A CRITIQUE OF *PERINÇEK V. SWITZERLAND*: INCORPORATING AN INTERNATIONAL AND HISTORICAL CONTEXT IS THE MORE PRUDENT APPROACH TO GENOCIDE DENIAL CASES

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I. INTRODUCTION

Armenians have long sought international acknowledgment of the 1915 mass-killings of Armenians in the Ottoman Empire as genocide.[1] Several countries, including many European countries and an overwhelming majority of U.S. states, have classified the events as an instance of genocide.[2] However, a recent European Court of Human Rights ("ECtHR") Grand Chamber decision, *Perinçek v. Switzerland*,[3] has taken the conversation of acknowledgment a step in the wrong direction. In *Perinçek*, Switzerland prosecuted Doğu Perinçek, a Turkish politician, for proclaiming, while speaking at a conference in Switzerland, that "the allegations of the 'Armenian genocide' are an international lie" and commanding individuals to not "believe the Hitler-style lies such as that of the 'Armenian genocide.'"[4] After Perinçek's appeal, the ECtHR held that his statements were protected as free expression under Article 10 of the European Convention on

1. *See, e.g.*, Thomas de Waal, *The G-Word*, 94 FOREIGN AFF. 136, 143-46 (2015) (discussing the Armenian-American case for their government to recognize the events of 1915 as genocide).

2. Dennis Lynch, *Who Recognizes Armenian Genocide? 20 States That Formally Acknowledge 1915 Events*, INT'L BUS. TIMES (Apr. 21, 2015, 10:32 PM), http://www.ibtimes.com/who-recognizes-armenian-genocide-20-states-formally-acknowledge-1915-events-1891494; David Steinberg, *Forty-Three U.S. States Recognize Armenian Genocide . . . But Obama Won't*, PJ MEDIA (Apr. 22, 2015), https://pjmedia.com/blog/forty-three-u-s-states-recognize-armenian-genocide-but-obama-wont/.

3. Perinçek v. Switzerland, App. No. 27510/08 (Eur. Ct. H.R. Oct. 15, 2015), HUDOC, http://hudoc.echr.coe.int/eng?i=001-158235.

4. *Id.* para. 13, 17-21.

Human Rights ("Convention").[5] The Court, in determining whether Perinçek's statements violated the Convention, focused on the limited effects of the statements within Switzerland, while superficially considering the potential effect of inciting hatred in Turkey.[6] The ECtHR has recognized that genocide denial laws have an important purpose in stopping hate speech, but, often, hate speech is directed toward an audience outside the place where the statements are made. Therefore, because the ECtHR evaluated the effects of hate speech solely, or even mostly, in the country where the speech was made and gave little weight to the historical context surrounding the statements, it failed to adequately achieve the aims underlying genocide denial laws. Ultimately, in addition to considering the effects of speech within the country where it was made, any court evaluating hate speech–in this context, genocide denial–and its effects should incorporate into its analysis the broader historical and international contexts surrounding the statement at issue.

I will begin with a brief summary of the events leading up to and constituting the Armenian Genocide. I will then discuss the modern Turkish approach to discussions of the Genocide, followed by the ECtHR's approach toward hate speech and genocide denial and how its approach somewhat changed in *Perinçek*. Subsequently, I will introduce and offer support for four justifications for the existence and enforcement of genocide denial prosecution laws: (1) preventing immediate violence within the borders of a state; (2) preventing violence, even extraterritorially; (3) preventing future violence and oppression by restricting rhetoric that may lead to the rekindling of the group or ideology that carried out the massacres at issue; and (4) protecting the dignity of genocide survivors and their subsequent generations. Using those justifications, I will critique the *Perinçek* decision. Finally, with the above mentioned justifications in mind, I will provide my own take on a more prudent approach to determining whether particular instances of genocide denial amount to prosecutable offenses. Generally, the approach consists of a three-part, judicially-determined balancing test that seeks to evaluate the speaker's objective intent in making the statement, the statement's domestic and international effect, and the statement's severity when juxtaposed alongside its surrounding historical context. In addition, I propose that courts, as a threshold matter, should determine whether

5. *Id.* para. 1-9, 300.
6. *Id.* para.146-53, 245-47.

the occurrence of the denied event has enough of a historical consensus to warrant the imposition of a fine or a criminal conviction.

II. Background

One must not examine *Perinçek* in a vacuum. To fully grasp *Perinçek*'s effect on Turkey and the international Armenian community, and where the *Perinçek* decision fits in the Armenian-Turkish narrative, the ECtHR should have more extensively considered the history of the Armenian Genocide and the long history of denial in Turkey. Without a development of such historical background, any discussion determining whether the denial of a mass killing equates to hate speech fails to capture the true international effect of hate speech. As will be further illustrated below, the events surrounding *Perinçek* can be characterized as a distant echo of the Ottoman Empire's dangerous ideology towards its minority, specifically Armenian, population. Ottoman policies and, after the fall of the Empire, Turkish policies and government actions effectuated an anti-Armenian ethno-nationalism,[7] resulting in the Armenian Genocide, which continued afterwards as a state supported program of denial and censorship.

A. *History of the Genocide*

In 1375, the Armenian sovereign state fell, not forming again until a short lived stint in 1918 and then again in 1991.[8] Less than a hundred years after the 1375 collapse, the Ottoman Empire took control of the area, leaving the Armenians under Ottoman rule.[9] The Ottomans eventually placed their minority residents in their own millet system, "which involved a structured organization of non-Muslim communities autonomous in their internal affairs and answerable to the central government through patriarchs."[10] By the late eighteenth century, ethnic minorities, including Armenians, "played an important role in the Ottoman social structure," securing key positions in trade

7. *See* Guenter Lewy, *The First Genocide of the 20th Century?*, 120 COMMENTARY, Dec. 2005, at 47-48; Waal, *supra* note 1, at 139.

8. *See* GEORGE A. BOUMOUTIAN, A CONCISE HISTORY OF THE ARMENIAN PEOPLE 297 (5th ed. 2006); Lewy, *supra* note 7, at 48; Sergey Minasyan, *Multi-Vectorism in the Foreign Policy of Post-Soviet Eurasian States*, 20 DEMOKRATIZATSIYA 268, 269 (2012).

9. *See* Lewy, *supra* note 7, at 48-49; Sergey, *supra* note 8, at 268-69.

10. Suraiya Faroqhi, *Ronald Jennings*, 15 TURK. STUD. ASS'N BULLETIN 217, 218 (1991); *see also* Lewy, *supra* note 7, at 48.

and finance as merchants, bankers, and artisans.[11] In fact, by the end of the nineteenth century, Armenians made up a significant portion of the total population in the Ottoman capital city of Istanbul.[12] Despite the social prominence of ethnic minorities, Ottomans viewed non-Muslim millets, including the Armenians, as inferior to Muslims.[13] As such, some ethnic minorities in the Ottoman Empire demanded reform, while others demanded independence.[14]

In 1876, Sultan Abdul Hamid II became the leader of the Ottoman Empire.[15] Feeling pressure both internally–from Ottoman ethnic minorities–and externally–from western European Powers, Hamid repressed the Empire's non-Muslim population.[16] Paranoid of losing control of his Empire, Hamid conducted a series of Armenian massacres in the eastern province, resulting in approximately 90,000 deaths.[17] As a result of Hamid's bloody attempt to solve the "Armenian question," he became mockingly known as the "Red Sultan."[18]

Ultimately, in 1908, the Young Turks cut short Hamid's political reign when they took control of the Empire through a military coup.[19] Known as a constitutional movement, the Young Turks' uprising was a response to the inefficiencies of Hamid's rule and a call to reestablish the constitution of 1876, which Hamid had ignored since two years after its signing.[20] This change in leadership may have ostensibly seemed like a positive development for the struggling ethnic minorities in the Empire. However, the Young Turks' approach to the failing Empire's problems was arguably even more radical than Hamid's.[21] In 1909, Ottoman forces, under the command of the Young Turks' corresponding political association, the Committee of Union and Progress

11. Berch Berseroglu, *Nationalism and Ethnic Rivalry in the Early Twentieth Century*, 52 INDIAN J. POL. SCI. 458, 468-69 (1991); Lewy, *supra* note 7; *see* Hans Kohn, *Ten Years of the Turkish Republic*, 12 FOREIGN AFF., 141, 145 (1933).

12. Berseroglu, *supra* note 11, at 469.

13. Robert Melson, *Paradigms of Genocide: The Holocaust, the Armenian Genocide, and Contemporary Mass Destructions*, 548 ANNALS AM. ACAD. POL. & SOC. SCI. 156, 158 (1996) (citing Roderic H. Davison, *Turkish Attitudes Concerning Christian-Muslim Equality in the Nineteenth Century*, 4 AM. HIST. REV. 844, 845 (1954)).

14. *See* Donald Boxham, *The Armenian Genocide of 1915-1916: Cumulative Radicalization and the Development of a Destruction Policy*, 181 PAST & PRESENT 141, 147-48 (2003).

15. Melson, *supra* note 13, at 159.

16. *Id.*

17. Boxham, *supra* note 14, at 149.

18. Sir Valentine Chirol, *The Downfall of the Khalifate*, 2 FOREIGN AFF. 571, 572 (1924).

19. Boxham, *supra* note 14, 149; *see also* Feroz Ahmad, *The Young Turk Revolution*, 3 J. CONTEMP. HIST., 19, 19-20, 24-25 (1968).

20. Ahmad, *supra* note 19, at 20.

21. *See* Melson, *supra* note 13, at 158-59.

("CUP"), massacred 20,000 Armenians in the Adana province of Cilicia as a reactionary crackdown to "supposedly . . . repress increasingly forthright calls for Armenian separatism."[22]

Despite the Ottoman Empire's new leadership, the start of the twentieth century ushered an era of continued Ottoman destabilization.[23] In 1908, the same year as the Young Turks' coup, Austria-Hungary annexed Bosnia-Herzegovina from the Ottoman Empire.[24] Additionally, between 1910 and 1911, the Empire experienced revolts by the Druses, Albanians, and Yemenis.[25] Eventually, both Bulgaria and Albania seceded from the Empire.[26] Adding even more fuel to the fire, in 1913, Russia, with the encouragement of the Armenian Catholicos (the head bishop of the Armenian Apostolic Church), suggested a reform plan aimed to "curb abuses against . . . Christians [in the Empire]."[27] The reform plan called for the creation of two zones that comprised the provinces with the highest proportions of Armenian residents;[28] these two zones would be administered by European inspectors to ensure "greater social justice and security of life and property."[29] The Ottomans viewed the reform plan as a challenge to their sovereignty in the eastern provinces.[30] The reform plan and the sociopolitical unrest legitimized Ottoman paranoia towards its Armenian population in the eyes of many Turks.

As World War I approached, the Young Turks and the CUP successfully aligned with Germany as an anti-Russian alliance.[31] At the same time, Armenians, with their population concentrated in the eastern provinces of the Empire, near the Russian border, became known as an alien nationality.[32] With the ever-growing fear of a Russian-Armenian alliance, the Young Turks identified and labeled the Armenians as an existential threat to the Empire and, more fundamentally, to Ottoman national identity.[33] Accordingly, the Young Turks, soon after

22. Boxham, *supra* note 14, at 149.
23. *See id.*
24. *Id.*
25. *Id.*
26. *Id.* at 149-50.
27. *Id.* at 150.
28. *Id.* at 150-51.
29. *Id.* at 151.
30. *Id.* at 150.
31. Melson, *supra* note 13, at 159.
32. *Id.*
33. *See* Boxham, *supra* note 14, at 148.

taking control of the Empire, implemented policies motivated by xenophobia, uber-nationalism, and the goal of Turkic homogeneity.[34]

The events collectively known as the Armenian Genocide followed. In 1915, a majority of Armenian soldiers in the Ottoman army were either worked to death or killed.[35] In the same year, the government passed the Tehcir Law, which implemented "a policy of enforced relocation . . . of the 'entire Armenian population of the war zone to [Der] Zor . . . in the heart of the Syrian desert.'"[36] The deported Armenians left their homes, leaving behind their families and belongings, and marched through the desert.[37] Along the way, many deportees perished and all suffered inhumane treatment.[38] Moreover, Turkish and Kurdish villagers, typically incited and led by CUP killing squads, terrorized those who remained.[39]

The Genocide had a noticeable and lasting effect on the cultural makeup of the crumbling Ottoman Empire.[40] Before the commencement of the Genocide, in the later years of the Ottoman Empire, the Ottoman Armenian population had peaked at approximately 2.5 million;[41] however, after the Young Turks' and CUP's program of expulsion, destruction, and decimation, the same Armenian population suffered nearly 1.5 million deaths, while most of the survivors spread across the Middle East.[42] Even with nearly three-quarters of the Ottoman Armenian population deceased, the Young Turks still sought to control the Armenians who survived exile, particularly those who en-

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34. Melson, *supra* note 13, at 158-59.

35. *See id.* at 159-60.

36. Can Erimtan, *Hittites, Ottomans and Turks: Ağaoğlu Ahmed Bey and the Kemalist Construction of Turkish Nationhood in Anatolia*, 58 ANATOLIA STUD. 141, 153 (2008) (citing ERIK J. ZÜRCHER, TURKEY: A MODERN HISTORY 115, 120 (1993)).

37. *See* Melson, *supra* note 13, at 160.

38. *See* Stephan Astourian, *The Armenian Genocide: An Interpretation*, 23 HIST. TEACHER, 111, 114 (1990) ("Armenians were driven out of their homes . . . [as] adult and teenage males, . . . separated from the deportation caravans, were killed a few kilometers away. The worst suffering befell women and children, forced as they were to march for weeks." Those who survived and marched through the Syrian desert were "beaten by [Ottoman soldiers], attacked by irregular troops and nomads, deprived of food and water, and often stripped of their clothes.").

39. Melson, *supra* note 13, at 160 (citing Vahakan N. Dadrian, *Genocide as a Problem of National and International Law: The World War I Armenian Case and Its Contemporary Legal Ramifications*, 14 YALE J. INT'L L. 221 (1989)).

40. *See, e.g.*,Waal, *supra* note 1, at 148 (discussing what little Armenian culture survived in modern-day Turkey as a result of the Genocide).

41. Berseroglu, *supra* note 11, at 472 (citing VARTAN ARTINIAN, THE ARMENIAN CONSTITUTIONAL SYSTEM IN THE OTTOMAN EMPIRE, 1839-1863: A STUDY OF ITS HISTORICAL DEVELOPMENT (1988) (originally written as a Ph.D. dissertation in 1970, Brandeis University)).

42. *See* Berseroglu, *supra* note 11, at 481; Melson, *supra* note 13, at 160.

ded up in Aleppo, Syria, limiting their ability to move around the area.[43]

As World War I came to a close, the world's powers failed to effectively address the Armenian plight due to the attention and resources consumed by the war.[44] Originally, the Ottoman Empire signed the Treaty of Sèvres in 1920, ending its hostilities with the Allied Powers.[45] This treaty partitioned the Ottoman Empire, partly ceding its eastern territories to Armenia and its north-western territories to Greece.[46] Shortly after signing this treaty, the Turkish War of Independence broke out, led by Mustafa Kemal Atatürk.[47] As a result, the Republic of Turkey, viewed as a more modern national state, rose out of the ashes of the Ottoman Empire as the successor Turkish state.[48] In 1923, the newly formed Republic of Turkey signed the Treaty of Lausanne, arguably canceling the effect of the formerly executed Treaty of Sèvres.[49] As the Allied Powers and the U.S. failed to effectively intervene, assist, or advocate for the Armenians,[50] the 1923 treaty included no mention of the Armenians or the creation of an Armenian state.[51]

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43. *Talaat Pasha's Directive to Aleppo Governorate: Displaced Armenians Shall Remain in Places of Exile*, NEWS.AM (Mar. 15, 2017, 11:11 AM), https://news.am/eng/news/378600.html (discussing a translating a telegram sent by Talaat Pasha, the Ottoman Empire's Minister of the Interior and a member of the three-headed Young Turks regime, to the Governorate of Aleppo, Syria, where many exiled Armenians ended up, that instructed the Governorate to keep all Armenians "in their places of exile, and [to not issue] . . . letter[s] of permission . . . that will enable them to go elsewhere.").

44. *See* Melson, *supra* note 13, at 166.

45. Treaty of Peace with Turkey—Sèvres, Aug. 10, 1920, T.S. No. 11 [hereinafter Treaty of Sèvres]; *World War I: Treaties And Reparations*, U.S. HOLOCAUST MEMORIAL MUSEUM, https://www.ushmm.org/wlc/en/article.php?ModuleId=10007428 (last visited Dec. 2, 2017).

46. Treaty of Sèvres, *supra* note 45, art. 84, 88, 89, 90; Philip Marshall Brown, *From Sevres to Lausanne*, 18 AM. J. INT'L L. 113, 113-16 (1924) (discussing partitioning of Ottoman Empire).

47. *See* Walter F. Weiker, *Atatürk as a National Symbol*, 6 TURK. STUD. ASS'N BULLETIN 1, 1-2 (1982).

48. *See* Berseroglu, *supra* note 11, at 468-69; Kohn, *supra* note 11, at 145.

49. Treaty of Peace with Turkey—Lausanne, Fr. -Gr. Brit. -Greece -It. -Japan -Kingdom of Serb., Croat., and Slovn. -Rom. -Turk., July 24, 1923, 28 L.N.T.S. 11. *See generally* Treaty of Sèvres, *supra* note 45.

50. 2 RICHARD G. HOVANNISIAN, THE REPUBLIC OF ARMENIA 322-23, 402-03 (1982); 3 RICHARD G. HOVANNISIAN, THE REPUBLIC OF ARMENIA 50-53, 87-90 (1996); 4 RICHARD G. HOVANNISIAN, THE REPUBLIC OF ARMENIA 1, 12, 15, 23-24, 28 (1996).

51. *See, e.g.*, 117 *British And Foreign State Papers* 308-09, 543-91 (His Majesty's Stationery Office 1926); LAUSANNE CONFERENCE ON NEAR EAST AFFAIRS: RECORDS OF PROCEEDINGS AND DRAFT TERM OF PEACE, TURKEY NO. 1, CMD. 1814 (His Majesty's Stationery Office 1923) (indicating no mention of the people of Armenia or Armenia as a state throughout the entire work, which is a collection of the records, letters, documents, and proceedings associated with the Lausanne Conference and its resulting Treaty).

While the deadly ethnic cleansing program of the Ottoman Empire subsided, the spirit of removing and exiling Armenians from previously Ottoman controlled territories remained alive in subsequent Turkish policies. The Turkish cleansing program soon took the shape of institutional exclusion of Armenians from the country.[52] Turks began coercing the remaining Armenians into leaving the country and signing away their rights to any present and future claims.[53] Furthermore, those who left the country without receiving official permission, including those who were involuntarily deported, had their citizenship revoked and were not allowed back in the country.[54] Such deported individuals also lost their property rights to the belongings they left behind.[55] Essentially, after the Ottomans brutally expelled a large chunk of its Armenian population, the new Turkish Republic locked the door behind them. All of these post-Republic policies were either issued or facilitated by Mustafa Kemal Atatürk, also known as the forefather and founder of the modern Republic of Turkey.[56]

B. *Present-day Turkey and the State of Denial*

With Atatürk held as such a prominent figure in modern-day Turkey,[57] as well as the government's emphasis on national and historic pride, denial of the Armenian Genocide has swept across Turkey as almost synonymous with Turkish patriotism.[58] The ideas of Turkification, seemingly carried over from the ideology underlying the program of ethnic cleansing pushed by the Young Turks in the 1910s and continued by Atatürk, run through Turkish society, particularly its government, today.[59] Since the Young Turks set in motion what Ata-

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52. *See, e.g.*, Vahram L. Shemmassian, *The Exodus of Armenian Remnants from The Interior Provinces of Turkey*, 1922-1930, *in* ARMENIAN TSOPK/KHARPERT 389-413 (Richard G. Hovannisian ed., 2002).

53. *E.g.*, *id.* at 394-95.

54. *See* TANER AKÇAM & ÜMIT KURT, SPIRIT OF THE LAWS 69-75 (Aram Arkun trans., 2012).

55. *Id.*

56. *See* Kohn, *supra* note 11, at 154.

57. *See* Weiker, *supra* note 47.

58. *See, e.g.*, Thomas W. Smith, *Civic Nationalism and Ethnocultural Justice in Turkey*, 27 HUM. RTS. Q. 436, 443 (2005) (first citing TURK. OSMANLI ARŞIVI DAIRE BAŞKANLĞI, OSMANLY BELGELERINDE ERMENILER, 1915–1920 (1994); then citing TURK. OSMANLI ARŞIVI DAIRE BAŞKANLIĞI, ERMENI OLAYLARY TARIHI (1998); then citing TURK. OSMANLI ARŞIVI DAIRE BAŞKANLIĞI, ERMENI MESELESININ SIYASI TARIHÇESI, 1877–1914 (2001); and then citing Directorate General of Press and Information, Office of the Prime Minister, Genocide Statue and Museum Opens in Igdir, TURK. PRESS REV., 6 Oct. 1999, *available at* http://www.hri.org/news/turkey/trkpr/1999/99-10-06.trkpr.html#20).

59. *See* Kohn, *supra* note 11.

türk would eventually mold into the Republic of Turkey, Turks view the Armenian claims of genocide as a threat to their national identity and, more directly, their national historical legitimacy.[60] This is evinced by the Turkish government's active program of ensuring silence both within its own borders and throughout the international community.[61]

The Turkish program of silencing its own residents has a long and sometimes bloody history. At its root, Article 301 of the Turkish Penal Code, formerly Article 159 (originally enacted in 1926[62]), criminalizes any open statement "denigrating Turkishness" or denigrating any institution of the Turkish government, including the judicial and military institutions.[63] The crime of denigrating Turkishness carries with it a punishment of between six months and two years if committed by a Turkish resident;[64] the punishment is increased by one-third if a Turkish citizen commits the crime outside of Turkey.[65]

The history of Article 301 prosecutions includes an overwhelming record of Turkish residents discussing their opinions, beliefs, and historical findings on the issue of the Genocide.[66] For example, in 2006, Turkey prosecuted Orhan Pamuk, a famous novelist, for simply mentioning the Armenian Genocide committed by Ottoman Turks during an interview with a Swiss magazine.[67] Another case in 2005 involved Hrant Dink, an Armenian journalist and columnist for the Turkish-Armenian newspaper, *Agos*.[68] The Turkish government charged Dink with insulting Turkishness, a violation of Article 301 of the Turkish Penal Code, for writing several articles addressing the Genocide of the Armenians and the cultural identity of Armenians living in Turkey.[69] Shortly after his conviction, a young Turkish nationalist assassinated

60. *See id.*

61. Ronald Grigor Suny, *Truth in Telling: Reconciling Realities in the Genocide of the Ottoman Armenians*, 114 AM. HIST. REV. 930, 938 (2009).

62. Jahnisa Tate, *Turkey's Article 301: A Legitimate Tool For Maintaining Order Or A Threat To Freedom Of Expression?*, 37 GA. J. INT'L & COMP. L. 181, 197 (2008-2009) (citing Yasemin Celik Levin, *The Effect of CEDAW on Women's Rights*, *in* HUMAN RIGHTS IN TURKEY 202, 210 (Zehra F. Kabasakl Arat ed., 2007)).

63. TURK. PENAL CODE, Art. 301 (2005) (amended 2008); *see also* Tate, *supra* note 62, at 182-83.

64. TURK. PENAL CODE, Art. 301 (2005) (amended 2008).

65. *Id.*

66. *See* Tate, *supra* note 62, at 198.

67. *Id.* (citing VERITY CAMPBELL ET AL., TURKEY 51 (10th ed. 2007)).

68. *Turkish-Armenian Writer Shot Dead*, BBC NEWS (Jan. 19, 2007, 6:58 PM), http://news.bbc.co.uk/2/hi/europe/6279241.stm [hereinafter *Turkish-Armenian Writer Shot Dead*].

69. *Id.*

Dink.[70] Although it may seem as though the Turkish government had no culpability in Dink's assassination, as it vowed to prosecute the orchestrators and perpetrators of Dink's murder, the ECtHR had a different opinion.[71] In *Dink v. Turkey*, the ECtHR found that Turkish officials, including the police in both Trabzon and Istanbul, and the Trabzon gendarmerie, had been informed of the likelihood of an assassination attempt and even of the identity of the suspected instigators, providing the Turkish government with ample reason to protect Dink.[72] Among other issues considered, the Court concluded that the Turkish government violated Dink's Article 2 right to life by not protecting Dink from a known, imminent threat.[73] Even more disturbing, upon taking Dink's assassin into custody, officers at the Turkish police station welcomed the murderer as a hero, posing for pictures with him while hoisting the Turkish flag.[74]

Turkey's silencing of the truth about the Genocide goes beyond domestic bounds, as seen by the extraterritorial scope of Article 301 of Turkey's Penal Code.[75] Furthermore, Turkey has engaged in an active international campaign in spreading its own, softened version of the story, while keeping the Armenian cause at bay.[76]

C. The ECtHR, Perincek, and its Legal Context

As the historical and international contexts of *Perinçek* have now been sufficiently developed, I will move on to discuss the case and its legal context. As will be implied in this section, and expanded in greater detail in later sections, courts need to examine the effects of

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70. Holly Case, *Two Rights and A Wrong: On Taner Akçam*, THE NATION (Mar. 13, 2013), https://www.thenation.com/article/two-rights-and-wrong-taner-akcam/.

71. *See* Dink v. Turkey, App Nos. 2668/07, 6102/08, 30079/08, 7072/09, 7124/09, para. 139 (Eur. Ct. H.R. Dec. 14, 2010), HUDOC, http://hudoc.echr.coe.int/eng?i=001-100383; *see also Turkish-Armenian Writer Shot Dead*, *supra* note 68.

72. *Dink*, App Nos. 2668/07, 6102/08, 30079/08, 7072/09, 7124/09, para. 67, 88 (2010).

73. *Id.* para. 139.

74. *New video shows hero's welcome at police station for Hrant Dink's murderer – VIDEO*, TURKISH MINUTE (Sept. 9, 2016), https://www.turkishminute.com/2016/09/09/new-video-shows-heros-welcome-police-station-hrant-dinks-murderer/.

75. TURK. PENAL CODE, Art. 301 (2005) (amended 2008).

76. *See, e.g.*, Suny, *supra* note 61 (indicating that the Turkish ambassador to Washington prompted an editor of the Microsoft Encarta encyclopedia to remove any mention of "genocide" in the 1915 events, and that Turkish money financed powerful lobbyists in Washington to work against a U.S. House of Representatives resolution in 2000 that would have recognized the mass killings of Armenians in the Ottoman Empire as a genocide); *Turkish Group Sponsors Genocide Denial Ads, Prompts Outrage*, THEARMENIAWEEKLY (Apr. 22, 2016), https://armenianweekly.com/2016/04/22/genocide-denial-ads/ (indicting that, near the time of the centennial commemoration of the Armenian Genocide, Turkish funded ads placed in weekly publications claimed that the Armenian position on what actually transpired during the 1915 events is a fabrication).

hate speech internationally and not just in the country where the speech takes place, especially when considering statements denying extraterritorial genocides. Any other approach disregards the justifications underlying genocide denial laws.

1. Freedom of Expression in the European Convention on Human Rights and the ECtHR's Two-Tier System of Analysis

The Convention–the binding authority for the ECtHR–has established several freedoms and restrictions.[77] Since Article 10 and Article 17 of the Convention relate to freedom of expression and its limits, the two Articles are the most relevant here and will therefore be discussed more extensively below. Article 10 ensures individuals' freedom of expression.[78] Specifically, Article 10 (1) ensures individuals the right to freely express themselves while it mandates a negative obligation for party countries to not interfere with such expression.[79] Article 10 (2), on the other hand, allows party countries to prescribe limits on individuals' expression to maintain social harmony and prevent chaos.[80] Article 17 bars individuals' Article 10 (1) freedom of expression where speech runs contrary to the fundamental values of the Convention.[81]

In terms of procedure, the ECtHR has developed a two-tier analysis in handling freedom of expression cases.[82] When an applicant files a claim with the ECtHR, asserting that a state has unjustly punished them for their speech, the Court first determines whether the speech in question contravenes the Convention's underlying values under Ar-

77. Council of Europe, European Convention on Human Rights (Nov. 4, 1950) [hereinafter European Convention on Human Rights].

78. *Id.* art. 10 (1)-(2) ("1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions . . . without interference by public authority . . . . 2. The exercise of these freedoms . . . may be subject to such . . . conditions [or] restrictions . . . as 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 rights of others[.]").

79. *Id.* art. 10 (1).

80. *Id.* art. 10 (2).

81. *Id.* art. 17 ("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."); *see also* Paolo Lobba, *Holocaust Denial before the European Court of Human Rights: Evolution of an Exceptional Regime*, 26 EUROPEAN J. INT'L L. 237, 249 (2015).

82. *See* Lobba, *supra* note 81, at 241-42.

ticle 17.[83] This Article is known as the abuse clause or, more informally, the guillotine effect, since, if the Court preliminarily determines that the applicant's speech violated Article 17, it need not analyze whether prosecution of that speech violated the applicant's Article 10 freedom of expression.[84] The ECtHR has employed the guillotine effect of Article 17 in several cases where freedom of expression has been at issue and the speech in question has crossed the threshold of conventional protection.[85]

If, however, an applicant's claim passes the muster of the guillotine effect, the ECtHR analyzes the claim under Article 10 (1) and Article 10 (2).[86] The Court determines whether prosecution of the speech was pursuant to a state law that could have put a reasonable person on notice of possible criminal liability, whether a criminal penalty for the statements was necessary in a democratic society, and whether the "'restrictions' or 'penalties' imposed . . . [were] proportionate to the legitimate aim pursued."[87] For instance, in the portion of *Dink* addressing Dink's conviction, under Article 301 of the Turkish Penal Code, the ECtHR concluded that Turkey violated Dink's Article 10 right to freedom of expression.[88] It reasoned that the journal articles issued by Dink did not seek to offend, insult, or incite violence against a group of people; therefore, although the Turkish court based its ruling on Turkish Penal Code, Article 301, the ECtHR held that prosecuting Dink was neither necessary in a democratic society nor

83. Seurot v. France (No. 2), App. No. 57383/00 (Eur. Ct. H.R. May 18, 2004), HUDOC, http://hudoc.echr.coe.int/eng?i=001-45005 ("[T]out propos dirigé contre les valeurs qui soustendent la Convention se verrait soustrait par l'article 17 à la protection de l'article 10[,]" translated to '[A]ny statement directed against the values ??that underlie the Convention would be removed by Article 17 to the protection of Article 10'); *see also* Lobba, *supra* note 81, at 243.

84. *See* Lobba, *supra* note 81, at 239.

85. *See, e.g.*, Pavel Ivanov v. Russia, App. No. 35222/04, para. 1-3 (Eur. Ct. H.R. Feb. 20, 2007), HUDOC, http://hudoc.echr.coe.int/eng?i=001-79619 (holding that a series of articles calling out Jews as the source of evil in Russia and calling for their exclusion from social life did not warrant the protection of Article 10 because it constituted a vehement attack on one ethnic group, which is contrary to the Convention's values of tolerance and social peace); Norwood v. The United Kingdom, 2004-X1 Eur. Ct. H.R. 343, 348-49 (holding that publicly displaying a poster with an illustration of the Twin Towers burning and a message stating "Islam out of Britain – Protect the British People" constituted a vehement attack against a religious group, which is contrary to the Convention's values of tolerance and social peace).

86. *Seurot*, App. No. 57383/00, (2004).

87. Erbakan v. Turkey, App. No. 59405/00, para. 56 (Eur. Ct. H.R. July 6, 2006), HUDOC, http://hudoc.echr.coe.int/eng?i=001-76232.

88. Dink v. Turkey, App Nos. 2668/07, 6102/08, 30079/08, 7072/09, 7124/09, para. 139 (Eur. Ct. H.R. Dec. 14, 2010), HUDOC, http://hudoc.echr.coe.int/eng?i=001-100383.

was the restriction of his speech proportionate to the legitimate aim pursued.[89]

To clarify the ECtHR's use of the two-tier analysis for freedom of expression cases, an additional examination of the ECtHR's case-law will follow. Specifically, the next section will examine two cases that, respectively, illustrate facts sufficient to prompt the ECtHR to release Article 17's guillotine (and its accompanying analysis on anti-conventional speech) and facts sufficient to prompt the ECtHR to withhold an application of Article 17, opting, instead, for an application of Article 10.

2. Freedom of Expression/Incitement to Hatred Cases Decided by the ECtHR

Garaudy v. France,[90] a case decided in 2003, involved the denial of the Holocaust.[91] Roger Garaudy, who published a book in which he denied the Holocaust, was charged and convicted by the Paris Court of Appeal on five counts of "denying crimes against humanity, publicly defaming a group of persons, namely the Jewish community, and inciting to racial discrimination and hatred."[92] Garaudy appealed his conviction to the ECtHR, claiming that France had violated his Article 10 right to freedom of expression.[93] The European Court held that Garaudy's book did not warrant the protection of Article 10, but instead triggered the guillotine effect of Article 17 since the language and sentiment used in the book amounted to a clear invocation of racial hatred and an accusation of falsifying history.[94] As stated by the Court, "[d]enying crimes against humanity is . . . one of the most serious forms of racial defamation of Jews and of incitement to hatred of them."[95] The Court concluded by asserting that Article 17 applied in this case because the denial of the occurrence of established historical atrocities instantiated anti-conventional values such as racial hatred.[96]

In a 2010 hate speech case, *Le Pen v. France*, the applicant's claim survived the Court's Article 17 analysis, but ultimately failed the Arti-

89. *Id.* para. 134-36.
90. Garaudy v. France, 2003-IX Eur. Ct. H.R. 369 (2003).
91. *See id.* at 375, 390-91.
92. *Id.* at 371.
93. *Id.* at 381.
94. *See id.* at 397.
95. *Id.*
96. *See id.*

cle 10 test and was thus inadmissible.[97] In *Le Pen*, the French government charged the applicant, Jean-Marie Le Pen, who was the president of the French National Front party, with incitement of discrimination, hatred, and violence against the Islamic community.[98] The conviction arose from Le Pen's statements during an interview,[99] where he said "the day there are no longer 5 million but 25 million Muslims in France, they will be in charge."[100] Le Pen later urged that the French must "watch [their] step" with the ever-increasing population of Muslims in the country, implying a social rejection of an entire group of people.[101] The ECtHR held that the restrictions imposed on Le Pen's freedom of expression were proportionate to the legitimate aims cited by the French court.[102] Additionally, the Court held that France's prosecution of Le Pen was necessary in a democratic society because his statements were likely to give rise to feelings of rejection and hostility.[103] Ultimately, the Court concluded that France had not violated Le Pen's Article 10 (1) freedom of expression, rejecting further review of his case.[104]

In sum, from *Garaudy*, we can conclude that the ECtHR applies Article 17 to statements inciting racial hatred or advocating a revision of the history of an atrocity, both of which run contrary to conventional values. Additionally, from *Le Pen*, we can conclude that statements not necessarily contrary to conventional values can still prompt just punishment by a state, under Article 10 (2), when such statements give rise to feelings of rejection and hostility towards a group of people. Nevertheless, even though the facts in *Perinçek* seemingly fit the holdings of both *Garaudy* and *Le Pen*, the ECtHR decided *Perinçek* inconsistent with both precedents. Although not clearly evident at this point, the ECtHR's decision on whether Article 17 applies or whether a state infringed upon one's Article 10 right to freedom of expression depends, at least partly, on the temporal and geographic proximity of the event or circumstance the speaker referred to.

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97. Le Pen v. France, App. No. 18788/09 (Eur. Ct. H.R. Apr. 20, 2010), HUDOC, http://hudoc.echr.coe.int/eng?i=001-98489.

98. *Id.* at 2.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 5, 7 (noting that, in this case, the needs of a democratic society outweighed the need to allow the applicant's freedom of expression).

103. *Id.* at 7.

104. *Id.* ("It follows that this complaint must be rejected as being manifestly ill in accordance with Article 35 §§ 3 and 4 of the Convention.").

3. Perinçek v. Switzerland

The central case for this discussion, *Perinçek v. Switzerland*, falls under a unique procedural category. The Court in *Perinçek* stated that Article 17 is only applicable on an exceptional basis,[105] seemingly retracting from its position in *Garaudy* concerning Article 17's applicability to the denial of the occurrence of historically established atrocities.[106] The *Perinçek* Court also found that a determination of whether Perinçek's statements were contrary to the values of the Convention (Article 17) overlaps with a determination of whether the restriction of his statement was necessary in a democratic society and proportionate to a legitimate aim (Article 10).[107] Therefore, the Court joined its Article 17 discussion to the merits of Perinçek's Article 10 violation claim, essentially avoiding the guillotine effect.[108]

Perinçek is the founder and chairman of the Turkish Patriotic Party, formerly known as the Turkish Workers' Party.[109] In 2008, a Swiss court held that three Turks, including the European representative of the Turkish Workers' Party, Ali Mercan, were guilty of racial discrimination after claiming the Armenian Genocide was an "international lie."[110] This indicates that Perinçek was well aware of the law which he later violated.

In *Perinçek*, Switzerland convicted Perinçek of hate speech.[111] During three conferences in Switzerland, between May and October of 2005, Perinçek repeatedly asserted that the mass killings of 1915 did not amount to genocide, referring to the events as "an international lie."[112] Perinçek stated, in pertinent part:

> Let me say to European public opinion . . . : the allegations of the 'Armenian genocide' are an international lie . . . Imperialists from the West and from Tsarist Russia were responsible for the situation boiling over between Muslims and Armenians. The Great Powers,

105. Perinçek v. Switzerland, App. No. 27510/08, para. 114 (Eur. Ct. H.R. Oct. 15, 2015), HUDOC, http://hudoc.echr.coe.int/eng?i=001-158235 ("In cases concerning Article 10 . . . [Article 17] should only be resorted to if it is immediately clear that the impugned statements sought to deflect this Article from its real purpose by employing the right to freedom of expression for ends clearly contrary to the values of the Convention").

106. *See* Garaudy v. France, 2003-IX Eur. Ct. H.R. 369, 394, 397-98 (2003).

107. *Perinçek*, App. No. 27510/08, para. 115 (2015).

108. *Id.*

109. *Id.* para. 10-11.

110. *Swiss Court Confirms Conviction of Turks for Denying Armenian Genocide*, ASBAREZ (Feb. 11, 2010), http://asbarez.com/77511/swiss-court-confirms-conviction-of-turks-for-denying-armenian-genocide/.

111. *Perinçek*, App. No. 27510/08, para. 17-22 (2015).

112. *Id.* para. 12-16.

> which wanted to divide the Ottoman Empire, provoked a section of the Armenians, with whom we had lived in peace for centuries, and incited them to violence. The Turks . . . defended their homeland from these attacks. . . . It should not be forgotten that Hitler used the same methods . . . [of] exploiting ethnic groups . . . to divide up countries for his own imperialistic designs . . . Don't believe the Hitler-style lies such as that of the 'Armenian genocide.' Seek the truth like Galileo, and stand up for it.[113]

Perinçek appealed his conviction to the ECtHR as a violation of his Article 10 right to freedom of expression.[114] After an initial ruling by a panel of the ECtHR, finding a violation of Perinçek's Article 10 right, Switzerland appealed the case to the Grand Chamber of the ECtHR, which accepted the case for consideration.[115]

As mentioned above, the Grand Chamber bypassed a thorough preliminary analysis of Article 17 because, the Grand Chamber claimed, determining whether Perinçek relied on the Convention to infringe on the conventional rights and freedoms of others overlapped with an Article 10 analysis of whether Switzerland's interference with Perinçek's freedom of expression was necessary in a democratic society.[116] Thus, the Court went on to apply the three factors of Article 10. First, the Court determined that Switzerland's interference with Perinçek's speech was pursuant to Swiss state law–Article 261 *bis* §4.[117] It also held that, even if Perinçek did not actually know that making his statements about the Genocide would lead to criminal liability (despite Switzerland's unclear case-law on whether the Armenian Genocide would fall within the meaning of Article 261 *bis* §4[118]), obtaining legal counsel would have sufficiently put Perinçek on notice; essentially, Perinçek carried the burden of the risks associated with making his statements.[119]

Then, the Court considered the legitimate aims factor of the Article 10 analysis. In arguing their case to the ECtHR, the Swiss government asserted that it could interfere with Perinçek's right to freedom of expression in pursuance of two legitimate aims under Article 10 (2): (1) " 'the prevention of disorder[;]' " and (2) " 'the protection of the . . .

113. *Id.* para. 13.

114. *Id.* para. 1-9, 23.

115. *Id.* para. 4.

116. *Id.* para. 115.

117. *Id.* para. 137-38.

118. Code Pénal Suisse [CP] [Criminal Code] Jan. 1, 2017, art. 261 bis (Switz.), https://www.admin.ch/opc/en/classified-compilation/19370083/201709010000/311.0.pdf.

119. *Perinçek*, App. No. 27510/08, para. 138-40 (2015).

rights of others.'"[120] With regard to the first legitimate aim, the Court stated that Switzerland must show that "[Perinçek]'s statements were capable of leading or actually led to disorder . . . and that in acting to penalize [him], the Swiss authorities had [this aim] in mind."[121] It pointed out that, besides presenting evidence of two opposition rallies to conferences attended by Perinçek in Switzerland a year before the events at issue, Switzerland failed to show that, in punishing Perinçek, it sought to prevent disorder.[122] Therefore, the Court held that Switzerland had not pursued the legitimate aim of preventing disorder.[123] Instead, the Court found that the Swiss government pursued the legitimate aim of protecting the rights of others, specifically the dignity of the local Armenian community.[124]

Finally, the Court considered the necessity of the Swiss government's interference with Perinçek's right to freedom of expression in a democratic society, ultimately concluding that interference was not necessary.[125] The Court reached its conclusion on the issue of the necessity of interference by first assessing the following two aspects, among other aspects less relevant to this paper: (1) the nature of Perinçek's statements to determine whether they were entitled to heightened protection under Article 10; and (2) with regard to the context of Switzerland's interference, geographical and historical factors to determine whether there existed a pressing social need for interference.[126]

The Court's assessment of the first aspect–that is, the nature of Perinçek's statements and, accordingly, what degree of protection it deserved–rested on an important distinction.[127] The Court noted that "expression[s] on matters of public interest" prompt a higher degree of protection, while "expression[s] that promote . . . or [justify] violence [or] hatred" do not prompt such protection.[128] In concluding that Perinçek's statements required a greater degree of protection, the Court reasoned that Perinçek neither justified the killing of the

120. *Id.* para. 145.

121. *Id.* para. 152.

122. *Id.* para. 153.

123. *Id.* para. 154.

124. *Id.* para. 156-57.

125. *Id.* para. 158, 226, 239-41 (the court balanced Perinçek's Article 10 right to freedom of expression and the Armenian community's Article 8 right to respect for private life. I have omitted, for the most part, any mention of the Court's Article 8 discussion since it does not relate to my paper in any significant way).

126. *Id.* para. 229-30, 242.

127. *Id.* para. 229.

128. *Id.* para. 230.

Armenians nor called for hatred, violence, or intolerance against the Armenians.[129] It also noted that this case was different from Holocaust denial cases, where an incitement of hatred or intolerance is presumed, because "the applicant [in *Perinçek*] spoke in Switzerland about events which had taken place on the territory of the Ottoman Empire . . . ."[130]

The Court's assessment of the second aspect resulted in no finding of such a pressing social need as to require an interference with Perinçek's right to freedom of expression.[131] A satisfaction of the necessity of interference factor, the Court asserted, requires a rational connection between the measures taken and the ultimate aim sought.[132] With that in mind, the Court considered whether the situation in Turkey justified Perinçek's punishment in Switzerland.[133] Despite conceding that instantaneous electronic communication leaves no statement purely local, the Court found no causal link between the oppression faced by the minority Armenian population in Turkey and the statements made by Perinçek.[134]

Furthermore, the Court expanded on the idea of a "direct link," which is seemingly central to their conclusion in the geographical and historical factors section.[135] As mentioned above, the Court differentiated the present case from Holocaust denial cases, where, regardless of form, a statement made in Western Europe (particularly in those states involved or affected by the Holocaust) denying the Holocaust presumptively implies "an anti-democratic ideology and anti-Semitism."[136] The Court points out that, unlike the events of the Holocaust and the states involved or affected by it, there is no direct link between Switzerland and the events of 1915 in the Ottoman Empire, besides an Armenian community in Switzerland.[137]

With a vote of ten-to-seven, the ECtHR held that Switzerland violated Perinçek's Article 10 right by unjustly interfering with his freedom of expression.[138] The next section provides justifications for

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129. *Id.* para. 239-41.
130. *Id.* para. 234.
131. *Id.* para. 242-48.
132. *Id.* para. 245-46.
133. *Id.* para. 245.
134. *Id.* para. 246-47 (asserting, dismissively, that, with regard to the facts of *Perinçek* causing the events in *Dink*, "this can hardly be regarded as a result of [Perinçek]'s statements in Switzerland.").
135. *Id.* para. 243-44.
136. *Id.* para. 243.
137. *Id.* para. 244.
138. *Id.* para. 140.

having genocide denial laws to bolster my critique of *Perinçek* and provide backing for my genocide denial approach proposal.

III. Justifications for Prosecuting Genocide Denial

Surveying international law and jurisprudence regarding genocide,[139] it is evident that four primary reasons underlie the purpose of having genocide denial laws. In order of immediacy and, as a result, importance to respective lawmaking bodies, they are: (1) to prevent immediate violence within the borders of a state; (2) to generally prevent violence, even extraterritorially; (3) to prevent future violence and oppression by restricting rhetoric that may lead to the rekindling of the group or ideology that carried out the massacres at issue; and (4) to protect the dignity of survivors and their subsequent generations. These justifications are unique in the realm of criminal law because the crime of genocide usually carries with it a deep-seated effect on society as a whole, especially on those in the alleged perpetrating group and those in the alleged victim group.

Admittedly, the ordering and mere presence of some of these justifications may cause disagreement and, hence, require further support. Specifically, it is foreseeable that some critics may contest placing the second justification before the third, or even having the second or fourth justifications in the list at all. On its face, the potential concern over the second justification is understandable because states are commonly expected to prioritize the protection of their own citizens and the maintenance of peace within their own borders before addressing extraterritorial concerns. Moreover, the second justification may prompt an issue of legislative jurisdiction. The fourth justification may also prompt one to question why the feelings or dignity of an event distant in time and space should even concern a state. However, I will argue, the above mentioned justifications are crucial in maintaining social peace, integrity, and civility.

139. *See, e.g.*, Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention]; Rome Statute of the International Criminal Court art. 6, 25, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002); *see also* Gregory H. Stanton, *The Ten Stages of Genocide,* Genocide Watch, http://genocidewatch.org/genocide/tenstagesofgenocide.html (last visited Oct. 20, 2017) ("DENIAL is the final stage that lasts throughout and always follows a genocide. It is among the surest indicators of further genocidal massacres.").

A. *Justification #1: The Prevention of Immediate Violence Within the Borders of a State*

The prevention of both temporally and spatially immediate violence is the highest priority for any state, since the immediate safety of citizens is of utmost concern to governments. Hateful genocide denial carries with it a risk of inciting immediate violence against the group targeted by the statement and/or retaliation by that group. Therefore, governments should prosecute speech when it rises to this level.

For instance, in U.S. jurisprudence, speech is protected at a much higher degree than in Europe.[140] However, the U.S. does not have a completely hands-off approach to speech regulation.[141] Despite the extensive scope of one's freedom of speech in the U.S., the Supreme Court has limited free speech where speech has the capacity to cause immediate danger by using the "Brandenburg test."[142] The test, articulated by the U.S. Supreme Court in the 1969 case of *Brandenburg v. Ohio*, limits the protection of the first amendment where: (1) a statement "is directed to inciting or producing imminent lawless action[;]" and (2) that statement "is likely to incite or produce such action."[143] The idea underlying the "Brandenburg test" parallels the justification I propose here.

However, although the U.S. only goes this far in justifying the restriction of speech, the courts of Europe as well as other jurisdictions go further in scrutinizing the admissibility of speech. As controversial as it sounds, I argue that U.S. policies are too lax and allow too much freedom at the cost of safety, security, and dignity, both domestically and abroad.[144] For this reason, I will continue providing justifications for restrictions on speech with genocide denial in mind.

B. *Justification #2: The Prevention of Violence, Even Extraterritorially*

The general prevention of international violence and hatred should also be a concern for law-making bodies around the world. The world is a much smaller place now than before, due to the advance-

140. *See* Isabelle Rorive, *What Can Be Done Against Cyber Hate? Freedom Of Speech Versus Hate Speech In The Council Of Europe*, 17 CARDOZO J. INT'L & COMP. L. 417, 420-21 (2009).

141. *See id.* at 421.

142. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

143. *Id.*

144. *See* JEREMY WALDRON, THE HARM IN HATE SPEECH 18 (2012); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 445 (1990); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2321 (1989).

ment of communication technologies. A statement made on one side of the world can end up on the other side of the world, whether or not sent intentionally. As the means of communication become more sophisticated and immediate, so too does the risk of violence. For example, a recent survey conducted by security firm, Trend Microof, found that alleged terrorists utilize email account applications such as Gmail and Yahoo.[145] ISIS, the Islamic terrorist organization in the Middle East, is estimated to have approximately 46,000 Twitter accounts, using the internet as its main source of recruitment.[146] Gmail, Yahoo, and Twitter are not bound by international borders, accordingly, neither is the threat of the incitement of violence. Law-making bodies should adapt accordingly in order to maintain security and preserve accountability for their citizens.

Additionally, an underlying purpose for human rights is to address wrongful and hurtful conduct and to promote more peaceful communities. However, the principles of promoting peacefulness and preventing harm to others only goes as far as a law enforcing that principle can reach. As mentioned in the dissenting opinion of Judges Spielmann, Casadevall, Berro, De Gaeto, Sicilianos, Silvis, and Kûris in *Perinçek*: placing a geographical limit on the determination of the effects of a statement "amounts to seriously watering down the universal, *erga omnes* [which means "towards all" in Latin] scope of human rights."[147]

Generally, legislative bodies pass laws that are enforceable and only prompt considerations of conduct occurring within their own, respective, jurisdictions.[148] Therefore, passing and enforcing laws that seek to prevent extraterritorial violence prompts an issue of legislative jurisdiction. However, certain exceptions apply to this principle: namely, certain crimes of extreme depravity trigger universal jurisdiction. For instance, "[t]he Genocide Convention, which refers explicitly to territorial jurisdiction, has been interpreted [so as part of customary international law] as not prohibiting the application of the principle of

145. Don Reisinger, *The Many Ways Terrorists Communicate Online*, FORTUNE (May 3, 2016), http://fortune.com/2016/05/03/terrorists-email-social-media/.

146. Duane Bean, *How ISIS Made Twitter One of Its Main Recruiting Tools – And What Can Be Done About It*, INDEP. J. REV. (Aug. 11, 2015), http://ijr.com/2015/08/380544-how-isis-made-twitter-one-of-its-main-recruiting-tools-and-what-can-be-done-about-it/.

147. Perinçek v. Switzerland, App. No. 27510/08, para. 6 (Eur. Ct. H.R. Oct. 15, 2015), HUDOC, http://hudoc.echr.coe.int/eng?i=001-158235 (Spielmann, Casadevall, Berro, De Gaetano, Sicilianos, Silvis, and Kûris dissenting).

148. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402-03 (AM. LAW INST. 1986) [hereinafter RESTATEMENT OF U.S. FOREIGN RELATIONS].

universal jurisdiction to genocide."[149] Since denial is known as the final stage of genocide and is a sure sign that more mass atrocities are to follow[150] and since genocide prevention and prosecution is a common goal of the international community,[151] genocide denial should also trigger universal jurisdiction insofar as it allows a court to consider conduct and the effects of that conduct within and beyond the borders of their immediate jurisdiction.

C. *Justification #3: Prevention of Future Violence and Oppression by Restricting Rhetoric That may Lead to the Rekindling of the Group or Ideology That Carried out the Massacres at Issue*

While prevention of future violence or oppression seems more attenuated than preventing imminent violence on the surface, it has the most potential for damage. This is because, as mentioned above, genocides or mass killings have a deep rooted effect on society. Remnants of hateful regimes, unfortunately, still linger, even after governments punish perpetrators for committing crimes against humanity.[152] Allowing hateful genocide denial, in the context of this justification, carries the risk of rekindling the sentiment that motivated the mass killing to begin with, thus, having the potential of reenergizing a movement that may have otherwise withered into non-existence. Laws should, whenever possible, diminish the resurgence of old nationalist death programs.[153]

D. *Justification #4: Protection of the Dignity of Survivors and Their Subsequent Generations*

Finally, protecting and upholding the dignity of genocide survivors as well as their descendants is, admittedly, the weakest justification of the bunch. Despite this, there is real concern over the well-being of groups who have suffered targeted killings. Such hateful actions, sanctioned by a government or institutional organization, and

149. *Rule 157: Jurisdiction over War Crimes*, INT'L COMM. OF THE RED CROSS, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter44_rule157 (last visited Oct. 21, 2017); *see also* Genocide Convention, *supra* note 139, art. VI; *Jorgic v. Germany*, 17 Eur. Ct. H.R. 1165, 1167 (2006); L.C. Green, *The Eichmann Case*, 23 MOD. L. REV. 507, 513 (1960).

150. Stanton, *supra* note 139.

151. *See* Genocide Convention, *supra* note 139, art. I, IV, V; RESTATEMENT OF U.S. FOREIGN RELATIONS, *supra* note 148, § 404.

152. *See* Anie Kalayjian & Marian Weisberg, *Generational Impact of Mass Trauma: The Post-Ottoman Turkish Genocide of the Armenians*, *in* JIHAD AND SACRED VENGENCE 254, 268 (Jerry S. Piven et al. eds., 2002).

153. *See, e.g.*, Garaudy v. France, 2003-IX Eur. Ct. H.R. 369, 396-98 (2003).

directed at a particular group of people, even affect survivors' subsequent generations.[154] In fact, Article 8 of the Convention implicitly recognizes this concern as it protects the private life of individuals.[155]

As has become clearer at this point, an international context is imperative in ensuring a reasonable and all-encompassing analysis of the effects of hate speech, particularly genocide denial.

IV. Critique of the ECtHR's Decision in *Perinçek*

The *Perinçek* Court asserted that Perinçek's speech did not have the capacity to incite violence or cause public unrest mainly because it took the limited approach of overemphasizing the importance of effects, or lack thereof, in Switzerland.[156] The Court's determination was limited to Switzerland, when it should have given more weight than in did to the context of modern-day Turkey's treatment of its minority-Armenian population and even non-Armenians who attempt to comment on the occurrence of the Genocide. In fact, among the several hundred violations of Article 10 freedom of expression cases in the ECtHR, Turkey has over 400 cases lodged against it.[157] In this case, the Court should have considered the Turkish political context mentioned in Section 2-B of this paper because Perinçek, as the founder and leader of the Turkish Workers' Party, represented the government of Turkey, albeit to a small degree, and, to some extent, the will of its people. The Court should have considered Perinçek's speech a propagation of the Turkish agenda to accuse the Armenians of fabricating history or, even more disrespectful, to allege that Armenians killed more Turks than vice versa merely as a means to escape the legal and political consequences of committing genocide.[158]

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154. *See* Kalayjian & Weisberg, *supra* note 152.

155. European Convention on Human Rights, *supra* note 77, art. 8.

156. Perinçek v. Switzerland, App. No. 27510/08, para. 196-97 (Eur. Ct. H.R. Oct. 15, 2015), HUDOC, http://hudoc.echr.coe.int/eng?i=001-158235.

157. See *European Court of Human Rights Document Search*, HUDOC, https://goo.gl/psNumA (last visited Oct. 21, 2017), for a list of all article 10 cases filed against Turkey through the European Court of Human Rights.

158. *See, e.g.*, Sevgi Ertan & Cagri A. Savran, *Turks Died Too*, The Tech, Apr. 30, 1999, at 5; Nick Danforth, *Opinion: What we all get wrong about Armenia, Turkey and genocide*, Al Jazeera America (Apr. 24, 2015, 5:00 AM), http://america.aljazeera.com/opinions/2014/4/what-we-all-get-wrongaboutthearmeniangenocide.html ("[T]he one thing both Turks and Armenians in this debate implicitly agree on is that any historical evidence of Turkish victimhood somehow negates Turkish guilt. Thus, Turks tend to highlight examples of crimes committed against them . . . in order to refute accusations of genocide.").

Additionally, as mentioned above, *Garaudy*[159] seems to rest on an unstated premise, which is more expressly pronounced in *Perinçek*: the allowable severity of a state's action in prosecuting genocide denial rests on the temporal and geographic proximity of the occurrence.[160] That is, in cases where an extra-European genocide is denied in a European country that did not have any relation to the perpetrators, the Court would not affirm the prosecution of denial, sans an explicit incitation of violence or a call to arms. This is especially troubling when considering justifications two and four mentioned above. Denial of mass killings and accusations of falsifying its history may occur in European countries that had no affiliation with the perpetrators, while still tarnishing the surviving generations' dignity.[161] The Armenian Genocide, the Cambodian Genocide, the Rwandan Genocide, and many others have occurred outside the bounds of the European Union. Excluding the prosecution of deniers of any of those genocides on the basis of their location undermines the maintenance of peace and the protection of surviving members' and their descendants' dignity.

Even after considering the foregoing list of justifications and their suggested order of legislative priority, *Perinçek*, undoubtedly, falls short of being an open-and-shut case, unlike, say, *Garaudy*.[162] Nonetheless, although I critique the ECtHR's reasoning and holding in *Perinçek*, I do not do so for its own sake. On the contrary, I will use the shortcomings identified in the ECtHR's approach in *Perinçek*, detailed above, as a means to advocate for a fairer and more just approach to genocide denial laws and adjudicative matters arising from them. Namely, I propose, courts should incorporate the historical and international contexts that surround a statement when determining whether the statement rises to the level of punishable hate speech.

159. *See Garaudy*, 2003-IX Eur. Ct. H.R. at 394, 397-98, http://hudoc.echr.coe.int/eng?i=001-23829 (holding that the denial of the Holocaust was a violation of Article 17, indicating that Garaudy could not depend on his Article 10 freedom of expression for such statements, and stating that disputing the existence of "crimes against humanity [was] . . . one of the most serious forms of racial defamation . . . and . . . incitement to hatred . . . .").

160. *See Perinçek*, App. No. 27510/08, para. 6-8 (2015) (Spielmann, Casadevall, Berro, De Gaetano, Sicilianos, Silvis, and Kûris dissenting).

161. *See, e.g.*, *Perinçek*, App. No. 27510/08 (2015).

162. *Compare id.* para. 10-27 (indicating that the applicant, Perinçek, declared the Armenian Genocide an "international lie"), *with Garaudy*, 2003-IX Eur. Ct. H.R. at 375-81 (indicating that the applicant, Roger Garaudy, wrote and published a book that adopted revisionist theories about the Holocaust and disputed the existence of the crimes against humanity committed by the Nazis against the Jewish community of Europe); *see also supra* Part II., Section C., Subsections ii.-iii.

V. Proposed Approach to Genocide Denial Laws

Beyond the ECtHR, I will provide a framework for approaching genocide denial cases that sufficiently touches upon the four justifications mentioned above. The approach is not the perfect conception of a universally applicable genocide denial law; however, it is a good starting point. The framework consists of a three part, judicially-determined balancing test that seeks to determine the speaker's objective intent, the statement's domestic and international effect, and the cruelty of the statement when placed in its surrounding historical context. Additionally, I propose that courts, as a threshold matter, should determine whether the occurrence of the denied event has enough of a historical consensus to warrant the imposition of a fine or a criminal conviction. By providing a court with ample historical background of the event, such a determination will also assist a court in determining the third factor of the proposed test, that is, the severity of the statement when considered among its historical context.

A. The Test For Determining Whether A Statement Amounts To a Criminal Violation Should Consist of a Balancing Test

A useful test for determining whether an instance of genocide denial constitutes hate speech, subjecting the speaker to criminal liability, should include a determination of: (1) the objective intent of the speaker; (2) the domestic and international effect of the statement; and (3) the severity of the statement when placed in the historical context. This test would allow for a court to make a determination with all four of the justifications underlying genocide denial laws in mind, unlike the determination made in *Perinçek*.

1. Objective Intent

Similar to the first element of the "Brandenburg test,"[163] the objective intent factor I propose here seeks to determine the speaker's intent, with the backdrop of the four justifications proposed above.[164] Under the objective intent factor, a court will determine, through inferences made through circumstantial facts and evidence, whether the speaker intended to: (1) cause or justify immediate violence within the borders of the prosecuting state; (2) cause or justify extraterritorial violence; (3) cause violence or oppression in the future by rekindling or justifying the ideology underlying the massacres at issue; or (4) tar-

163. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).
164. *See supra* Part III.

nish the dignity of survivors of the massacres at issue and their subsequent generations. Of course, these justifications, as stated above, vary in their degree of importance. Therefore, a court analyzing the objective intent factor should assign varying degrees of culpability based on what it concludes the speaker intended by making their statement(s).

Perinçek, for instance, seemingly intended to further spread the Turkish program of denial and suppression throughout the world,[165] thus perpetuating the Young Turks' and Atatürk's destructive and repressive ideology still present in Turkey today.[166] Therefore, if the ECtHR in *Perinçek* analyzed Perinçek's statements using the objective intent factor, it would have likely found that Perinçek intended to cause violence or oppression in the future by rekindling or justifying the ideology underlying the Armenian Genocide and that Perinçek intended to tarnish the dignity of Genocide survivors and their subsequent generations. Additionally, Perinçek arguably intended to cause or justify violence or, at the very least, oppression outside the borders of Switzerland, specifically, within Turkey.

2. Domestic and International Effect

The domestic and international effect of a statement can be seen by surveying the immediate result of the domestic and international landscape and how such statements are used or taken throughout the world. In the context of *Perinçek*, for example, genocide denial is used as a means of silencing opposition in modern day Turkey,[167] resulting in the death of journalists[168] and the prosecution and harassment of its historians[169] and novelists.[170] Although no direct causal link exists between Perinçek's statements and violence occurring either within

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165. *See Perinçek*, App. No. 27510/08, para. 13 (2015) ("*Let me say to European public opinion . . . : the allegations of the 'Armenian genocide' are an international lie* . . . Don't believe the Hitler-style lies such as that of the 'Armenian genocide.'") (emphasis added).

166. *See* Weiker, *supra* note 47, at 1; Kaya Genc, *After the Failed Coup, Many Young Turks are Yearning for Independence*, HUFFINGTON POST: THE WORLD POST (Oct. 19, 2016, 5:06 PM), https://www.huffingtonpost.com/entry/failed-coup-turkey-independence_us_58057c32e4b0180a36e600ec.

167. *See, e.g.*, *Perinçek*, App. No. 27510/08, para. 1-5 (2015) (Spielmann, Casadevall, Berro, De Gaetano, Sicilianos, Silvis, and Kûris dissenting); *Turkish-Armenian Writer Shot Dead*, *supra* note 68.

168. *See Turkish-Armenian Writer Shot Dead*, *supra* note 68.

169. *See* Case, *supra* note 70 (indicating that Taner Akçam, a Turkish historian who studies the Armenian Genocide, "was subjected to various . . . forms of official and unofficial harassment and humiliation" after publishing "his book *A Shameful Act: The Armenian Genocide and the Question of Turkish Responsibility* . . . .").

170. *See* Tate, *supra* note 62, at 198.

Switzerland or in Turkey, the statements and the ECtHR's weak response to it surely sent a message to the Turkish government and other governing bodies–namely, that the denial and marginalization of a traumatic and atrocious event, in an attempt to shed culpability, are permitted and even lauded as exercises of free expression. Therefore, the domestic and international effects of Perinçek's statements triggered both the third and fourth justifications. Specifically, Perinçek's statements rekindled or justified the ideology underlying the Armenian Genocide, which had the propensity to lead to further violence or oppression, and tarnished the dignity of Genocide survivors and their subsequent generations.

3. Severity Among Historical Context

Finally, determining the severity of a statement in its historical context can be determined by studying the history of the events and how, or if, such statements were used in the perpetration, execution, or cover-up of the mass killing. This factor is less rigid than those preceding it, providing a court with discretion as to what it considers severe when taking into account a statement's historical context. For instance, a court could consider whether, after the mass killing, the perpetrating group denied the occurrence of the event (known as the last stage of genocide) or whether racist rhetoric led to the mass killings and whether the statement fits with such history. In determining this factor, courts will likely be most efficient when using the evidence gathered from the evaluation of the threshold 'historical consensus' matter, discussed further below.

B. Courts Should be Limited to Only Prosecuting the Denial of Genocides with Enough of a Historical Consensus

Since criminal liability can have substantial consequences and because such liability would result merely from one's statement, potentially leaving much room for speculation, it is important to mark barriers for the scope of the test. Accordingly, it should first be determined, as a threshold matter, whether there exists a historical consensus of the mass killing in question. In making such a determination, two potential concerns arise. First, one must avoid a determination method with the potential meddling of unwanted, outside influences, including: political, economic, religious, or nationalistic biases. Second, one must avoid a determination method that is cumbersome, would be difficult to ascertain, or would cause an undue burden of a court's time. Below, I will propose two types of determination meth-

ods. Ultimately, I will conclude that a court-employed committee of lawyers/court attorneys is the best option available. I propose that the ECtHR adopt this approach for future genocide denial cases that require such a determination.

The first option is testimony provided by historians or experts in the field of history directly to the court. Historians could be called in or introduced by each party, or parties, to testify to their opinions of the available records. Historians may also consider and testify to survivors' stories and evaluate their significance. Since the Court would make the final decision on the consensus, there would be little to no concern of outside influence, as long as judges can withhold any cultural, ethnic, or social biases they may have from their legal determinations. However, this option would be too cumbersome and unwieldy since the testimony of multiple history experts would take an extremely long time and has the potential to convolute the issue. Therefore, this option is often not viable.

The best option for making a determination as to the historical consensus of the occurrence of a mass killing is through a court-employed committee of lawyers/court attorneys. This option, unlike the independent committee mentioned above, eliminates the concern of impartiality since the members of such a committee would be directly under the control of the court, which itself is a neutral body. This committee, like the one mentioned above, can make its determination by considering governmental and institutional records and individual accounts. If need be, the committee can hear from historians or experts in the field of history. This option, assures the timeliness and accuracy of the determination because of the familiarity of the subject to the committee, whose members are already trained in the study of history.

VI. Conclusion

Unfortunately, mass killings occur periodically throughout human history and are bound to be repeated in the future. Furthermore, for every mass killing that occurs, statements denying the event or attempting to diminish the gravity of the event seem to follow. Denial statements have the risk of affecting society in an anti-social way. Hence, the importance of genocide denial laws is four-fold: (1) preventing imminent violence; (2) preventing violence extraterritorially; (3) preventing future acts of violence; and (4) avoiding the reopening of still-healing psychological wounds caused by a mass killing. For the sake of upholding justice and peace and preserving the dignity of European genocide survivors and their descendants, no matter

where that mass killing occurred, the ECtHR must broaden its focus in a more serious manner, beyond the bounds of Europe, when determining the effects of a statement outright denying or downplaying the destructiveness of a mass killing. Finally, a court should rely on an internally employed committee of lawyers/court attorneys to confirm that a minimally sufficient historical consensus exists as to the occurrence of a mass killing to ensure that genocide denial laws are not stretched beyond their intended scope.