to Turkish nationalists to implement their plan of extermination of the Armenian population. Under the special plan the Turkish authorities first disarmed and killed the male population of the Ottoman Empire. On April 24, 1915, the Armenian elite and community leaders were arrested and murdered. Those who were not immediately killed were forced to death marches. The overall number of slaughtered is estimated from 1 to 1.5 million¹.

The denial of the crime began almost immediately. This denial of the Armenian Genocide by the Republic of Turkey, the successor state of the Ottoman Empire, continues to this very day. Armenian Genocide denial refers to outright refutation, minimization or trivialization of aspects of the Armenian Genocide, which is clearly motivated by racism and anti-Armenian bigotry. Whether written or spoken, articulated by Turkish authorities, Turkish society or pseudo-academicians, Armenian Genocide denial implies lies, manipulation of facts and anti-Armenianism.

This denialistic policy of Turkish authorities excites public anger and resentment toward the Armenian population. As a result, “Armenian” remains a term of abuse and surveys indicate

¹ For more details see Armenian Genocide Museum Institute, www.genocide-museum.am/

that Armenians are the most hated people in Turkey, and 73% of Turkish children think Armenians are “bad people”².

The issue is very actual for the Republic of Armenia, as Genocide recognition constitutes one of the main dimensions of the Republic’s foreign agenda.³ The denial of the Armenian Genocide by the Republic of Turkey is an obstacle towards the implementation of the policy-goal. History has finished its role in the scene - the historical information, different archives proved the Armenian Genocide. The turn is for the legal experts.

Today the Republic of Turkey is an active member of international community and party to different international treaties, under which it takes some obligations to implement. The Republic has ratified the European Convention on Human Rights in 1954⁴. The Convention on the Elimination of all forms of Racial Discrimination (CERD) was signed by the Republic of Turkey on October 13, 1972 and ratified on September 16, 2002⁵. In 2003 the Republic of Turkey declared its commitment to implement the obligations undertaken by the Covenant on Civil and Political Rights in compliance with the Charter of the United Nations. By signing the Optional Protocol in 2006, the Turkey gave the Committee of Human Rights the authority to receive and consider communications from individuals within the jurisdiction of Turkey who claim to be the victims of any violation of the rights set forth in the Covenant by Turkey.”⁶

Article 90 of the Turkish Constitution states that international agreements ratified by the Turkish Parliament directly become a part of domestic legislation. In the case of a contradiction

² T. Hofmann, Armenians in Turkey Today: A Critical Assessment of the Situation of the Armenian Minority in the Turkish Republic, Belgium, 2002, p. 6.

³ Ruben Safrastyan, Genocide Factor in the Armenia’s Foreign Policy, from <http://www.globalpolitician.com/print.asp?id=661>

⁴ www.echr.coe.int/NR/rdonlyres/53726604.../PCP_Turkey_en.pdf

⁵ www.bayefsky.com/html/turkey_t2_cerd.php

⁶ www2.ohchr.org/english/issues/minorities/docs/CLA3a.doc

between international agreements in the realm of fundamental rights and freedoms provisions of international agreements shall prevail.⁷

Despite this clear indication of the prevalence of International treaties within the Turkish legislation and its commitment towards the principles contained in the agreements the Turkish Republic continues to violate its obligations. This paper will argue that the denial of the Armenian Genocide constitutes a form of racism, which is prohibited under Public International Law and the denialistic policy of the Republic of Turkey is a violation of the state's obligations under different instruments of international law.

Chapter I of the paper details the main theoretical considerations of the paper. It first presents the irrefutable character of the Armenian Genocide, by revealing some of the different independent historical and legal sources on the Armenian Genocide. Chapter I further considers the concept of Genocide denial as a last stage of Genocide, contemplated by genocide scholars and theorists, and considers the implication of the approach within the realm of the Armenian Genocide denial. The next consideration of the Chapter, which is also a founding argument for the whole paper, is Genocide denial as a most serious form of racism and racial discrimination. The paper discusses the opinions of scholars on the issue of Genocide denial as racism, and further elaborates the idea based on the legal framework, identifying national, as well as international court decisions on Genocide Denial as a form of racism. The first Chapter ends with an examination of national and international legal frameworks. It reveals the national legislations criminalizing the denial of Genocide, as well as different International treaties and agreements prohibiting Genocide denial as an independent concept or as a form of racism.

⁷ CERD/C/TUR/3, 13 February 2008, p.3, para 2.

Later chapters discuss the obligations, arising from different International treaties related to the denial of the Armenian Genocide and the violations of the Turkish Republic of its international commitments.

Chapter II considers the European Convention on Human Rights, namely Article 17, which forbids the member-states, group or person “to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set in the Convention.” The Chapter discusses the implications of the Armenian Genocide denial on two-levels: state denial and the consequences of the denialism in the society in the form of racial discrimination and racist violence towards the Armenians. Based on the case-law of ECHR, the paper will argue that the Armenian Genocide denial is an act contrary to the fundamental values of the Convention and of democracy, namely justice and peace,⁸ and by denying the Armenian Genocide the Republic of Turkey violates its obligations under ECHR.

The third Chapter examines the obligations of the Turkey under the Convention on the Elimination of all forms of Racial Discrimination (CERD). The Article 4 of the Convention clearly prohibits the discrimination and incitement to racism and encompasses condemnation of propaganda for ideas of racial superiority as well as justification or promotion of racial hatred. CERD goes beyond the notion of incitement to hatred and discrimination and obliges states to penalize the dissemination of racist ideas. So, the paper will reveal the violations of Turkey under this international instrument as well.

Chapter four discusses the obligations of Turkey under the Covenant of Civil and Political Rights, Article 20 (2) which obliges state-parties to prohibit any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. The paper will demonstrate that the denial of the Armenian Genocide as a state policy amounts to the advocacy

⁸ ECHR annual report, 2003, Registry of the European Court of Human Rights Strasbourg, 2004, p. 65.

of hatred and results in incitement to discrimination, hostility and violence against the Armenian population.

The paper will conclude with a summary of observations and a reinforcement of the core argument that Armenian Genocide denial is a form of racism. It's a clear implication of anti-Armenian bigotry, since in the context of the Armenian Genocide Turkish official rhetoric considers the Armenians in the past and in our days as a threat to the national security, which is also motivated by a fear not to lose very basic values in the national and state identity of Turkey connected with history⁹.

For the accomplishment of the task the available academic literature to find out historical background of the issue concerned was studied. For the assessment of genocide denial as a form of racism apart from scholarly articles national as well as international case-law was examined. International treaties were assessed in both historical and legal perspectives. The *traveuax preparatoir* of the Conventions concerned were also studied to reveal the drafters' intent toward particular articles and their real meaning. The practical effect of the Articles was examined and assessed based on the case-law. General comments and observations of Treaty bodies were also considered.

The method of "case studies" was used to scrutinize Holocaust denial cases. Then the method of analogy was applied to find similarities and differences between the Armenian genocide denial and that of Holocaust.

The paper has also considered expert opinions particularly that of the director of the Genocide Museum Institute Dr. Hayk Demoyan. Nikolay Hovhannisyan-professor in history, Edik Zohrabyan-professor of history, Arman Zrvandyan- expert in International Criminal Law, were also interviewed.

⁹ Hayk Demoyan, personal interview, 29.05.2012.

Chapter I

Genocide Denial as a Form of Racism

a) Armenian genocide as an unequivocal evidence

Article II of the Genocide Convention stipulates that ‘genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.’¹⁰

In spring 1915 the Ottoman Government disarmed and then **killed** (or worked to death) nearly 250.000 Armenian men. On April 24, 1915, the Ottoman Government **killed** hundreds of leading Armenian political, intellectual, cultural and religious leaders (a). Finally, Ottoman authorities began systematically **deporting the general Armenian population** (women, children, elderly) from their homes, forcing them into death marches, by depriving from fundamental human needs that resulted in diseases, exhaustion and deaths (c). The ICTR in *Akayesu* held that systematic expulsion of groups from their homes satisfy the Article 2 (c).¹¹ A vast number of Armenian children were **forcibly turkified** (e). The case law of Rwandan and Former Yugoslavian military tribunals for genocides definitely demonstrates that the Armenian Genocide falls under the Genocide definition.¹² Clearly, the aforementioned facts satisfy the elements a, c and e of the Genocide Convention.

¹⁰ Convention on the Prevention and Punishment of the Crime of Genocide, Article II.

¹¹ *Prosecutor v. Akayesu*, Case ICTR-96-4-T. International Criminal Tribunal for Rwanda, September 2, 1998. para. 505-6.

¹² See Shabas, Robertson.

It should also be noted that in 1944 the term "genocide" was coined by Raphael Lemkin to name a new crime based also on the Armenian massacres.¹³

The International Association of Genocide Scholars considers that the Turkish massacres of over one million Armenians were a crime of genocide.¹⁴ An independent human rights and international criminal law expert Geoffrey Robertson after the examination of the evidences on the Armenian Genocide concluded that the evidence was compelling on the Ottoman Empire responsibility for Genocide.¹⁵ There is a record of the New York Times 1915 report on the day-to-day progress of the Armenian Genocide.¹⁶

A lot of prominent political and public figures throughout the time,¹⁷ as well as the parliaments of many states¹⁸ have recognized the Armenian Genocide.

On May 24, 1915 the atrocities committed against the Armenian population in the Ottoman Empire were condemned by a joint declaration of France, Great Britain and Russia, which asserted that `in the presence of **these new crimes** of Turkey against humanity and civilization, the allied Governments **publicly** inform that the Ottoman Government as well as their agents will be hold personally responsible for the massacres'.¹⁹ By Article 230 of Sevres the Turkish Government undertook to hand over to the persons responsible for the massacres committed on the territory of the Turkish Empire. The Article also stipulates the designation of the special Tribunal to try the accused.²⁰

¹³ Crimes against humanity and civilization, The Genocide of Armenians, *Facing History and Ourselves*, Massachusetts: National Foundation Inc., 2004, p. 184.

¹⁴ A letter of the International Association of Genocide Scholars (IAGS) to the Turkish government approved unanimously at the Sixth biennial meeting of IAGS on June 7, 2005, Boca Raton, Florida.

¹⁵ G. Robertson, Was there an Armenian Genocide, London 2009, para. 45, 93.

¹⁶ R. D. Kloian, *The Armenian genocide: first 20th century Holocaust : 65th anniversary memorial 1915-1980*, 1988.

¹⁷ Robert Fisk, *Peres stands accused over denial of 'meaningless' Armenian Holocaust*, 18 April 2001, <http://giwersworld.org/israel/fisk6.phtml>

¹⁸ https://www.anca.org/genocide_resource/recognition.php

¹⁹ Schabas, W. A., *Genocide in International Law*, Port Chester, NY, USA: Cambridge University Press, 2000. p.16.

²⁰ *Ibid*, p. 22.

In 1985 the UN Sub-Commission of the Economic and Social Council in its final report on genocide (known as Whitaker report) recognized the Armenian massacres of 1915 as genocide.²¹ A decade later, a French court in the trial of American historian Bernard Lewis referred to this report as an official UN statement recognizing the Armenian genocide.²²

The Armenian Genocide was also legally qualified through Turkish Court martial and Malta trials and this official recognition is among the most effective tools against denial.²³ Several Turkish officials were tried and sentenced to death for the massacres of the Armenian population. At the same time International Tribunal was established in Malta to conduct its own investigation into massacres against the Armenians, because of the biased process carried out by the Turkish courts martial.

So, the massacres, deportations and other inhuman acts of Turkey against the Armenian population in 1915 are acts of genocide.

b) Genocide Denial as a final stage of Genocide

Genocide is not a single act but a continuing process. The International Association of Genocide Scholars identified 8 stages of Genocide: classification, symbolization, dehumanization, organization, polarization, preparation, extermination and **denial**. The denial is the eighth stage of the Genocidal policy, which ‘always follows genocide’²⁴. A great number of scholars argue that the deliberate denial of a known genocide is a harmful act that should be put

²¹ B. Whitaker, *Revised and updated report on the question of the prevention and punishment of the crime of genocide*, para 24. See the whole report on <http://www.preventgenocide.org/prevent/UNdocs/whitaker/section2.htm>. Also, Excerpts from the UN Report on Genocide, Thirty –eight session, August 5-30, Geneva Switzerland, 1985. <http://www.teachgenocide.org/files/DocsMaps/UN%20Report%20on%20Genocide%20%28excerpts%29.pdf>

²² Shabas, p. 465. See also http://www.senat.fr/basile/visio.do?id=d45186620120123_8&idtable=d136282-72330_3ld45186620120123_8&c=Genocide+bill&rch=ds&de=20110527&au=20120527&dp=1+an&radio=dp&af=36282&tri=p&off=0&afd=ppr&afd=ppl&afd=pjl&afd=cvn#eltSign7

²³ For more information see Vahakn N. Dadrian and Taner Akcam, *Judgments in Istanbul*, New York and Oxford: Berghahn Books 2011.

²⁴ <http://www.genocidewatch.org/genocide/8stagesofgenocide.html>

on the same footing as indirect and direct contributions to the actual genocide.²⁵ Some of the ways in which denial of genocide causes "violence to others" have been identified by renowned genocide scholar Israel Charny, who emphasizes that denial conceals the horror of the crimes and exonerates those responsible for it.²⁶ This point is reiterated by Deborah Lipstadt that "denial aims to reshape history in order to rehabilitate the perpetrators and demonize the victims."²⁷ The denial of Jews Genocide, Holocaust, is part of the genocidal project itself' (Wachsmann). "Genocide denial precisely aims at killing the victims a second time by 'destroying the world's memory of them' (Lemkin). 'It is an attempt of extermination on paper which takes over from the real extermination' (Vidal-Naquet), "the ultimate stage of the genocidal process which perpetuates the crime."²⁸

The Genocide denial has several implications²⁹. The first aspect is the victim group. The denial of genocide brings to the annihilation and double killing³⁰ of victims. Both the reduction of the number of victims and denial of genocide has the intent "to ensure the ongoing annihilation of the group"³¹ and drowning them in a "destructive confusion between the roles of victim and executioner"³². For example, Holocaust denial comments "manifestly present an anti-Semitic and racist connotation, which cannot be interpreted as more than an anti-Jewish incitement, with independence of any judgment of opinion on the existence of historical fact."³³

Another aspect of genocide denial is an individual concern, as it 'insults and humiliates

²⁵ Charny, Kulka, and Vidal-Naquet, Roger W. Smith, Eric Markusen, Robert Jay Lifton

²⁶ Israel W Charny, "*The Psychology of Denial of Known Genocides*", *A Genocide, A Critical Bibliographic Review*, Vol. 2, London: Mansell Publishing, p. 23.

²⁷ Deborah E Lipstadt, *Denying the Holocaust The Growing Assault on Truth and Memory*, New York: The Free Press, 1993, p. 217.

²⁸ S. Garibian, p. 486.

²⁹ Michel Troper, "*La loi Gayssot et la constitution*", *Annales, Histoire, Sciences Sociales*, 54(6), (1999), p. 1253.

³⁰ Confronting Genocide denial, from www.facinghistory.org

³¹ Fournet, Caroline, *Crime of Destruction and the Law of Genocide: Their Impact on Collective Memory*, Oxon: Ashgate Publishing Group, 2007, p. 17.

³² S. Garibian, p. 487.

³³ Spain Constitutional Court, Case of Violeta Friedman, No 101/90, Judgment of 11 November 1991.

the survivors, the relatives of the dead, and the entire people of the victims³⁴ as continuing manifestations of dehumanization. The survived victims have to live in a society which once aimed at destroying them and which murdered their loved ones. As the president of the International Association of Genocide Scholars put it “denial is a continuing attempt to destroy the victim group psychologically and culturally, to deny its members even the memory of the murders of their relatives.”³⁵

Denial is also called as the surest indicator of further genocidal massacres (genocide can beget genocide) as the ‘deliberate denial is a form of aggression that should be regarded as a contribution to genocidal violence’³⁶ and “the distortion of history for political ends has significant implications for both the practice of democracy and the protection of human rights,” and “each historical misrepresentation of efforts to exterminate a particular ethnic group increases the likelihood that such efforts will be undertaken again in another time and place.”³⁷ Implications of Holocaust denial were “masking a more dangerous agenda” that is “the black hole of forgetting was the negative force that resulted in future genocides”.³⁸ Consequently, “when the massacres of the Armenians were made negligible, the exterminations of the Holocaust were made possible”.³⁹

Despite the vast amount of evidence to the historical reality of the Armenian Genocide its

³⁴ Charny, Israel, *The denial of Holocaust and Genocide*. Proceedings of the 1992 World Conference Against A & H Bombs, Hiroshima and Nagasaki, August 2-9, pp. 44-45, also Smith, Markusen, & Lifton, 1995

³⁵ Smith R., Markusen E., Lifton, *Professional Ethics and the Denial of Armenian Genocide*, p. 13

³⁶ *Ibid.*, p. 13

³⁷ S. Garibian, p. 488.

³⁸ Sixty-first General Assembly, Plenary 85th Meeting (AM), General Assembly adopts resolution condemning any denial of holocaust. <http://www.un.org/News/Press/docs/2007/ga10569.doc.htm>

³⁹ Ani Kalayjian, *Exploring Long-Term Impact of Mass Trauma on Physical Health, Coping, and Meaning: An Examination of the Ottoman Turkish Genocide of the Armenians*, http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=ani_kalayjian&sei-redir=1&referer=http%3A%2F%2F

denial by successive regimes in Turkey is continuing from 1915 to the present days.⁴⁰ Despite the consensus of experts on the issue, Turkey spends millions of dollars to deny the Armenian genocide⁴¹ with very good success. The Turkish denialistic policy is being carried out in two dimensions: foreign policy and academia, with the primary support of the Government. Within the realm of the first dimension the Turkish authorities have a clear political objective and in this aspect the denial of the Armenian Genocide is not simply to rewrite the past but to “control and shape the future”⁴² for Turkey. The second aspect is academia. The revisionist historians provide the politicians and lobbyists with the intellectual base to further the denial of the Armenian Genocide.⁴³ When academics and professionals in the face of decisive evidence contribute to the denial of the Armenian Genocide they contribute to racist ideologies which are central features of genocide, thus “assisting in implementing and actually engaging in mass killing”.⁴⁴

While outlining 12 tactics of Genocide denial, Charny mentions that all of them are being persistently used by the Turkish Government.⁴⁵ Denial of the Armenian genocide has become a huge industry based on ‘academic dishonesty, falsified information, political pressure, intimidation and threats, funded or supported by the Turkish state’.⁴⁶ This organized denial constitutes “the reign of lies”, as the denialist, in order to sustain denial, has to persistently lie,

⁴⁰ Theriault H., *Genocide, Denial and Domination: Armenian-Turkish Relations from Conflict Resolution to just Transformation*, Journal of African Conflicts and Peace Studies (April 2009): 82-96.

⁴¹ Holthouse, David, *State of Denial: Turkey Spends Millions to Cover Up Armenian Genocide*, Intelligence Report. Summer 2008, Issue Number: 130 (<http://www.splcenter.org/get-informed/intelligence-report/browse-allissues/2008/summer/state-of-denial>).

⁴² Richard Cohen, *Killing Truth*, The Washington Post, 31 May 1983, p 81.

⁴³ David Holthouse, *State of Denial Turkey Spends Millions to Cover Up Armenian Genocide*, Southern Poverty Law Center Intelligence Report Summer 2008

⁴⁴ Smith R, Markusen E., Lifton R., *Professional Ethics and the Denial of Armenian Genocide*, p. 16.

⁴⁵ Charny I, *Templates for Gross Denial of a Known Genocide: A Manual*,” in *The Encyclopedia of Genocide*, volume 1, page 168.

⁴⁶ <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2008/summer/state-of-denial>

which “corrupts the entire system.”⁴⁷

The Armenian Genocide denial has all three implications of denial. By denying the Armenian Genocide Turkey annihilates and engages in double killings of the victims of the Armenian Genocide. Insisting that only a small number of Armenians were killed is another form of victimization.

There are Genocide survivors and relatives of Genocide victims living in Turkey and in other parts of the world. They have to live in the society which destroys them psychologically and culturally and denies the Armenians even the memory of the murders of their relatives. That is what “the Turkish government today is doing to Armenians around the world.”⁴⁸

What is now going on in Turkey also indicates that denialism of the Turkish state results in the incitement to further violence against the Armenian population. According to the Director of the Armenian Genocide Museum Hayk Demoyan the most striking example of Turkish authorities denying the Armenian genocide is the statement of the Prime-Minister R. Erdogan: “Turks are so noble that they cannot commit such bad things as genocide” or “Armenian genocide is not proved by the Turkish history” (Volkan Vural, former ambassador of Turkey in USSR).⁴⁹ This clearly racist and revisionist statements contribute to the formation of the anti-Armenian bigotry in Turkey.

Anti-Armenian demonstrations in Turkey and other parts of the world against the recognition of the Armenian Genocide are indication of the existence of hostile tension towards the Armenians. The recent events of Feb. 26, 2012, were among the most visible ones as a new

⁴⁷ Ayse Gunaysu, *The Reign of Lies in Turkey*, <http://www.armenianweekly.com/2012/05/11/gunaysu-the-reign-of-lies-in-turkey/>

⁴⁸Smith R., Markusen E., Lifton R., *Professional Ethics and the Denial of Armenian Genocide*, p. 13

⁴⁹ Hayk Demoyan, personal interview, 29.05.2012.

nationalistic campaign against the Armenians.⁵⁰ Upon the approaching of the 100th anniversary of the Armenian Genocide the antagonism is deepened. After the adoption of the bill criminalizing the Armenian Genocide in France there were held a number of demonstrations in Turkey. The slogans explicitly called for violence against the Armenians: "Today Taksim, Tomorrow Yerevan: We will descend upon you suddenly in the night", "Mount Ararat will be your grave."⁵¹ Dissemination of anti-Armenian pamphlets in different states with the statements of proud towards the history of Turkey is another implication of denialism.⁵²

b) Genocide Denial as a form of racism

Racism is defined as “belief in the superiority of the particular race; prejudice based on this racism and antagonism towards other races”.⁵³ By another definition ‘racism is a behavior, usually a manifestation of hatred and contempt for individuals with well-defined physical characteristics...’⁵⁴ Interestingly the notion of racism as such is not defined in the Convention on Elimination of all Forms of Racial Discrimination. Article 1 stipulates that ‘racial discrimination shall mean any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life’. Certain elements of a definition of the notion of racism could be found in Article 4 (a): all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, acts of violence

⁵⁰ <http://www.todayszaman.com/columnist-273004-racist-acts-at-khojaly-protest.html>, <http://www.hurriyetdailynews.com/nine-anti-armenian-protesters-detained-in-turkey-.aspx?pageID=238&nID=18755&NewsCatID=339>

⁵¹ <http://www.hurriyetdailynews.com/ngo-files-complaint-against-minister.aspx?pageID=238&nid=14874>

⁵² <http://wn.com/anti-Armenian>, <http://www.youtube.com/watch?v=enFwWrXxMK4>, Armnews, 16. 04. 2012.

⁵³ Racism and Human Rights, ed. Walden, Raphael, Leiden: Brill Academic Publishers, 2004, p. 8.

⁵⁴ Solomos, John Back, *Theories of Race and Racism*, Florence, KY, USA: Routledge, 1999, p. 64.

or incitement to such acts against any race or group of persons of another color or ethnic origin, assistance to racist activities.

The Explanatory Memorandum of the European Commission against Racism and Intolerance (ECRI) underlines that the term ‘racism’ should be understood in a broad sense, ‘including phenomena such as xenophobia, **anti-Semitism** and intolerance’. The use of the expression ‘such as’ in the definition of racism aims at establishing an open-ended list of grounds, ‘thereby allowing it to evolve with society’⁵⁵ to include other implications of racism.

The mentioned definitions lead to the conclusion that the main basic similarity linking all these definitions is hatred and antagonism toward particular group. Genocide as a crime has a clear discriminatory character, as directed towards a particular identifiable group.⁵⁶ Genocide denial as a final stage of Genocide is again targeted towards that particular group. By denying the Genocide the victim group is again singled out and as a result, both past hatred towards that group and the need to defeat the idea of negation all aggravated the antagonism toward that group, thus qualifying to racism.

Nowadays both academic writings and court decisions clearly demonstrate that Jews genocide **denial** and minimization or distortion of the facts of the **Holocaust** is a form of **anti-Semitism (racism)**.⁵⁷ **Denial of Holocaust** is considered to be among the most insidious forms of **anti-Semitism**,⁵⁸ while deniers of Holocaust are called **racists**⁵⁹ and **bigots**.⁶⁰ The public opinion is that **Holocaust deniers** are generally animated by **anti-Semitism** intent and that

⁵⁵ ECRI general policy recommendation N°7 on national legislation to combat racism and racial discrimination adopted by ECRI on 13 December 2002, p.56.

⁵⁶ Cassese, Antonio, *International Criminal Law*, (2nd ed., New York: Oxford University Press, 2008, pp.138-140.

⁵⁷ United States Holocaust Memorial Museum. “The Holocaust.” *Holocaust Encyclopedia*.

<http://www.ushmm.org/wlc/en/?ModuleId=10005143>. Accessed on {18.04.2012}.

⁵⁸ Roth S.J. “*Denial of the Holocaust as an Issue of Law*”, Israel Yearbook of Human Rights 23(1993), p. 215.

⁵⁹ Kahn, Robert A., *Holocaust Denial and the Law: A Comparative Study*, Gordonsville: Palgrave Macmillan Location, 2004, p. 4.

⁶⁰ Smith R., Markusen E., Lifton R., *Professional Ethics and the Denial of Armenian Genocide*, p. 15.

Holocaust denial harms the **reputation and honor** of the Jews as a group.⁶¹ Denial and negation are at the heart of racism.⁶² Negationism is a specific category of racist comments since it both constitutes a denial of crimes against humanity and incitement to hatred against a particular community.⁶³

German case law recognized the denial of the Holocaust as an **insult to the personal honor** of individuals belonging to the group of victims.⁶⁴ The Paris Chamber Instance ruled in Faurisson that the **denial of Holocaust** creates a real danger for that particular group, arising “feelings of **contempt, hatred and violence** against Jews”.⁶⁵ In the United Kingdom, in the case opposing Deborah Lipstadt to David Irving, the court ruled that Irving was ‘an active **Holocaust denier, anti-Semitic and racist**.’⁶⁶ In 2002 the Federal Court of Australia in its judgment found that Holocaust denial and vilification of the Jews constitutes a **racial discrimination**.⁶⁷ The European Court of Human rights also rules that Holocaust denial constitutes “the **most serious form of racial discrimination**”,⁶⁸ it constituted “an insult to the Jewish people and at the same time a **continuation of the former discrimination** against the Jewish people.”⁶⁹ Human Right Committee also agreed that the denial of the existence of the Holocaust is a **principal vehicle** for **anti-Semitism**.⁷⁰

⁶¹ J.H.H. Weiler, *European Union Jean Monnet Char.*, Jean Monnet Working Paper 10/09 Laurent Pech, The Law of Holocaust Denial in Europe: Towards a (qualified) EU-wide Criminal Prohibition, <http://centers.law.nyu.edu/jeanmonnet/papers/09/091001.html>

⁶² Dijk, Teun A., *Racism and Discourse in Spain and Latin America*, Philadelphia:John Benjamins publishing Company, 2005, p. 3.

⁶³ Anne Weber, *Manual on hate speech*, p. 24.

⁶⁴ Roth S.J., *Denial of the Holocaust as an Issue of Law*, p. 233.

⁶⁵ Verdicts on Prof. Faurisson, 15 Patterns of Prejudice, N. 4, 51-55, (1981)

⁶⁶ The Guardian (April 12, 2000)

⁶⁷ Fournet, Caroline. *Crime of Destruction and the Law of Genocide : Their Impact on Collective Memory*. p 127, <http://site.ebrary.com/lib/auarmenia/Doc?id=10211215&ppg=129>

⁶⁸ ECtHR, Garaudy v. France, application no.65831/01, para. 53.

⁶⁹ ECmHR Udo Walendy v. Germany, No. 21128/92, decision of 11 January 1995.

⁷⁰ *Robert Faurisson v. France*, Communication No. 550/1993 , U.N. Doc. CCPR/C/58/D/550/1993(1996), para 9.7.

While the awareness of anti-Semitism is really widespread, the “tolerance for **anti-Armenian bigotry** appears strong enough that it's still considered politically acceptable to deny Armenian genocide”.⁷¹ Meanwhile, Anti-Armenian bigotry captures a long term history of annihilation and hatred towards Armenians in Turkey and Azerbaijan. **Anti-Armenian bigotry** as a term refers to the conception of Armenians as an alien, hostile and undesirable group and the practices that derive from and support such a conception, which has a long historical origin and a complex theoretical background, as a unique implication of racism. As one of the leading ideologists of the Turkish nationalism movement Dr. Nazim said “ it is absolutely necessary to eliminate the Armenian people in its entirety, so that there is no further Armenian on this earth and the very concept of Armenia is extinguished.”⁷²

The denial of the Armenian Genocide is an **insult to the personal honor, dignity and reputation of Armenians**. Denial also serves as a vehicle of continuation of the past **discrimination, contempt and violence** against the Armenian population. Despite these similarities with Jews Holocaust, there is one very important difference, which makes the denial of the Armenian Genocide more dangerous and more discriminatory: in comparison with Holocaust, which has been accepted and excessively regretted by the successor of perpetrator state, the Armenian Genocide is not yet recognized by the successor of perpetrator state; moreover, the Republic of Turkey continued to vigorously deny the fact, thus strengthening and serving basis for the hatred and antagonism towards Armenians. The Turkish society is raised and nurtured on the idea that the Armenian Genocide is a myth created by the Armenians⁷³; anyone who raises the issue of the Armenian Genocide is prosecuted for “insulting Turkish

⁷¹ [Stephen Zunes](http://www.fpif.org/articles/obama_and_the_denial_of_genocide), Obama and the Denial of Genocide, March 11, 2010, http://www.fpif.org/articles/obama_and_the_denial_of_genocide

⁷² G.S. Graber, *Caravans to Oblivion: The Armenian Genocide, 1915*, New York: John Wiley, 1996, pp. 87-88.

⁷³ T. Hofmann, Armenians in Turkey Today: A Critical Assessment of the Situation of the Armenian Minority in the Turkish Republic, Belgium, 2002: 6, 25-27. Also see www.tallarmeniantale.com/

nation” under Article 301 of the Criminal Code⁷⁴ (according to last data there are 97 people jailed under Penal Code 301, while human rights groups say this number exceeds “those detained in China”⁷⁵). These are the clear indications of racist ultra nationalism⁷⁶, anti-Armenian bigotry, and anti-Armenianism. The ongoing passionate policy of Turkish authorities to deny Armenian genocide results in more deepening of antagonistic moods in Turkey (anti-Armenian bigotry demonstrations⁷⁷), which sometimes take very dangerous forms: assassination of Hrant Dink, followed by demonstrations calling for further violence “Grey wolves are here, where are the Hrants?”⁷⁸ (The grey wolf is the symbol of the ultra-nationalist Turks⁷⁹). By denying the Armenian genocide Turkey not only distorts history, it creates an image for the Armenians as an inventors of history, as perpetrators of lie (“You are invaders, you are murderers, you are all Armenians.”⁸⁰), who try to convince the whole international community about the bad image of Turks, and what is most dangerous the Armenians want restitution. The impact of rewriting history is as dangerous as denials generated by anti-Armenianism.⁸¹ This denial policy creates a real danger for the Armenians and is tantamount to incitement to hatred and contempt. “The Armenian genocide is very illustrative that both indifference towards genocide and denial of genocide may easily turn into incitement”.⁸² The French Bill criminalizing the Armenian

⁷⁴ A person who publicly denigrates Turkish nation, the Republic of Turkey or the [Grand National Assembly of Turkey](#), shall be punishable by imprisonment of between six months and two years.

⁷⁵ Read more: <http://www.metrowestdailynews.com/opinion/x643676904/Demoorjian-Historical-facts-reveal-Armenian-Genocide#ixzz1wMyVwQIq>

⁷⁶ Solomos, John Back, *Theories of Race and Racism*, Florence, KY, USA, Routledge, 1999, p. 200.

⁷⁷ See Chapter I (b).

⁷⁸ Pinar Ögünç, *Evening out One Misery with Another*, <http://www.hurriyetdailynews.com/evening-out-one-misery-with-another--.aspx?pageID=238&nID=14788&NewsCatID=396>

⁷⁹ For more information see <http://afa.home.xs4all.nl/comite/eng/index.html>

⁸⁰ Pinar Ögünç, *Evening out One Misery with Another*, <http://www.hurriyetdailynews.com/evening-out-one-misery-with-another--.aspx?pageID=238&nID=14788&NewsCatID=396>

⁸¹ Israel W. Charney, *The Psychological Satisfaction of Denials of the Holocaust or Other Genocides by Non-Extremists or Bigots, and Even by Known Scholars*, <http://www.ideajournal.com/articles.php?id=27>

⁸² Charney 1991, pp. 22-23.

Genocide also was grounded on the notion of anti-Armenianism developed by Turkey.⁸³

The denial of the Armenian Genocide as an act of racism and racial discrimination was also recognized on the legal level. The federal Tribunal of Suisse in its ruling of December 12, 2007, found the defendant guilty of **racial discrimination** for having **denied** that the massacres and deportations of the Armenian people in Turkey in 1915 constituted genocide.⁸⁴ The Tribunal of Grand Instance in Paris in its decision of 6 July, 2005 against the Encyclopedia Quid, which in its last editions **denied** the events of 1915 as genocide, found that Quid had caused **moral sufferings** to “close ones and heirs of the Armenian Community, as well as groups who try to preserve the memory of these events, agitation and moral harm enhanced by the fact that the memory and historical interest had just triumphed over the decades of silence.”⁸⁵

Subchapter (a) of the paper clearly demonstrates that the massacres of Armenians in Ottoman Empire are Genocide, while the Turkey is engaged in the ongoing policy to deny the historical reality. Given the indisputable record of the Armenian genocide, those who refuse to recognize Turkey’s genocide of Armenians, like those who refuse to recognize Germany’s genocide of European Jews, are motivated by **racism and bigotry**.⁸⁶

Therefore, the denial of the Armenian Genocide constitutes an act of racism and anti-Armenian bigotry.

c) National legislation on genocide denial

Some argue that because genocide is connected with history, and history should not fall under the legal rule, genocide denial cannot be considered within the legal framework. However,

⁸³ http://www.senat.fr/basile/visio.do?id=d45186620120123_8&idtable=d136282-72330_3|d45186620120123_8&_c=Genocide+bill&rhc=ds&de=20110527&au=20120527&dp=1+an&radio=dp&af=36282&tri=p&off=0&afd=ppr&afd=ppl&afd=pjl&afd=cvn#eltSign7

⁸⁴ Tribunal fédéral Suisse, ruling of 12 December 2007, X. v. Y., 6B.398/2007

⁸⁵ Fournet, Caroline, p. 89.

⁸⁶ Stephen Zunes, *Obama and the Denial of Genocide*, March 11, 2010, http://www.fpif.org/articles/obama_and_the_denial_of_genocide

the role of courts in this instance is to sanction between historical knowledge and propaganda. The European Commission officials, reiterating that racism can manifest itself in the form of genocide denial',⁸⁷ decided to punish the acts "publicly condoning, denying or grossly trivializing of crimes of genocide, crimes against humanity and war crimes as defined in the Statute of the ICC."⁸⁸ Definitely agreeing that deniers are generally animated by **racist intent** and that denial harms the reputation and honor of the victims as a group⁸⁹, the EU passed a *Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law of 2008 (EU FD)*.⁹⁰ All EU Member States are now under the legal obligation to criminalize genocide denial 'when it is carried out either in a manner likely to incite to violence or hatred or in a manner likely to disturb public order or which is threatening, abusive or insulting'.⁹¹

The scope of the EU FD includes crimes of genocide, crimes against humanity as well as *war crimes* by contrast to its 2001 version, which only expressly punished the act of denying or grossly trivializing the sole Holocaust.⁹² There are a number of states which have passed laws explicitly punishing the denial of the Holocaust⁹³ and/or other genocides and crimes against humanity.⁹⁴ Some legal provisions, while not specifically addressing Genocide denial, were nonetheless willing to punish such conduct on the basis of general provisions dealing with "hate

⁸⁷ Runo Waterfield, *EU plans far-reaching 'genocide denial' law*, The Daily Telegraph 4 February 2007

⁸⁸ Ibid

⁸⁹ B. Winkler, "Racism and Xenophobia in the EU Member States: Trends and Developments", Seminar on Combating Racism and Xenophobia, Vienna, 20 June 2006. Speech available at: <http://eumc.europa.eu>.

⁹⁰ Framework Decision of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ L328/55 [2008], p. 123.

⁹¹ J.H.H. Weiler, *European Union Jean Monnet Char.*, The Law of Holocaust Denial in Europe: Towards a (qualified) EU-wide Criminal Prohibition, <http://centers.law.nyu.edu/jeanmonnet/papers/09/091001.html>

⁹² The Jean Monnet program <http://centers.law.nyu.edu/jeanmonnet/papers/09/091001.html> p. 45

⁹³ Ibid. pp. 8-9. Also Michael J. Bazylar, *Holocaust Denial Laws and Other Legislation Criminalizing Promotion of Nazism*, von Oppenheim Research Fellow, International Institute for Holocaust Studies, Yad Vashem Professor of Law, Whittier Law School, California, USA.

⁹⁴ R. Smith, *Legislating against Genocide Denial: Criminalizing Denial or Preventing Hate Speech*, <http://beta.genocidepreventionnow.org/Portals/0/docs/smith.pdf> Rwanda journalists jailed for genocide denial launch supreme court appeal <http://www.guardian.co.uk/world/2012/jan/29/rwanda-journalists-genocide-denial-appeal>

speech”⁹⁵ or racial discrimination.⁹⁶ The Armenian genocide is punishable under the legislations criminalizing Genocide (Switzerland, Luxembourg, Lichtenstein, Slovakia, Slovenia, and Cyprus) and crimes against humanity.

It derives that Genocide denial as a form of racism, hate speech or racial discrimination is punishable under the national legislations.

b) International law on Genocide Denial

Having assessed our argument in the context of national legislation banning Genocide denial, it would benefit our analysis to shift to the international standards. Genocide denial is also punishable under International law. Although the Genocide Convention does not explicitly include hate speech or disbanding of racism, the draft Convention contained a provision on hate propaganda, which was named even more dangerous than direct incitement to commit genocide.⁹⁷ The Soviet Union and France persistently proposed a paragraph to prohibit ‘all forms of public propaganda (press, radio, cinema, etc.) aimed at inciting racial, national or religious enmities or hatreds...’⁹⁸

Article III (c) of the Genocide Convention (direct and public incitement to commit genocide) could be considered as including cases of genocide denial. Similarly, Article II (b) was interpreted by International Criminal Court Preparatory Commission as “including inhuman or

⁹⁵ Hate speech is a communication that carries no meaning other than the expression of hatred for some group, especially in circumstances in which the communication is likely to provoke violence. It is an incitement to hatred primarily against a group of persons defined in terms of race, ethnicity, national origin, gender, religion, sexual orientation, and the like. <http://definitions.uslegal.com/h/hate-speech/>

⁹⁶ Finland, Hungary, Italy, Ireland, Latvia, Greece, Malta, Poland the Netherlands, Sweden and the United Kingdom are among the states where “revisionist ideologies” could be punished under general criminal provisions dealing with the maintenance of public peace or those dealing with statements and behaviors motivated by racist intent.

⁹⁷ UN Doc. E/447, p. 32. For details see UN Doc. A/401 ‘Basic Principles of a Convention on Genocide’, UN Doc. E/AC.25/7.

⁹⁸ UN Doc. A/C.6/SR.86 (Morozov, Soviet Union), (Chaumont, France)

degrading treatment”.⁹⁹ Denial of genocide could also fit into this definition as a torture or inhuman and degrading treatment, as ‘denial is a denial of people’s right to remember, a mockery of their sensibility, second victimization, celebration of deaths and destruction’.¹⁰⁰ Mental sufferings not only didn’t end after physical destruction, they continue to deepen by the passage of time and consequently the denial of genocide harms even more.

It’s worth mentioning that the UN special advisor on the revised and updated Convention of Genocide offered to include Genocide denial as an incitement to Genocide in the Optional Protocol to the Genocide Convention.¹⁰¹

Prohibition of hate has been addressed by several instruments of international human rights law. Article 7 of the Universal Declaration of Human Rights states that: “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to discrimination”. Moreover, the right to freedom of expression is subject to such limitations as are determined by law for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society’. Article 29(3) stipulates that ‘the rights and freedoms may in no case be exercised contrary to the purpose and principles of the United Nations’. Article 30 of UDHR further states that ‘nothing in this Declaration may be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth therein’. It may be easily argued that all these articles prohibits genocide denial, even if only implicitly.

⁹⁹ ICC Elements of Crime, Articles 6 (b).

¹⁰⁰ Charny 1991, pp. 22-23.

¹⁰¹ Whitaker Report, *Revised and updated report on the question of the prevention and punishment of the crime of genocide*, para. 49, from <http://www.preventgenocide.org/prevent/UNdocs/whitaker/>.

The International Convention on the Elimination of All Forms of Racial Discrimination contains quite extensive obligations with respect to the prevention of hate propaganda in its Article 4. The International Covenant on Civil and Political Rights (Article 20 (2)) imposes an obligation upon States parties to prohibit by law 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'.

Despite its large vision of freedom of expression, the Inter-American Convention in article 13 (5) contemplates that 'where propaganda for war or advocacy of racial hatred constitute incitements to violence, they are to be considered as offences punishable by law'.

Article 17 of European Convention on Human Rights pointed out that none of the provisions of the ECHR may be interpreted as implying any right to engage in any activity or perform any act aimed at destruction of the rights and freedoms set forth in the ECHR.

At the level of the Council of Europe, the Convention on Cybercrime and its Additional Protocol as well as the General Policy Recommendation No.7 by the European Commission against Racism and Intolerance (ECRI) of the Council of Europe¹⁰² touches upon the issue of Genocide denial. According to Article 6 of the Protocol each State Party **shall adopt legislative measures to criminalize** the distribution through a computer system to the public, material 'which **denies**, grossly minimizes, approves or justifies acts constituting **genocide** or **crimes against humanity**, as defined by international law and recognized as such by final and binding decisions of the International Military Tribunal or of any other international court ...' when committed intentionally and without right.¹⁰³

As discussed above, a number of international legal instruments explicitly prohibit Genocide denial.

¹⁰² European Commission against Racism and Intolerance (ECRI) – General Policy Recommendation No. 7 of 13 December 2002 on National Legislation to Combat Racism and Discrimination, CRI (2003) 8.

¹⁰³ Council of Europe Additional Protocol of the Convention on Cybercrime of 23 November 2001, Article 6.

Chapter II

Turkey's Obligations under ECHR

The denial of the Armenian Genocide as an “established historical fact”¹⁰⁴ of Genocide constitutes violation by Turkey of its’ obligations under ECHR Article 17.

Article 17 of the ECHR stipulates that “nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention”.

Article 17 refers directly to the notion of “abuse of rights” and prevents anyone from taking advantage of the provisions of the Convention against the rights and freedoms guaranteed by the Convention. The European Court of Human Rights (hereinafter the Court) interpreted this provision as ‘making it impossible to derive from the Convention a right to engage in any of the rights and freedoms set forth in the Convention’.¹⁰⁵ Article 17 covers essentially those rights which, if invoked, ‘will facilitate the attempt to derive there from a right to engage personally in activities aimed at the destruction of any of the rights and freedoms set forth in the Convention’.¹⁰⁶

The idea of the abuse clause (Article 17) in international human rights law originated after World War II as a tool against Nazism, fascism and communism and serves as a vehicle enabling a democratic community to protect itself.¹⁰⁷ ‘The requirements of Article 17 also reflect

¹⁰⁴ *Lehideux and Isorni v. France, Garaudy v. France.*

¹⁰⁵ ECtHR, *Lawless v. Ireland*, *Lawless v. Ireland*, Application No. 332/57, Judgement of 1 July 1961, para 7.

¹⁰⁶ *Ibid.*

¹⁰⁷ Hannes Cannie, Dirk Voorhoof, “*The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection?*” *Netherlands Quarterly of Human Rights* 29/1 (2011): p. 56.

concern for the defense of democratic society and its institutions”¹⁰⁸. So, when the actions that infringe the very spirit of the Convention and democracy as an essential value, Article 17 of the Convention should become applicable.

Like any other remark directed against the values underlying the Convention, a denial of crimes against humanity¹⁰⁹, runs counter to the fundamental values of the Convention and of democracy, namely justice and peace¹¹⁰. The Court consequently held that the “negation or revision of clearly established historical facts” of crimes against humanity triggers the application of Article 17.¹¹¹ In other words, the denial of established historical facts of crimes against humanity, war crimes, Genocide constitutes an abuse of rights thus violating Article 17 of ECHR.

The Court has reasoned that denying the reality of clearly established historical facts ‘*does not constitute historical research akin to a quest for the truth*’. The purpose as well as the result of denial is completely different, which as a consequence ‘*accuse the victims themselves of falsifying history*’,¹¹² which is not just ‘opprobrious but also lacking in humanity’¹¹³. The Court has concluded that, in accordance with Article 17 of the Convention, no one could rely on the freedom of expression (Article 10 of the Convention¹¹⁴) for denying established facts of crimes

¹⁰⁸ ECtHR *Lehideux and Isorni v. France* - 24662/94 [1998] ECHR 90 (23 September 1998), Concurring opinion of judge Jambrek, para 3

¹⁰⁹ The term is used as a general term referring to the crimes under the Statutes of the International Criminal Court and other ad-hoc tribunals.

¹¹⁰ ECHR annual report, 2003, Registry of the European Court of Human Rights Strasbourg, 2004, p. 65.

¹¹¹ ECtHR, *Lehideux and Isorni v. France*, para 47 and 53.

¹¹² ECtHR, *Garaudy v. France*, Application no.65831/01, Inadmissibility decision of 7 July 2003 p. 29

¹¹³ ECtHR, *Janowiec and others v. Russia*, para 160.

¹¹⁴ Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

against humanity. It is obvious that in cases in which Article 17 is applied there is no balancing of rights and, consequently, the applicant is categorically refused any protection.

The Court took this position towards the denial of Holocaust. In *Garaudy v. France* the Court stressed that the ‘negation or revision of the established historical fact, such as Holocaust’ would be removed from the protection of the freedom of expression by Article 17.

It should be noted that the Court has not yet precisely explained what constitute a clearly ‘established historical fact’ and when exactly does an historical fact become “clearly established”. In *Garaudy*, the Court pointed out “historical facts that are not the subject of debate between historians, but are clearly established”. However this attitude is not clear and precise and brings to another issue, particularly how can a court determine when a debate between historians has been resumed? If we take this approach of the court and the fact that Holocaust was considered to be an “established historical fact”¹¹⁵, the standard was not given categorically application: the massacres of Jews and the existence of gas chambers is still continued to be argued by some historians¹¹⁶. So, the issue is not much in the historical debate context, as the revisionism in this case may be animated by racist (in this case anti-Semitic) or political approach, but in the objective foundations of documented history and law.

In its recent case on Katyn massacres *Janowiec and others v. Russia*, the Court reiterates its constant position that a denial of crimes against humanity ‘runs counter to the fundamental values of the Convention and of democracy, namely justice and peace and that the same is true of statements pursuing the aim of justifying war crimes such as torture or summary executions’.¹¹⁷

The Court also considered the Katyn massacres (assassination of Polish officers by Soviet

¹¹⁵ECtHR, *Lehideux and Isorni v. France, Garaudy v. France*.

¹¹⁶ J. D. Josephs, *Holocaust Denial Legislation: a Justifiable infringement with of freedom of expression?* Working Papers du Centre Perelman de philosophie du droit, N 2008/3. p. 9.

¹¹⁷ ECtHR, *Janowiec and others v. Russia*, para 160 and 165.

Government) to be within the category of clearly established historical events.¹¹⁸ Therefore, Katyn massacres constitute an “established fact of crime against humanity”.

The significance of Katyn judgment is that it removed the exceptional status of Holocaust, thus making it clear that Article 17 of the European Convention of Human Rights will be applied in any cases of negation and revision of “established historical facts of crimes against humanity” as incompatible with the values of the Convention.

The Armenian Genocide is an “established historical fact” (see chapter 1 (a)). Despite this irrevocable fact, the Turkish denialistic policy blatantly distorts and systematically denies the Armenian Genocide. It questions the **reality, extent and seriousness** of these historical events which are clearly established. Denying the Armenian Genocide obviously run counter to the fundamental values protected by the Convention, namely justice and peace. It amounts to ‘deflection of the right of freedom of expression from its meaning and use for the ends contrary to the Convention and for the destruction of rights and freedoms of Armenians guaranteed by the Convention.’¹¹⁹

There is no doubt that denying the reality of ‘clearly established historical fact’, such as the Armenian Genocide, does not constitute historical research for the discovery of truth. The aim as well as the consequences of denial is completely different. The Turkish state tries to maintain its image and not to destroy the “reign of lie”¹²⁰. The purpose is to protect itself from economic perspective (not to pay compensation). The recognition of the Armenian Genocide may also bring to territorial issue (the whole territory of the Western Armenia is in Turkey). As a result Armenians as victims are themselves accused of falsifying history. Therefore, similar to

¹¹⁸ Ibid

¹¹⁹ Council of Europe, European Commission of Human Rights, Decisions and Reports, 86-B, Strasbourg September 1996, p190.

¹²⁰ Ayse Gunaysu: The Reign of Lies in Turkey, <http://www.armenianweekly.com/2012/05/11/gunaysu-the-reign-of-lies-in-turkey/>

any other remark directed against the Convention's underlying values, the denial of the Armenian genocide as a category of "clearly established historical fact" of Genocide, violates Article 17 of the Convention.

As the wording of Article 17 clearly stipulates that the limitation not to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms applies also to states, and the states are also prohibited to deny the "clearly established Genocides", as an act contrary to the values protected by the Convention. Thus, Turkey violates its obligation under ECHR Article 17, when denies the Armenian Genocide as a "clearly established fact" of the most grievous form of crime against humanity.

b) Genocide denial as a form of racial discrimination

Because the Court emphasized also the discriminatory nature of Holocaust denial, the paper will consider the denial of the Armenian Genocide under this concept as well. The denial of established historical fact of Holocaust (genocide) also undermines other values of the Convention, namely non-discrimination based on race¹²¹, which constitutes a serious threat to the public order and is incompatible with human rights, thus triggering Article 17 of the Convention.¹²²

The Court was always of the position that the statements denying Holocaust as a crime against humanity is 'the most serious form of racial discrimination'¹²³, because it's not only a denial of historical fact but is 'aimed at cleansing the totalitarian Nazi regime of the stain of

¹²¹ Article 14 of which ensures the enjoyment of the rights and freedoms of the Convention without discrimination on the grounds of race. And the discrimination based on race could amount to degrading treatment within the meaning of Article 3 of the Convention. J. Glimmerveen and J. Hagenbeek v/the Netherlands, applications n° 8348/78 & 8406/78, Decision of 11 October 1979 p. 195.

¹²² ECtHR, *Garaudy v. France*, p. 29.

¹²³ ECtHR, *Garaudy v. France*, para 53.

mass murder and therefore discriminates against Jewish people'.¹²⁴ Denying the existence of gas chambers as a common knowledge (rely on encyclopedia and other sources to prove) means to incite hatred and discrimination.¹²⁵ Holocaust denial was described as 'a continuation of the former discrimination against the Jewish people',¹²⁶ and also 'incitement to hatred against Jews'.¹²⁷ Negation of the Holocaust has also been construed as 'an insult to the Jewish people', 'reproaching them with lying and extortion and thus portraying them as particularly abominable',¹²⁸ hence injuring their reputation and rights.¹²⁹

To amount an action to racial discrimination two **essential criteria** should be met: Firstly, the *intent*. Was the intention to spread racist ideas based on hatred or to inform the public on an issue of general interest?¹³⁰ Secondly, the *content of the statements*. The line here is 'between statements of facts the existence of which can be demonstrated, and value judgment, though cannot be proved, need to be supported by a sufficient factual basis.'¹³¹ Thus, the Court attaches great importance to the truthfulness of the statements and denying the truthfulness of the irrefutable constitutes discrimination.

As an **irrefutable fact** (*content*) the Armenian Genocide cannot be viewed as an issue of general interest that need to be disseminated among the public. As the chapter 1 (c) demonstrates the denial of the Armenian genocide is clearly animated by **hatred** (*intention*) and creates an atmosphere of distrust, danger and violence against the Armenian population.

¹²⁴ECommHR, *F.P. vs Germany*, 29 March 1993, App. No. 19459/92.

http://www.concernedhistorians.org/content_files/file/le/46.pdf

¹²⁵ ECommHR, *Otto E.F.A. Remer v Germany*, 1995, App. No. 25096/94; ECommHR, *Honsik v Austria*, 1995.

¹²⁶ ECommHR, *Udo Walendy v Germany*.

¹²⁷ *Ibid*

¹²⁸ *Ibid*

¹²⁹ ECommHR, *Nationaldemokratische Partei Deutschlands, Bezirksverband München-Oberbayern v Germany*, 1995, App. No. 25992/94; *D.I. vs Germany*.

¹³⁰ Anne Weber, *Manual on hate speech*, France: Council of Europe Publ., 2009, p. 33.

¹³¹ *Ibid*.

Taking the overall denialistic policy of Turkish authorities, having regard to the general negations and the acts of anti-Armenian bigotry, the aim of denying the reality of the Armenian Genocide pursues racist aim. Denying the Armenian Genocide is a form of racial defamation of Armenians and of incitement to hatred of them (see Chapter 1). Denial of the Armenian Genocide infringes the rights of Armenians, damaging their reputation and honor. It's also creates a serious threat to the public order as explicitly has called to violence ("We will descend upon you suddenly in the night", "Mount Ararat will be your grave."¹³²).

Thus, the denial of the Armenian Genocide as an “established fact of Genocide” constitutes also a form of discrimination against Armenians. The denial of this type of crime obviously undermines the value of non-discrimination and constitutes a serious threat to public order.

b) Anti-Armenian bigotry and Article 17

The policy of denial of the Armenian Genocide by the Turkish authorities results in the anti-Armenian moods in the Turkish society. As a result, anti-Armenian demonstrations constitute “general and vehement attack”¹³³ on Armenian population and constitute a violation of Turkey’s positive obligations under ECHR Article 17.

The Court has emphasized in its various judgments that “tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society and it may be considered necessary to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance”.¹³⁴ Besides, the Court has repeatedly showed itself to be ‘particularly conscious of the vital importance of combating racial

¹³² <http://www.hurriyetdailynews.com/ngo-files-complaint-against-minister.aspx?pageID=238&nid=14874>

¹³³ ECtHR, *Ivanov vs Russia*, 2007, Application No. 35222/04.

¹³⁴ Anne Weber, *Manual on hate speech*, France, p. 2.

discrimination in all its forms and manifestations'¹³⁵. In this regard, Article 17 was interpreted as prohibiting racial discrimination and hate speech which are contrary to the values protected by the Convention. The Court has explicitly associated the fight against anti-Semitism, anti-Muslims, Islamophobia as such with the fundamental values protected by the Convention¹³⁶.

Despite the fact that the Court has recognized freedom of expression as one of the 'essential foundations of a democratic society and its progress' and the principle is applicable not only to 'information or 'ideas' that are favorable or inoffensive, but also to those that offend, shock or disturb'¹³⁷, it makes clear that the freedoms covered under the provision are not absolute and are protected insofar as their exercise does not conflict with other fundamental rights or objectives of general interest. The exercise of freedom of expression is clearly connected with duties and responsibilities and should be interpreted, 'to the extent possible, so as to be reconcilable with its obligations' under the International Convention for the Elimination of All Forms of Racial Discrimination'.¹³⁸ (See Chapter III)

The Court has afforded an even broader material scope to the abuse clause in racist cases. The Court held that 'a general and vehement attack on one ethnic group is in contradiction with the Convention's underlying values, notably tolerance, social peace and non-discrimination'.¹³⁹ The clause was given a direct and categorical application in *Ivanov v. Russia*, where the applicants had been convicted for incitement to hatred against the Jewish people. Here the applicant accused the Jewish people of plotting a conspiracy against the Russian people and ascribed fascist ideology to the Jewish leadership.

¹³⁵ ECtHR, *Jersild v. Denmark*, 36/1993/431/510, para. 30.

¹³⁶ *Ibid*, p.63

¹³⁷ Hannes Cannie, Dirk Voorhoof, *The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection?* Netherlands Quarterly of Human Rights, Vol. 29/1 (2011), p. 64.

¹³⁸ ECtHR, *Jersild v. Denmark*, para. 30.

¹³⁹ ECtHR, *Ivanov vs Russia*.

The Court has also authorized the direct application of the abuse clause distinctly outside of the broad sphere of anti-Semitism. In *Leroy v. France* the Court's reasoning implied that Article 17 is applicable in cases of Islamophobia as an implication of racism.¹⁴⁰ In *Norwood v. United Kingdom* the Court applied Article 17 for the first time in a case of anti-Muslim racism, because of openly racist statements on the poster -"Islam out of Britain."¹⁴¹ The Court found this as a 'general and vehement attack on an ethnic group'. It derives that the Court is not willing to limit the application of Article 17 only to anti-Semitism. The scope of the provision is really open-ended to meet the new discriminatory approaches towards a particular group. The inclusion of anti-Muslimism and Islamaphobia concepts in the scope of the provision indicates the interpretation of Article 17 by the Court as a tool against the destruction of democratic values.

The anti-Armenian bigotry demonstrations in Turkey constitute "a general and vehement attack' on Armenians. The racist approach of the facts transpires clearly from the content of their statements: "You are all Armenians, you are all bastards ". The idea opens door to antagonism, xenophobia and anti-Armenianism. The elements of proof in these facts are sufficient to justify the use of Article 17, as they intended to use freedom of expression as a tool against the destruction of rights of Armenians.

Therefore, anti-Armenian bigotry demonstrations in Turkey constitute "general and vehement attack" on Armenians and thus constitute a violation of Article 17 of the ECHR. Because the Court also put positive obligation on the state¹⁴² to ensure the enjoyment of the rights of the Convention, Turkey is violating its obligation by not guaranteeing the protection of the Armenian population from racist attacks.

¹⁴⁰ Hannes Cannie , Dirk Voorhoof, The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection? p. 63.

¹⁴¹ The European Convention on Human Rights, catalogue.pearsoned.co.uk/assets/.../M02_FOST9313_03_SE_C02.pdf

¹⁴² ECtHR, *Taner Akçam v. Turkey*, Application no. 27520/07, 2012.

Chapter III

Turkey's obligations under International Convention on the Elimination of All Forms of Racial Discrimination Article 4

The overall denialistic policy of Turkey and anti-Armenian bigotry acts as implications of racism violate Turkey's obligations under International Convention on the Elimination of All Forms of Racial Discrimination (CERD) Article 4¹⁴³.

Article 4 of the CERD obliged States Parties to condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one color or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of this Convention, inter alia:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another color or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

¹⁴³ See http://www.bayefsky.com/html/turkey_t2_cerd.php also http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en

Thus, in the field of speech, Article 4 includes condemnation of propaganda for ideas of racial superiority as well as justification or promotion of racial hatred, and centers on the concepts of dissemination and incitement.¹⁴⁴

The CERD Committee¹⁴⁵ ruled that the purpose of the Convention is the protection of the group, usually a vulnerable group.¹⁴⁶ In the *Jewish Community of Oslo et al. v. Norway* the Committee accepted that Jews are 'victims' of violations of Articles 4 because of the general inability of Norwegian law to protect them against the dissemination of anti-Semitic and racist propaganda. The Committee also accepted their status of victims because of their membership to a particular group of potential victims, as every Jew faced an imminent risk of racial discrimination, hatred or violence.¹⁴⁷ Ongoing public statements against particular group have a negative effect on their daily life and consequently, every member of the group satisfies the “victim” requirement.¹⁴⁸

Therefore, there is no need to be a particular addressee, but just a vulnerable group or a member to a particular group of **potential victims** to suffice a victim status. Armenians constitute a vulnerable group in Turkey in the context of Genocide denial, which arouses hatred and hostility against the Armenian Community. Besides, an ongoing policy of Genocide denial and anti-Armenian statements obviously affect the everyday life of every Armenian. Therefore, every member of the Armenian Community as well as the Armenian Community as a whole suffices a victim status because of imminent risk of racial discrimination, hatred and violence.

¹⁴⁴ *P.S.N. v. Denmark* Communication No. 36/2006 U.N. Doc. CERD/C/71/D/36/2006 (2007), *A.W.R.A.P. v. Denmark* Communication No. 37/2006 U.N. Doc. CERD/C/71/D/37/2006 (2007)

¹⁴⁵ CERD Committee is the body of independent experts that monitors implementation of the International Convention on the Elimination of All Forms of Racial Discrimination.

¹⁴⁶ Organizations can also satisfy to the category of victims. *The Jewish community of Oslo et al. v. Norway*, Communication No. 30/2003, U.N. Doc. CERD/C/67/D/30/2003 (2005), para. 7.3.

¹⁴⁷ *The Jewish community of Oslo et al. v. Norway*, Communication No. 30/2003, U.N. Doc. CERD/C/67/D/30/2003 (2005), para. 7.3. Referring to the jurisprudence of other international human rights bodies, the Committee agreed that, in the circumstances, the authors had established that they belong to a category of potential victims.

¹⁴⁸ *Jama v. Denmark* Communication No. 41/2008 UN doc. CERD/C/75/D/41/2008 (2008), para. 6.2.

Whereas two of the four relevant provisions in Article 4(a) require incitement, the other two prohibit the mere dissemination of certain ideas, namely those based on superiority and racial hatred. It derives that the mere act of dissemination should be penalized, despite ‘the lack of intention and consequences, whether grave or insignificant.’¹⁴⁹ Consequently, for these two there is no requirement of nexus with a result. In setting a threshold for admissibility the Committee ruled that there is no need to establish a *prima facie* case, and statements of offensive character that does not *ab initio* fall outside the scope of Article 4 of the Convention are admissible.¹⁵⁰ The Committee adopted a very low standard in finding a racial discrimination:¹⁵¹ in *Jews Community* the merely “deference to Hitler in the speech and his principles and 'footsteps'” were enough to constitute incitement at least to racial discrimination, if not to violence against the Jews. Incitement to racial discrimination was found enough to be violation of Article 4. In *Jama v. Denmark*, the Committee found statements that the “aggressors came out of the Somali clubs” constituted an act of racial discrimination towards Somalians, because ‘there were no Somalians in the band’.¹⁵² It can be inferred that the standard of CERD to find discrimination is very low.

The Convention put on the states negative as well as positive obligations.¹⁵³ Because denial is a specific category of racism as incitement to hatred against particular group, consequently, by deliberately denying the Armenian Genocide the Turkish state is violating its negative obligations (refrain from discrimination) under the CERD, as openly engaging in the racial

¹⁴⁹ CERD report on Article 4.

¹⁵⁰ *Mohammed Hassan Gelle v. Denmark*, Communication No. 34/2004, U.N. Doc. CERD/C/68/D/34/2004 (2006). Para. 6.2 and 7.4.

¹⁵¹ *The Jewish community of Oslo et al. v. Norway*, para. 10.4. (On 19 August 2000, a group known as the 'Bootboys' organized and participated in a march in commemoration of the Nazi leader Rudolf Hess, delivering anti-Semitic speeches, and asking to fight for building a new Norway. In the course of the speech, Mr. Sjolie stated that his 'people and country are being plundered and destroyed by Jews, who suck our country empty of wealth and replace it with immoral and un-Norwegian thoughts'.)

¹⁵² *Jama v. Denmark* Communication No. 41/2008 UN doc. CERD/C/75/D/41/2008 (2008), para. 7.4.

¹⁵³ *Adan v. Denmark* Communication No. 43/2008, UN doc. CERD/C/77/D/43/2008 (2010), para. 7.2, 7.3.

discrimination against Armenians. Plus, the state clearly disseminates hatred and contempt towards the Armenians, which sometimes results in violence against the targeted group. The slogans in anti-Armenian demonstrations not only explicitly contain anti-Armenian statements - "You are all Armenians, You are all bastards"- which is enough to find a racial discrimination and violation of Article 4 (a), but also openly called to violence against the Armenian population - "Today Taksim, Tomorrow Yerevan: We will descend upon you suddenly in the night", "Mount Ararat will be your grave."¹⁵⁴ "Let Armenia be wiped out".¹⁵⁵

Thus, deliberate denial of the Armenian Genocide by the Turkish authorities constitutes a violation of Turkish negative obligations, as it disseminates discrimination, hatred (which is enough to find violation) and incitement to violence.

Turkey also violates its positive obligations under the CERD, which is to ensure the protection of a vulnerable group from discrimination. CERD requires discrimination to be an 'offence punishable by law'¹⁵⁶, which has been interpreted by the Committee to mean criminal offense, as long delays in civil suits may be ineffective in protecting the Community.¹⁵⁷ Thus, CERD goes beyond the notion of incitement to hatred and discrimination and obliged states to penalize the dissemination of ideas, assessing the principle of non-discrimination as a peremptory norm of international law.¹⁵⁸

Meanwhile, Article 4 is not self-executing but requires the adoption of specific national legislation¹⁵⁹ which should also make known remedies provided pursuant the Convention.¹⁶⁰

¹⁵⁴ <http://www.hurriyetdailynews.com/evening-out-one-misery-with-another--.aspx?pageID=238&nID=14788&NewsCatID=396>

¹⁵⁵ <http://www.mirrorspectator.com/pdf/031012.pdf>

¹⁵⁶ S. Fariior, p. 48.

¹⁵⁷ Ibid, p. 51.

¹⁵⁸ In its 2002 Statement on Racial Discrimination and Measures to Combat Terrorism, the Committee recalled, *inter alia*, that 'the prohibition of racial discrimination is a peremptory norm of international law from which no derogation is permitted': A/57/18 Chapter XI C.

¹⁵⁹ CERD/C/TUR/CO/3, 24 March 2009, Consideration of Reports submitted by States Parties under Article 9 of the Convention, Concluding observations of the Committee on CERD: Turkey, para. 14.

According to the CERD the state law should penalize all 4 categories of racial discrimination referred to in article 4 of the Convention,¹⁶¹ which is clearly compatible with any international principle of freedom of speech.¹⁶² Moreover, the Committee regularly recalls the states to criminalize attempts to deny war crimes and crimes against humanity as defined in the ICC Statute.¹⁶³ And that “the prohibition of attempts to justify crimes against humanity, and of their denial, should not be limited to those committed during the Second World War”¹⁶⁴ (when criminalizing denial of crimes against humanity France stressed that it tries to comply with CERD requirements¹⁶⁵).

As to the national legislation on racial discrimination despite the long indications on necessary and efficient law on the racial discrimination made by the Turkey¹⁶⁶, the European Commission against Racism and Intolerance (ECRI) report pointed out that by the year 2011 the Turkish legislation lack the definition of racial discrimination and comprehensive anti-discrimination legislation.¹⁶⁷ Article 216 (1) of the new Turkish Criminal Code¹⁶⁸ makes it a punishable offense with an imprisonment (1-3 years) to openly incite groups to enmity or hatred toward one another based on social class, race, religion, sect or regional difference, national

¹⁶⁰ S. Farrior, p. 56.

¹⁶¹ CERD, General Recommendation 15.

¹⁶² *The Jewish community of Oslo et al. v. Norway*, para. 9.3 and 10.5.

¹⁶³ Report of CERD, 56th and 57th session (2000) www.un.org/documents/ga/docs/55/a5518.pdf

¹⁶⁴ Conclusions and recommendations of the Committee on the Elimination of Racial Discrimination, France, U.N. Doc. CERD/C/304/Add.91 (2000), point 6; France, CERD, A/60/18 (2005) 26 at para. 114; CERD/C/304/Add.91 A/55/18.

¹⁶⁵ Jieskje Hollander, *Hate speech, A Historical Inquiry into the Development of its Legal Status*, Master Thesis 2007, University of Groningem.

¹⁶⁶ CERD, HRI/CORE/TUR/2007, 8 July 2008. Core Document Forming Part of the Reports of States Parties, Turkey, para. 86-110.

¹⁶⁷ European Commission against racism and intolerance (ECRI) report on Turkey (forth monitoring cycle) adopted on 10 December, published on 8 February 2011, p. 8.

¹⁶⁸ **ARTICLE 216-** (1) Anyone who openly incites sections of the population to enmity or hatred towards another group on the basis of social class, race, religion, or sectarian or regional difference, in a manner which may present a clear and imminent danger in terms of public safety shall be sentenced to imprisonment of from one to three years. (2) Anyone who openly denigrates a section of the population on grounds of their social class, race, religion, sectarian, gender or regional differences shall be sentenced to imprisonment of from six months to one year. (3) Anyone who openly denigrates the religious values of a part of the population shall be sentenced to imprisonment of from six months to one year, where the act is sufficient to breach public peace.

origin and ethnicity¹⁶⁹ “in a manner which might constitute a clear and imminent danger to public security”,¹⁷⁰ which excludes acts of discrimination that do not amount to danger to the public order. This last provision openly contradicts to the CERD, as Article 4 clearly stipulates that any propaganda is punishable, no matter the consequences to public security. Another concern still continued to be Article 301 of the Criminal Code of the Turkey.¹⁷¹ As a conclusion, Turkish national legislation does not fully cover all aspects of article 4 of the Convention.¹⁷²

To satisfy its obligations under CERD, States parties have not only to enact appropriate legislation but also to ensure that it is ‘effectively enforced’.¹⁷³ It does not suffice, for the purposes of Article 4 of the Convention, merely to declare acts of racial discrimination punishable on paper. Rather, criminal laws and other legal provisions prohibiting racial discrimination must also be effectively implemented by the competent state institutions.¹⁷⁴ “Because threats and acts of racial violence can easily lead to other such acts and generate an atmosphere of hostility, only immediate intervention can meet the obligations of effective response”,¹⁷⁵ guaranteeing to everyone “effective protection and remedies” against acts of racial discrimination.¹⁷⁶

Thus, a state will be considered in violation of its obligations under this provision if the

¹⁶⁹ CERD/c/sr.1914, 2 March 2009, Committee on the Elimination of Racial Discrimination, Seventy-fourth session, Summary Record of the 1914th meeting, para 54.

¹⁷⁰ Turkish Criminal Code, Article 216 (1)

¹⁷¹ Ibid., para 20.

¹⁷² CERD/C/TUR/CO/3, 24 March 2009, Consideration of Reports submitted by States Parties under Article 9 of the Convention, Concluding observations of the Committee on CERD: Turkey, para. 14.

¹⁷³ CERD, General Recommendation 15, Measures to eradicate incitement to or acts of discrimination (Forty-second session, 1993), U.N. Doc. A/48/18 at 114 (1994), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 204 (2003). Also see *Mohammed Hassan Gelle v. Denmark*, Communication No. 34/2004, U.N. Doc. CERD/C/68/D/34/2004 (2006), para 7.3.

¹⁷⁴ *Jama v. Denmark* Communication No. 41/2008 UN doc. CERD/C/75/D/41/2008 (2008), para. 7.3. *L.K.v. The Netherlands*, Communication No. 4/1991, U.N. Doc. A/48/18 at 131 (1993)., **para. 6.4.**

¹⁷⁵ Committee on CERD, General Recommendation 15 on Article 4 of the Convention, adopted by the Committee at its forty-second session (1993)(doc. A/48/18).

¹⁷⁶ *Adan v. Denmark* Communication No. 43/2008, UN doc. CERD/C/77/D/43/2008 (2010), para. 7.3.

investigation into acts of “racial discrimination, including all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons is found to be lacking or ineffective”.¹⁷⁷ They should ensure that the police and judicial authorities conduct thorough investigations into allegations of acts of racial discrimination as referred to in article 4 of the Convention.¹⁷⁸ According to the Committee when threats of racial violence are made, ‘especially when they are made in public and by a group, it is incumbent upon the State to investigate with due diligence and expedition.’¹⁷⁹ As noted by the Committee the statements made squarely in the public arena are the central focus of the Convention.¹⁸⁰

The denial of the Armenian Genocide is being carried out openly and publicly. The anti-Armenian demonstrations are also made in the public: they are made in the universities, in the squares, on the TV¹⁸¹.

The Committee has noted that Article 4 requires the state party to actively prosecute cases of alleged racial discrimination and to provide victims of such discrimination with the opportunity of judicial review of a judgment in their case,¹⁸² with relief relevant to the moral damage he has suffered.¹⁸³ Despite the indication of a number of human rights bodies acting in

¹⁷⁷ CERD *Ahmad v. Denmark*, communication n° 16/99, para. 6.2.

¹⁷⁸ *Jama v. Denmark* Communication No. 41/2008 UN doc. CERD/C/75/D/41/2008 (2008), para. 9.

¹⁷⁹ *L.K. v. The Netherlands*, Communication No. 4/1991, U.N. Doc. A/48/18 at 131 (1993). Para. 6.6. *Murat Er vs. Denmark*, Communication no. 40/2007, U.N. Doc. CERD/C/71/D/40/2007 (2007), para. 7.3.

¹⁸⁰ *Kamal Quereshi v. Denmark*, Communication No. 33/2003, U.N. Doc. CERD/C/66/D/33/2003 (2005), para. 6.3. *Jama v. Denmark* Communication No. 41/2008 UN doc. CERD/C/75/D/41/2008 (2008), para. 6.5.

¹⁸¹ Pinar Ögünç, Evening out One Misery with Another, <http://www.hurriyetdailynews.com/evening-out-one-misery-with-another-.aspx?pageID=238&nID=14788&NewsCatID=396>, Also Ayse Gunaysu, The Reigns of Lie in Turkey, <http://www.armenianweekly.com/2012/05/11/gunaysu-the-reign-of-lies-in-turkey/>

¹⁸² CERD *Yilmaz-Dogan v. the Netherlands*, Communication No. 1/1984, 10 August 1988, CERD/C/36/D/1/1984, para 9.4.

¹⁸³ *L.K. v. The Netherlands*, Communication No. 4/1991, U.N. Doc. A/48/18 at 131 (1993), para 6.9. *Mohammed Hassan Gelle v. Denmark*, Communication No. 34/2004, U.N. Doc. CERD/C/68/D/34/2004 (2006), para 9.

the Turkey,¹⁸⁴ the European Commission against racism and intolerance (ERCI) report on Turkey indicates that there is no Ombudsman or equivalent institution in Turkey, as well as any independent national body against racism and racial discrimination.¹⁸⁵

As to 4 (b) CERD demands states to prohibit all organizations including mass media which promote and incite racial discrimination.

A Turkish TV not only disseminates the Turkish official position of the denial of the Armenian Genocide, but also contributes to the development of anti-Armenianism. One example is a TV series on the “Armenian issue” prepared in Turkey, which is going to “tell the truth”. However, according to Turkish human rights activist Ayse Gunaysu, “the “consultants” for the TV series are well- known denialists of the Armenian Genocide.¹⁸⁶ The aim of these TV series is to disseminate the Turkish version of the Armenian history and “lies, through popular culture, will be much more easily and convincingly injected into people than through scientific and academic studies”¹⁸⁷.

Article 4 (c) of the CERD provides that states ‘shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination’. In the General Recommendation 15 the Committee holds that public authorities at all administrative levels, including municipalities, are bound by this paragraph and state parties are obliged to ensure the observance of these obligations and report on this.¹⁸⁸ The Committee in its decision in *Kamal Quereshi v. Denmark* called the state attention of the particular seriousness of hate speech when

¹⁸⁴ CERD, HRI/CORE/TUR/2007, 8 July 2008. Core Document Forming Part of the Reports of States Parties, Turkey, para. 73-85

¹⁸⁵ European Commission against racism and intolerance (ERCI) report on Turkey (forth monitoring cycle) adopted on 10 December, published on 8 February 2011, para 53-56.

¹⁸⁶ <http://www.armenianweekly.com/2012/05/11/gunaysu-the-reign-of-lies-in-turkey/>

¹⁸⁷ <http://www.armenianweekly.com/2010/08/23/gunaysu-a-turkey-classic-grotesque-co-existence-of-make-believe-liberalism-and-fascism/>

¹⁸⁸ International Human Rights Instruments. HRI/GEN/1/Rev.9 (Vol. II)

made by political figures.¹⁸⁹ General Recommendation 30 recommends that state parties take "resolute action to counter any tendency to target, stigmatize, stereotype or profile, on the basis of race, colour, descent, and national or ethnic origin, members of 'non-citizen' population groups, especially by politicians".¹⁹⁰

The Turkish denialistic policy is openly organized and carried out by the support and finance of the Turkish Government. The machinery of propaganda is being systematically implemented in all levels of state apparatus: starting from the schools to the universities, mass media, legal system and etc. The anti-Armenian bigotry acts, although said to be a civil society initiative, are "being organized by high-ranking state authorities"¹⁹¹.

Within the context of the present paper the rationale of Article 4 has also to be assessed in its preventive and pro-active role. Genocide as the most dangerous racist crime is within the ambit of Article 4. In its *Decision on follow-up to the declaration on the prevention of genocide*, CERD noted that "where the frequency of racist statements is increasing, this may be a warning sign for genocide."¹⁹² The Committee also emphasized that "systematic and widespread use and acceptance of speech or propaganda promoting hatred and/or inciting violence against minority groups", and "grave statements by political leaders/prominent people that express support for affirmation of superiority of a race or an ethnic group, dehumanize and demonize minorities, or condone or justify violence against a minority" as an indicators to future Genocide.¹⁹³

Among the early stages of racial discrimination that could lead to genocide, aggravated by the fact of "prior history of genocide", the Committee identifies 15 indicators, among which

¹⁸⁹ *Kamal Quereshi v. Denmark*, Communication No. 33/2003, U.N. Doc. CERD/C/66/D/33/2003 (2005), para. 8, also *Adan v. Denmark* Communication No. 43/2008, UN doc. CERD/C/77/D/43/2008 (2010), para 7.6.

¹⁹⁰ *Mohammed Hassan Gelle v. Denmark*, Communication No. 34/2004, U.N. Doc. CERD/C/68/D/34/2004 (2006), para 7.5.

¹⁹¹ <http://www.hurriyetdailynews.com/ngo-files-complaint-against-minister.aspx?pageID=238&nid=14874>

¹⁹² *Decision on follow-up to the declaration on the prevention of genocide: indicators of patterns of systematic and massive racial discrimination*, 14 October 2005, CERD/C/67/1, Indicator 8.

¹⁹³ *Ibid.* para. 20.

several are applicable to the Armenian case:

5. **Grossly biased versions of historical events** in school textbooks and other educational materials as well as celebration of historical events that exacerbate tensions between groups and peoples. Turkey is an excellent example of this practice. "Armenian genocide is not proved by the Turkish history"(Volkan Vural, former ambassador of Turkey in USSR)¹⁹⁴.

8. **Systematic and widespread use and acceptance of speech** or propaganda promoting hatred or inciting violence against minority groups, particularly in the media. As the discussions in this paper and namely in this chapter demonstrates the deliberate systematic and widespread denial of the Armenian genocide by the Turkish authorities constitutes an advocacy of hatred and incitement to violence against Armenians.

9. **Grave statements by political leaders**, which express support of race superiority, dehumanizing and demonizing minorities, or condoning or justifying violence against that particular minority. The statement of Prime-Minister R. Erdogan "Turks are so noble that they cannot commit such bad things as genocide" is just one example.¹⁹⁵ As already discussed, the denial of the Armenian genocide dehumanize and demonize the Armenians.

11. **Serious patterns of individual attacks** on minorities, principally motivated by the victims' membership of that group. The fact pattern discussed throughout this paper is a clear example.

What was more important is the Committee's assessment of these events as a predictor of violence is the "prior history of genocide or violence against a particular group", which is also present in the case of Armenians.

¹⁹⁴ Hayk Demoyan, personal interview, 29.05.2012.

¹⁹⁵ Ibid.

Chapter IV

Turkish Responsibility under International Covenant on Civil and Political Rights Article

20 (2)

The deliberate denial of the Armenian Genocide by Turkey as an “advocacy of national, racial or religious hatred inciting discrimination, hostility and violence” constitutes a violation of the Turkey’s obligations under ICCPR Article 20 (2).

Article 20 (2)¹⁹⁶ of the Covenant stipulates that any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

In its General Recommendation 11 the Human Rights Committee (hereinafter HRC)¹⁹⁷ explains that paragraph 2 of Article 20 is directed against **any** advocacy of national, racial or religious hatred that constitutes **incitement to discrimination, hostility or violence**¹⁹⁸, whether such propaganda or advocacy has internal or external aims to the State concerned. For article 20 to become fully effective States parties are under an obligation¹⁹⁹ to adopt legislation making it clear that propaganda and advocacy inciting discrimination, hostility and violence are contrary to public policy and providing for an appropriate sanction in case of violation. Like Article 4 of the CERD the Article 20 (2) is not self-executing and the State –parties should adopt legislation to implement the obligations under the Article.²⁰⁰ The HRC makes it clear that except taking

¹⁹⁶ Article 20 (1)- *Any propaganda for war shall be prohibited by law.*

¹⁹⁷ Human Rights Committee is the body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights.

¹⁹⁸ During the drafting period the members offered to prohibit hate propaganda and any advocacy of national, racial or religious hostility that constitutes an incitement to violence and hatred.

¹⁹⁹ S. Farrior, p. 25, 28. On drafting history of the Covenant. Art. 20 put an obligation on the state. Drafting history reveals that the delegates didn’t mean to provide the state with the opportunity to choose rather obliged them to restrict, prohibit certain acts. See also [Marc J. Bossuyt](#), Guide to the "travaux Préparatoires" of the International Covenant on Civil and Political Rights, Martinus Nijhoff Publishers, 1987.

²⁰⁰ www2.ohchr.org/english/issues/opinion/articles1920_iccpr/docs/experts_papers/Eltayeb.doc.

measures necessary to fulfill the obligations contained in article 20 (2), State Parties themselves should **refrain from** any such propaganda or advocacy.²⁰¹

The messages with a context that warn "of the dangers of international finance and international Jewry leading the world into wars, unemployment and inflation and the collapse of world values and principles" was assessed by the HRC as dissemination, which clearly constituted the advocacy of racial or religious hatred which a State-Party had to prohibit under article 20 (2).²⁰² Similarly, the HRC noted concern on the State party's failure to take action, following the publication of articles inciting violence against Jews in the Egyptian press. The Committee stated that the publication of the articles constituted advocacy of racial and religious hatred and incitement to discrimination, hostility and violence, and concluded that the State party was obliged to punish such acts by ensuring respect to Article 20 (2).²⁰³

Article 20 has found to be compatible with freedom of expression (ICCPR Article 19²⁰⁴), the exercise of which should be carried with "special duties and responsibilities". ICCPR Article 19 (3) puts limitations on the exercise of the freedom of expression. It particularly stipulates that the freedom of expression may be subject to certain restrictions, which shall be provided by law and are necessary: (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public or of public health or morals.

The HRC in its General Recommendation 34 notes that the acts that are addressed in article 20 are all subject to restriction pursuant to article 19 (3). As such, "restriction on

²⁰¹ See General Comment No. 11: Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20) adopted by the Human Rights Committee on 29/07/1983.

²⁰² J. R. T. and the W. G. Party v. Canada, Communication No. 104/1981, U.N. Doc. CCPR/C/OP/2 at 25 (1984), para. 8 (b).

²⁰³ Z. Majodina, Prohibition of Incitement to National, Racial and Religious Hatred in Accordance with International Human Rights Law, Expert Seminar for Africa, Nairobi April 6-7, 2011, p. 3.

²⁰⁴ **Article 19**

1. *Everyone shall have the right to hold opinions without interference.*
2. *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*

expression which may fall within the scope of Article 20 must also be permissible under Article 19, paragraph 3, which lays down requirements for determining whether restrictions on expression are permissible”.²⁰⁵ Therefore, the acts under Article 20 (2) should be prohibited provided to be proportionate and necessary a) for the protection of rights and reputations of others or for the protection of national security and b) for the protection of public order. General Comment 10 of the HRC indicates that the rights for the protection of which restrictions on the freedom of expression are permitted by article 19 (3) may relate also to the interests of the community as a whole.²⁰⁶ In this respect, some authors define Article 20 as a “collective right” (because it sanctioned the right to life and the right to live in peace with one’s neighbors), while freedom of expression - individual.

Consequently, ICCPR member state are under the obligation to prohibit by law any advocacy of national, racial or religious hatred that incite discrimination, hostility and violence provided they are proportionate and necessary for the protection of rights and reputations of others, as well as for the protection of national security and public order. Moreover, the ICCPR puts a clear obligation on the Member-States to refrain from the actions mentioned in the Article 20 (2).

In *Faurisson v. France* the HRC has found that the Law criminalizing Genocide denial (Gaysot Law of France) is fully compatible with Article 19 (3) restrictions, namely the freedom of expression limitation is provided by law, the adoption of the provision was necessary not only to protect the **rights and the reputation** of others, but also to protect **public order and morals**.²⁰⁷

²⁰⁵ See *Ross v. Canada*, Communication No. 736/1997, Views adopted on 18 October 2000. Also HRC General Comment 34, para 50.

²⁰⁶ *Robert Faurisson v. France*, Communication No. 550/1993, U.N. Doc. CCPR/C/58/D/550/1993(1996), para. 9.6, also *Ross v. Canada*, para. 11.5.

²⁰⁷ *Robert Faurisson v. France*, para 7.10.

The HRC has agreed that Holocaust denial is a “principal vehicle for **anti-Semitism**”²⁰⁸ and “is of a nature as to raise or strengthen **anti-Semitic** feelings”, and deny the respect to the Jewish community to live free from fear of an atmosphere of **anti-Semitism**.²⁰⁹ The Committee has made it clear that Holocaust denial is **racism** and **anti-Semitism** and recognized the role of Gayssot Law as serving the struggle against **racism**.²¹⁰ Holocaust denial is especially the case in which “the right protected is the right to be free from racial, national or religious incitement”.²¹¹

Genocide denial is recognized by the HRC as a form of racism and limitation on expressions denying Genocide was considered to be **necessary** and **proportionate** in a **democratic society**. It derives that Genocide denial passed the test under Article 19 (3); and if Genocide denial amounts to advocacy of national, racial or religious hatred that constitutes **incitement to discrimination, hostility or violence**, the issue should be considered under the Article 20 (2).²¹² The reference to “advocacy” meant that public element should be present and private speech is not within the ambit of Article 20 (2).²¹³

As already mentioned, HRC as well as other international bodies (see previous chapters) have accepted Genocide denial as a form of **racism** and **racial** and **national hatred** towards the target group.²¹⁴ To be able to qualify the genocide denial under Article 20 (2), the other elements of the article, namely the terms *discrimination*, *hostility* and *violence* will be further defined and

²⁰⁸ Ibid para 9.7.

²⁰⁹ Ibid. para 9.6.

²¹⁰ Ibid para 9.7.

²¹¹ *Robert Faurisson v. France*, Individual opinion by Elizabeth Evatt and David Kretzmer, co-signed by Eckart Klein (*concurring*), para 7.

²¹² *Robert Faurisson v. France*, Individual opinion by Rajsoomer Lallah (*concurring*), para. 4.

²¹³ Report of the United Nations High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights, General A/HRC/10/31/Add.3, 2009, p.8.

²¹⁴ David d. Knoll, “Race-hatred offence: Full Federal Court upholds rejection of racial hatred on the internet”, Law Society Journal (2003):61. Also Kathleen Mahoney, “Hate Vilification Legislation and Freedom of Expression – Where is the Balance?”, Australian Journal of Human Rights 1 (1994): 353-369, www.austlii.edu.au/au/journals/AJHR/1994/1.html.

elaborated within the understandings of HRC and simultaneously applied to the Turkish denial of the Armenian Genocide and its consequences.

The term ‘**incitement**’ refers to “*statements* about national, racial or religious groups which create an imminent risk of *discrimination, hostility or violence* against persons belonging to those groups”.²¹⁵ Incitement is very similar to “public provocation”²¹⁶. So, the incitement must be directly related to groups or individuals, belonging to that particular group²¹⁷. The deliberate advocacy of Armenian Genocide denial constitutes an incitement, as it creates an imminent risk of discrimination, hostility and violence against the *Armenian population*.

The term *discrimination* shall be understood as “any distinction, exclusion, **restriction** or preference based on race, gender, ethnicity, religion or belief, disability, age, sexual orientation, language political or other opinion, national or social origin, nationality, property, birth or other status color, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of **human rights and fundamental freedoms** in the political, economic, social, cultural or any other field of public life”.²¹⁸ The idea that Genocide denial constitutes discrimination has been excessively discussed during the paper (see particularly pp 17, 20). So, denial of the Armenian genocide passed the first test, as denial constitutes incitement to discrimination. However, other elements will also be discussed to demonstrate the aggravated character of negation.

Violence shall be understood as “the intentional use of physical force or power against another person, or against a group or community that either results in or has a *high likelihood* of

²¹⁵ Camden Principles on Freedom of Expression and Equality, ARTICLE 19, Principle 12.1 (iii).

²¹⁶ www2.ohchr.org/english/issues/opinion/articles1920_iccpr/docs/experts-papers/Muntabhorn.doc.

²¹⁷ Report of the United Nations High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights, General A/HRC/10/31/Add.3, 2009, p.6.

²¹⁸ CERD Article 1 and CEDAW Article 1.

resulting in injury, death, **psychological harm**, maldevelopment, or deprivation²¹⁹. As an important indicator of violence the experts mention the past violence and persecution against the vulnerable group²²⁰. In the context of 1915 events the deliberate denial by the Turkish government clearly incites violence against the Armenians, while anti-Armenian bigotry demonstrations openly call for violence: "Today Taksim, Tomorrow Yerevan: We will descend upon you suddenly in the night", "Mount Ararat will be your grave."²²¹ Psychological harm as a result of Genocide denial has also been discussed (see p.14-15).

The terms '**hatred**' and '**hostility**' refer to intense and irrational emotions of **opprobrium, enmity** and **detestation** towards the target group.²²² The negation of the events of 1915 by the state authorities obviously results in the enmity and detestation towards the victim group (see Chapter 1).

According to human rights experts, particular importance should be given to the determination of the **level of hostility** requested under article 20 (2). The elements amounting to incitement within the meaning of Article 20 (2) were identified by human rights experts as follows: *severity, intent, content, extent, in particular the public nature of the speech, imminence, likelihood or probability of action, and context.*²²³

Therefore, the starting point is the examination of **severity** of the hatred at issue, for the assessment of which the following may be considered: *severity of what is said* – Genocide denial

²¹⁹ World Health Organization, World Report on Violence and Health, 2002; http://whqlibdoc.who.int/publications/2002/9241545623_eng.pdf.

²²⁰ Report of the United Nations High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights, General A/HRC/10/31/Add.3, 2009, p.8.

²²¹ <http://www.hurriyetdailynews.com/evening-out-one-misery-with-another-.aspx?pageID=238&nID=14788&NewsCatID=396>

²²² Camden Principles on Freedom of Expression and Equality, ARTICLE 19, Principle 12.1 (i) also www2.ohchr.org/english/issues/opinion/articles1920_iccpr/docs/experts-papers/Muntabhorn.doc.

²²³ *Mohamed Eltaye*, The Prohibition of Incitement to National, Racial or Religious Hatred: The case of West Asian Arab Countries, p. 6. <http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Bangkok/MohamedEITayeb.pdf>

is an insult to the **honor** and **dignity** of the Armenians, with a violent implication. *Intensity* - denial of the Armenian Genocide is an everyday reality in Turkey. It is foreign policy, an internal affair, academic issue and it is openly broadcasted. *Reach and extent* - As a national policy the denial of the Armenian Genocide is disseminated by all possible means (public statements, TV, schools, media, other educational establishment, and embassies). Consequently, the whole public as well as international community are potential audience.

The **intent** of the particular speech can be determined from various factors: among which is the circumstances of speech dissemination, also from the scale and repetition of the communication. Within the whole context of the Armenian Genocide, the repetition of denial has a clear discriminatory intent.

Content or form of the speech is considered to be a critical element of the test.²²⁴ Among the relevant factors to assess content may be the frequency of the speech, advocacy, the speaker's authority or influence over the audience. The negation of 1915 massacres is being carried out on the state level, which has both psychological and coercive means to influence on the audience. The frequency of denial has already been stressed in the paper.

As to the **extent of the speech** (its reach and the size of its audience) experts pay attention to the fact that the incitement to hatred must have occurred in public, which is also a constitutive element in the Armenian Genocide denial.

Because incitement, by definition, is an inchoate crime, the action advocated through incitement does not need to be committed for the speech to amount to a crime. The **likelihood or probability of harm** implies some degree of risk. The anti-Armenian bigotry demonstrations are obvious examples of probable and potential harm to Armenians.

Context- is another important element to when assess whether particular statements are

²²⁴ The elements were presented during the expert seminar of HRC on the meaning of Article 20 of ICCPR.

likely to incite hatred. The overall context of the history of past massacres, discrimination and violence is of paramount indicators in this case. The **absence of criticism** of government or the **absence of broad social condemnation** can be relevant in assessing the context. The existence of Article 301 in Turkish Penal Code is among the vivid examples of clear prohibition on criticism and even on alternative views to the Armenian Genocide. There is no social condemnation of the Armenian Genocide denial, which can be explained by the blank prohibition from the state power and the fear of repressions.

The aforementioned discussion leads to the conclusion that the denial of the Armenian Genocide by the Turkish state passed all the possible tests to amount to advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. Therefore the denial of the Armenian Genocide is a clear violation of Turkey's obligations under ICCPR Article 20 (2).

Conclusion

Genocide is the most dangerous form of international crime (a crime of crimes²²⁵). By its essence Genocide is a discriminatory crime, involving a special mental element (*mean's rea*), which is a destruction of the particular group on the racial, national, ethnic or religious basis.²²⁶ The denial of the Genocide, which according to Genocide Association is a continuation of genocidal process, bears the same discriminatory character and what is more dangerous the same intent. "The key when questioning the reality of a crime of genocide is its specificity, just like that of denial, which is determined by the intention that motivates the act".²²⁷

This approach to Genocide denial as a form of racism has also been approved by the national and international tribunals, which qualify genocide denial as the most heinous form of racism. National legislations, which do not establish clear prohibition on the Genocide denial, deal with the issue under the anti-racism, anti-discriminatory laws²²⁸.

The paper has demonstrated that the denial of the Armenian Genocide is a clear indication of racism towards the Armenians. The Turkish policy-line of negation is based on the blanket rejection of the Armenian Genocide, enforced through the foreign policy vector and within state-supported academic circles. This state sponsored policy of denialism results in the strengthening of antagonism and "deepening nationalistic feelings"²²⁹ towards the Armenian population.

Denialistic policy of the Turkey is a violation of the state's positive and negative obligations under the Public International Law. By denying the Armenian Genocide Turkey is

²²⁵ Shabas A.

²²⁶ Convention on the Prevention and Punishment of genocide, Article II.

²²⁷ S. Garibian, Taking Denial Seriously: Genocide Denial and Freedom of Speech in French Law, *Cardozo Journal of Conflict Resolution* [Vol. 9:479], p. 485.

²²⁸ See for example Scandinavian States.

²²⁹ Hayk Demoyan, Personal Interview, 29.05.2012.

itself engaged in the violation of ECHR Article 17, CEDR Article 4, ICCPR Article 20 (2), as all three instruments require the states to take preventive actions and refrain from engaging in unlawful activity.

Besides, the state policy of denial, which amounts to the advocacy of hatred towards the Armenian population, results in the incitement to discrimination, hostility and violence within the society itself. The consequences of the denial are embodied in anti-Armenian bigotry demonstrations.

Recommendations:

1. One general recommendation would be to actively lobby on the state level the idea that the denial of the Armenian Genocide is a form of racism. This argument will serve a solid ground for the furtherance of the whole concept discussed in the paper. The actively promoted idea on racism will serve as a basis to condemn the actions of the Turkish Republic under Public International Law.
2. The idea of Genocide denial as a form of racism should be actively promoted through academic articles, legal writings and by NGO's to widen the targeted audience.
3. States parties to the CERD and ICCPR are subject to a supervisory mechanism. They are obliged to submit periodic reports to the Committee on the Elimination of Racial Discrimination and Human Rights Committee on compliance, while the Committees examines each report and addresses its concerns and recommendations to the State party in the form of concluding observations. Individuals may also file complaints with the mentioned Committee alleging violation of the Convention. Non-Governmental Organizations play a decisive role in and give an overview of the Reporting process and the role of the NGOs in this process, so their engagement as a source pointing out on

alleged violations, will be significant. This periodic review can be an excellent medium for furthering this policy.

4. Because both the Republic of Armenia and the Republic of Turkey are member-states to the European Convention on Human Rights, which provide an opportunity of state to state complaint, Armenia can sue Turkey on the denial of the Armenian Genocide as “an established fact of crime against humanity”.
5. Armenia should actively promote the idea of strengthening genocide prevention measures. Although the International Convention on the Prevention and Punishment of the Genocide contain the word prevention in its title, the legal tool is clearly lacking on that particular point²³⁰. The rehabilitation of the Additional Protocol to the Genocide Convention proposed in the UN Economic and Social Committee, which contains a provision on Genocide denial as an act of incitement to Genocide, will be one of the possible steps.

²³⁰ R. Provost, *Confronting Genocide*, Springer, Dec 1, 2010; Benjamin Whitaker, 'Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide', United Nations Economic and Social Council Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities Thirty-eighth session, Item 4 of the provisional agenda, E/CN.4/Sub.2/1985/6 — 2 July 1985 para. 47, 48, 49. <http://www.preventgenocide.org/prevent/UNdocs/whitaker/>; UN Secretary-General Kofi Annan's Stockholm Genocide Prevention Proposals, <http://www.preventgenocide.org/prevent/UNdocs/KofiAnnanStockholmGenocideProposals26Jan2004.htm>

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106. European Convention on Human Rights
107. Inter-American Convention on Human Rights
108. International Covenant on Civil and Political Rights
109. The Council of Europe Convention on Cybercrime
110. Universal Declaration of Human Rights