A EUROPEAN UNION FRAMEWORK DECISION ON THE OFFENCE OF DENYING A CRIME

Yaşar YAKIŞ
Former Foreign Minister of Turkey

Abstract: *The adoption of the Framework Decision entitled* ***Council Framework Decision 2008/913/JHA on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law*** *on November 28th, 2008 was an indication that racism and xenophobia began to rise in certain EU Member States and that needs decisive EU-wide legislation in order to combat these problems. Though at a later stage, with the incorporation of a new element that defines the criteria to determine which authority would consider these crimes, the competence is entrusted to the national courts of the EU Member States from the international criminal courts established for the specific task. The decision creates controversy that the crimes the denials of which are punishable include also genocide. Therefore this essay focuses exclusively on the discussion of whether the authorities designated by the Framework Decision are appropriate and competent for this specific task. The article tries to highlight the fact that the latest amendment to the Framework Decision might cause reactions and counter-reactions to probable developments that might well concern EU member states' past doings in some of the former colonies. It also argues that if a decision by a national court of one of the EU member state recognizes the 1915 events as genocide, this could spark tensions in Europe, which in return could backfire against the earlier best intentions to combat racism and xenophobia becoming just the opposite by inciting racism and xenophobia in the EU countries.*

Keywords: *Council Framework Decision 2008/913/JHA on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law, Competence of National Courts on Genocide, European Council, Racism and Xenophobia in the European Union*

1. Purpose

The European Council adopted on 28 November 2008 an important Framework

Decision. The full title of the Decision is the ***Council Framework Decision 2008/913/JHA on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law***.[1] The adoption of this Decision is an indication that racism and xenophobia started to rise in certain EU Member States and that, as a result of this, they needed to pass an EU-wide legislation in order to combat it.

While the Framework Decision was initiated for the purpose of making racism and xenophobia a punishable act, at a later stage a new element was incorporated in the text. This new element is the criteria to determine which authority will establish the crimes whose denial will be punishable. The purpose of this essay is to examine this particular aspect of the Framework Decision.

Before the Framework Decision was adopted, this competence was entrusted to the international criminal courts established for the specific task of looking into such matters or to the criminal courts of the country where the crime is committed. Now that the Framework Decision has entered into force, this competence is also entrusted to the national courts of the EU Member States.

2. Scope

The scope of this essay does not cover the entire Framework Decision. Neither does it cover the reasons for the incorporation of the offence of the denial of a crime within the scope of the punishable acts. The scope is much narrower than this.

There is no doubt that it is a laudable initiative to make racism and xenophobia a punishable act. It is equally laudable to incorporate the offence of denying such crimes in the scope of the punishable acts. There is nothing that could be challenged until this point. However as from this point onwards there is a series of controversial aspects. The root cause of this controversy is that the crimes denial of which is punishable includes also genocide. There is nothing unusual in the incorporation of genocide among the crimes whose denial should be punishable, because genocide is a crime against humanity. For this reason I will not dwell on this aspect of the question either. The Framework Decision introduces a new criterion to determine which authorities shall be entitled whether such a crime was committed. This essay will focus exclusively on the discussion of whether the authorities designated by the Framework Decision are the appropriate ones for this task.

1 The full text of the Framework Decision cold be reached in the following link: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008F0913:EN:NOT

3. The Importance for Turkey

This question is particularly important for Turkey, because it has the potential of becoming a headache in the relations between Turkey and the EU Member States. The crimes whose denial is punishable include also the crime of genocide. The genocide issue has become important for Turkey because it is presented in a distorted manner to the international public opinion.

When the Ottoman State was at war with Russia in 1915, Ottoman citizens of Armenian ethnic origin revolted, attacked the villages inhabited by Turks and cooperated with the Russian army who promised them an independent Armenia. The Armenian terrorist gangs attacked ammunition stores of their own army and delivered to the Russian army the weapons and ammunition that they stole from these stores. They cut the communication lines of their own army making difficult the supply of reinforcement of the frontline military units.

Armenia and Armenian Diaspora are not eager for the establishment of such a committee for fear that the truth may turn out to be different from what they claimed so far.

The Ottoman authorities decided upon this to relocate the Armenian population to other regions of the Ottoman State where they will not be able to commit such crimes. During this relocation and also during inter ethnic clashes between Turks and Armenians hundreds of thousands Turks and Armenians perished. Armenians claim that what has been done by the Ottoman authorities in 1915 is genocide. Turkey admits that several hundreds thousands Armenians perished but it does not admit that this was genocide. What the Ottoman authorities were doing was to take appropriate security measures when the country was faced with a foreign invasion. Similar measures were taken by the United States during the Second World War by relocating its citizens of Far Eastern origin despite the fact that they did not commit any wrongdoing before or during the war. The United States implemented this relocation decision with lesser human losses because it had means to do so. The Ottoman authorities could not do it without acrimony because they did not have means to do it the same way.

What has taken place in 1915 does not fit in the definition of genocide that was made later by the 1948 Geneva Convention on Genocide.

Turkey proposed to Armenia the establishment of a committee to be composed of historians from Turkey, Armenia and other countries to determine the exact nature of what happened in 1915. Turkey stated publicly that it is prepared to apologize in case this committee concludes that Turkey has to apologize.

Armenia and Armenian Diaspora are not eager for the establishment of such a

committee for fear that the truth may turn out to be different from what they claimed so far.

For this reason genocide has become a sensitive issue for Turkey.

4. Historical background

The major international instrument that deals with the subject of genocide in its most extensive form is a UN Convention that was adopted in 1948. Its full title is the ***Convention on the Prevention and Punishment of the Crime of Genocide***[2] (henceforth Genocide Convention). All EU Member States are party to this Convention; therefore they have a contractual obligation to abide by its provisions. The most comprehensive instrument on the subject of genocide is this Convention. It defines in detail the crime of genocide, it determines which acts could be considered as genocide and it enumerates the authorities that shall be entitled to determine whether an act could be characterized as genocide.

Since the purpose of this essay is not to study the Genocide Convention I will take up only the provisions of the Convention which are relevant to this subject.

The authorities that will be entitled to determine whether an act could be characterized as genocide are enumerated in article 6 and 9 of the Genocide Convention. The said articles read as follows:

Article 6

Persons charged with genocide or any of the other acts enumerated in Article 3 shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

Article 9

Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article 3, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

2 The text of the Convention could be reached in the following link: http://www.un-documents.net/cppcg.htm

According to these articles, only the following 3 authorities shall be entitled to determine whether an act could be characterized as genocide:

a) the tribunal of the State in the territory of which the act was committed;

b) such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction; and

c) the International Court of Justice (of The Hague)

The past practice confirms what has been provided for in these articles. In fact, Nazi criminals who committed the crime of genocide ((holocaust) against the Jews during the Second World War were tried in a court established in the German city of Nürnberg and the Belgian Nazis were tried in a court established in the Belgian city of Mechelen. Those indicted for the crime of genocide in Rwanda were tried by a court specially established for this purpose; and the perpetrators of genocide in Srebrenica were tried by a court established for this purpose in The Hague.

There is no provision in the Genocide Convention on the denial of a crime.

5. EU Framework Decision

The Framework Decision authorizes the national courts of the Member States to determine whether an act could be characterized as genocide. This essay makes an attempt to find out whether this approach of the EU Member States is in conformity with their obligations stemming from the Genocide Convention, in other words whether the EU Member States can put aside their obligations stemming from the Genocide Convention and adopt other rules that modify the criteria established by a convention to which they still are a party.

5.1. The evolution of the idea of the Framework Decision within EU

5.1.1. Joint Action Stage

The work carried out within the EU for the punishment of racism and xenophobia was put in a text that is called "Council Joint Action" as early as on 15 July 1996.[3] This text was providing for a joint action of the Member States in order to combat racism and xenophobia and was stressing the need *"for further approximation of*

3 The text of the Joint Action could be reached by following link: EUR-Lex - 31996F0443 - EN

law and regulations of Member States and for overcoming obstacles for efficient judicial cooperation which are mainly based on the divergence of legal approaches in the Member States".

Among the acts that the Council wanted to punish, those that fall within the scope of our study were drafted as follows in the Council Joint Action:

TITLE I

A. *In the interest of combating racism and xenophobia, each Member State shall undertake, in accordance with the procedure laid down in Title II, to ensure effective judicial cooperation in respect of offences based on the following types of behaviour, and, if necessary for the purposes of that cooperation, either to take steps to see that such behaviour is punishable as a criminal offence or, failing that, and pending the adoption of any necessary provisions, to derogate from the principle of double criminality for such behaviour:*

> ***(a)*** *public incitement to discrimination, violence or racial hatred in respect of a group of persons or a member of such a group defined by reference to colour, race, religion or national or ethnic origin;*
>
> ***(b)*** *public condoning, for a racist or xenophobic purpose, of crimes against humanity and human rights violations;*
>
> ***(c)*** *public denial of the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 April 1945 insofar as it includes behaviour which is contemptuous of, or degrading to, a group of persons defined by reference to colour, race, religion or national or ethnic origin;*

The way this article is drafted sheds light on the reasoning of the initiators of this Framework Decision.

Firstly, what is made punishable in the paragraph A (b) of the Title I above is not "*condoning of crimes against humanity (*which includes genocide –added by the author-). It is an offence that has a narrower scope than condoning such crimes. The paragraph provides for the punishment of an act of *"condoning of crimes against humanity* (including genocide)" only in case such offense is committed *"for a racist or xenophobic purpose."* This subtlety is important for the purpose of this essay, because if such offense is committed in the context of an expression of opinion or determining a historical fact, such act will not be made punishable.

Therefore the focus of the paragraph A (b) is on committing such an act *"for racist or xenophobic purposes"* and not for having committed it *per se*.

Secondly the reference to genocide is not direct. Genocide is implicit in the crimes against humanity. However the text avoided at that stage any direct reference to genocide. This subtlety is important because at the later stages there is a direct reference to genocide.

Thirdly, what is meant in the paragraph A (c) above by the reference to the "Charter of the International Military Tribunal appended to the London Agreement of April 1945" is the Nürnberg Tribunal that was established to try the Nazi criminals who committed the holocaust. The importance of this reference is that this wording makes a distinction between genocide as defined by an authorized penal court and those that are not defined by such an authorized body. It is only natural to take an appropriate measure to punish a person who denies a fact that has already been established by an authorized court and the Framework Decision rightly punishes such a denial.

Finally, there is a parallel between the punishment of the denial of holocaust and denial of non-holocaust crimes.

Finally, there is a parallel between the punishment of the denial of holocaust and denial of non-holocaust crimes. Both are punished in case the offence of denial is committed in a certain manner. In fact, paragraph A (c) provides that the denial of holocaust should be made punishable only in case such an act *"includes behaviour which is contemptuous of, or degrading to, a group of persons defined by reference to colour, race, religion or national or ethnic origin"*. In other words, if the act of the denial of holocaust is committed in the context of simple expression of opinion or determining a historical fact and if it is not aimed at *"degrading a group of persons",* it will not be a punishable offense. Here again the focus of the paragraph A (c) is on committing an act that "*includes behaviour which is contemptuous of, or degrading of a group of persons…"* There is no measure envisaged for a case where the act of the denial of holocaust does not *"include a contemptuous behaviour to degrade a group of persons."*

5.1.2. Commission Stage

The subsequent step in this field was taken by the European Commission. The Commission submitted on 26 March 2002 a Draft Framework Decision to the European Council. The relevant provisions are found in article 4 (c) and (d) of the Draft Framework Decision which read as follows:

Article 4

Offences concerning racism and xenophobia

Member States shall ensure that the following intentional conduct committed by any means is punishable as criminal offence:

……..

(c) *public condoning for a racist or xenophobic purpose of crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court;*

(d) *public denial or trivialisation of the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 April 1945 in a manner liable to disturb the public peace;*

The word genocide appears at this stage in the text drafted by the Commission. The draft provides that the "*public condoning of the crime of genocide*" will be punishable only in case it is committed "*for a racist and xenophobic purpose*". If such act is not committed for a racist and xenophobic purpose, the Commission draft does not propose that it should be punished. Therefore the emphasis is again on the racism and xenophobia and not on the condoning of genocide. As we will see under the next chapter (5. a. iii) the Council text punishes *"denial"*, *"condoning*" and "*trivialization"* of a crime while the Commission text was punishing the *"denial"* only. Furthermore the concept of *"racist and xenophobic purpose"* is explained in further detail in the Council text.

Article 4 (d) of the Commission draft deals only with holocaust and provides that the trivialisation of the holocaust should be punishable only in case it is committed *"in a manner liable to disturb the public peace"*. Here the emphasis is on the public order not on the trivialisation of the holocaust.

The Second point worth noting in Article 4 (d) is that the provisions regarding the holocaust are not put in the same paragraph as the non-holocaust genocide crimes and that a separate article is drafted especially for holocaust, because holocaust is a crime established by an authorised criminal court. This distinction is valid for the Council text as well.

5.1.3. Council Stage

After having received this Draft of the Commission, the European Council has

developed its own text and the work on this subject continued to be based on that new text. The work on the Framework Decision had slightly slowed down because Italy had some reservations regarding the text of the Council. The work on the Framework Decision has regained momentum in 2007.

A text that was originally designed to combat racism and xenophobia became a controversial text because of a new concept included in the text at the Council stage upon the initiative of one Member State. This new concept is the offence of the denying genocide. One may argue that with the incorporation of this new element, the Framework Decision has become a text that may ignite racism and xenophobia instead of combating it. I will clarify at the end of this essay how this may happen.

6. Are the legal foundations of the Framework Decision solid?

6.1. From the procedural standpoint

Before assessing the provisions of the Framework Decision, it may be appropriate to discuss the competence of the Council to adopt such a Framework Decision.

6.1.1. The Source of Council's Competence

The preamble of the Framework Decision reads as follows:

"Having regard to the Treaty on European Union Articles 29, 31, and 34 (2) (b)"

This wording means that the Council draws its competence to adopt a Framework Decision from Articles 29, 31 and 24 (2) (b) of the Treaty on European Union.[4] Therefore a closer look at them becomes important.

Article 29

Without prejudice to the powers of the European Community, the Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia.

That objective shall be achieved by preventing and combating crime, organized or

4 The Treaty is published in the Official Journal of the European Union on 24.12.2002

otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud, through:

- *closer cooperation between police forces, customs authorities and other competent authorities in the Member States, both directly and through the European Police Office (Europol), in accordance with the provisions of Articles 30 and 32,*

- *closer cooperation between judicial and other competent authorities of the Member States including cooperation through the European Judicial Cooperation Unit ('Eurojust'), in accordance with the provisions of Articles 31 and 32,*

- *approximation, where necessary, of rules on criminal matters in the Member States, in accordance with the provisions of Article 31 (e)*

Provisions relevant to our subject in this article are the underlined parts.

Article 31

1. Common action on judicial cooperation in criminal matters shall include:

a) facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States, including, where appropriate, cooperation through Eurojust, in relation to proceedings and enforcement of decisions;

b) facilitating extradition between Member States;

c) ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such cooperation;

d) preventing conflicts of jurisdiction between Member States;

e) progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organized crime, terrorism and illicit drug trafficking

Article 34

1. *In the areas referred to in this title, Member States shall inform and consult one*

another within the Council with a view to coordinating their action. To that end, they shall establish collaboration between the relevant departments of their administrations.

2. *The Council shall take measures and promote cooperation, using the appropriate form and procedures as set out in this title, contributing to the pursuit of the objectives of the Union. To that end, acting unanimously on the initiative of any Member State or of the Commission, the Council may:*

- *on the initiative of any Member State or of the Commission, in the areas referred to in Article K.1 (2) to (6)*

- *On the initiative of any Member State in areas referred to in Article K.1 (7) to (9)*

a) adopt common positions defining the approach of the Union to a particular matter;

b) adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States. Framework Decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect;

According to the Treaty that is in force now, the Council is authorized to adopt a Framework Decision on "racism" and on "xenophobia" but not on "genocide".

Important changes took place in connection with these articles after the entry into force of the Lisbon Treaty. Article 34 has been repealed in its entirety, but the Framework Decisions adopted before the Lisbon Treaty will remain in force. The Lisbon Treaty entered into force on 1 December 2009 while the Framework Decision entered into force on 28 November 2008. Therefore the validity of the Framework Decision cannot be questioned on this ground. However the question whether the European Council has the competence to adopt a Framework Decision on this particular subject is still open to question for the following reasons:

The Council's Competence and the denial of Genocide

Council's competence was not based on the solid ground even before the repeal of Article 34 by the Lisbon Treaty. According to the Treaty that is in force now, the Council is authorized to adopt a Framework Decision on "racism" and on "xenophobia" but not on "genocide". In fact, the provisions pertaining to racism

and xenophobia were found in Article 29 of the Treaty on European Union. This article is now replaced by the paragraph 3 of Article 67 of the Treaty on the Functioning of the European Union and it reads as follows:

Article 67

.....

3. *The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws.*

This new version of Article 29 is much shorter than the original text, but the provisions relevant to our subject did not change much. In both versions the Council is authorized to adopt Framework Decisions on "*racism*" and on *"xenophobia*" but not on "*genocide*". Actually this approach is perfectly in line with the original purpose of the Framework Decision where the genocide dimension was not part of the scope. Every thing started in good faith and in perfect compliance with the EU rules at the beginning. However when the "*offence of the denial of genocide*" was incorporated in the text, the ground on which the Decision is based has become questionable.

This loophole weakens the foundations of the Framework Decision. It will be up to the judiciary of the European Union to determine whether this transgression invalidates the entire Framework Decision or only the part of it that pertains to the incorporation of the denial of the crime of genocide into the text.

6.1.2. Lisbon Treaty and the Denial of Genocide

We have seen in the previous chapter (6.1) that pre-Lisbon Treaty on European Union did not allow the incorporation of the denial of genocide into the text. Does the Lisbon Treaty allow it? Articles 67, 82, 83 and 85 of the Treaty on the Functioning of the European Union tell us that it does not, because the Lisbon Treaty, in addition to repealing article 34 and replacing Article 29 by 67 (3), scattered also the provisions of article 31 over Articles 82, 83 and 85 of the Treaty on the Functioning of the European Union. However in neither of these new articles of the Lisbon Treaty there is any reference to the denial of genocide.

We may draw several conclusions when we read the relevant parts of these articles:

Article 82

(ex Article 31 TEU)

1. *Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures to:*

(a) *lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions;*

(b) *prevent and settle conflicts of jurisdiction between Member States;*

(c) *support the training of the judiciary and judicial staff;*

(d) *facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.*

2. *To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States.*

They shall concern:

(a) *mutual admissibility of evidence between Member States;*

(b) *the rights of individuals in criminal procedure;*

(c) *the rights of victims of crime;*

(d) *any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the*

Council shall act unanimously after obtaining the consent of the European Parliament. Adoption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals.

3. *Where a member of the Council considers that a draft directive as referred to in paragraph 2 would affect fundamental aspects of its criminal justice system, it may request that the draft directive be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure. Within the same timeframe, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft directive concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and Article 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.*

Article 83

(ex Article 31 TEU)

1. *The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.*

These areas of crime are the following:

- *terrorism,*
- *trafficking in human beings and sexual exploitation of women and children,*
- *illicit drug trafficking,*
- *illicit arms trafficking,*
- *money laundering,*

- *corruption,*
- *counterfeiting of means of payment,*
- *computer crime and*
- *organized crime.*

Despite the fact that the Lisbon Treaty does not mention in any of these articles the denial of the crime of genocide, it enumerates in considerable detail in the above list all crimes that should be covered by the Common Action at the EU level.

If the authors of the Treaty had the intention to incorporate the denial of the crime of genocide among the offences to be covered by the Framework Decision they would have added it in such a detailed list. Since they did not, we may presume that they did not want to authorize the Council to incorporate such an offense within the scope of the Framework Decision. If this loophole is ignored, the rules of *"Nullum crimen sine lege"* and *"Nulla poena sine lege*" will be violated indirectly. According to these two fundamental principles of the penal law there could be no crime without a law and no punishment without a law. Actually these rules are not directly applicable to our case. However by extension we may also say that the authority that will pass the law should be duly authorized to pass a law. If the rule of law has to prevail, a public authority should not be able to pass laws or regulations without being duly authorized.

The foregoing explanation indicates that the denial of the crime of genocide is made punishable by an authority that is not duly authorized.

The foregoing explanation indicates that the denial of the crime of genocide is made punishable by an authority that is not duly authorized. Therefore the legal foundations of this part of the Framework decision do not seem to be solid.

6.1.3. The limits of the Council's competence

There is another point worth noting in the above texts, but it pertains to future actions. A new rule is introduced by Article 83 of the Treaty on the Functioning of the European Union. The Council will not have the competence to adopt Framework Decisions in the 9 fields enumerated in Article 83 (1). The legal text in these fields will have to be in the form of Directives adopted in accordance with the ordinary legislative procedures. The Framework Decisions are not covered by these procedures. Therefore after the entry into force of the Lisbon Treaty, the Council

will have the competence to adopt Directives but not Framework Decisions. However the genocide issue cannot be the subject of a Directive either, because it is not listed in article 83.

6.2. From the Standpoint of Substance

So far, I discussed the Framework Decision only from the procedural standpoint. I now turn to its content.

The title of the first article of the Framework Decision is *"Offences concerning racism and xenophobia."* The offenses to be made punishable are enumerated in the first paragraph of this article. The said article reads as follows:

Article 1

Offences concerning racism and xenophobia

1. *Each Member State shall take the measures necessary to ensure that the following intentional conduct is punishable:*

a) *publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin;*

b) *the commission of an act referred to in point (a) by public dissemination or distribution of tracts, pictures or other material;*

c) *publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group;*

d) *publicly condoning, denying or grossly trivialising the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group.*

2. *For the purpose of paragraph 1, Member States may choose to punish only conduct which is either carried out in a manner likely to disturb public order or which is threatening, abusive or insulting.*

3. *For the purpose of paragraph 1, the reference to religion is intended to cover, at least, conduct which is a pretext for directing acts against a group of persons or a member of such a group defined by reference to race, colour, descent, or national or ethnic origin.*

4. *Any Member State may, on adoption of this Framework Decision or later, make a statement that it will make punishable the act of denying or grossly trivialising the crimes referred to in paragraph 1(c)and/or (d) only if the crimes referred to in these paragraphs have been established by a final decision of a national court of this Member State and/or an international court, or by a final decision of an international court only.*

The paragraph 1 (c) makes punishable the denial of genocide (which is among the crimes defined in Articles 6, 7 and 8 of the Rome Statute of the International Criminal Count) as well as the denial of all other crimes against humanity. There is nothing questionable in incorporating the denial of such crimes within the scope of the punishable acts if there is a decision of an authorized body establishing that such an act is in fact committed. On the contrary it would be incomplete if such offenses were to be kept out of the scope of the punishable acts. Turkey should support and contribute to these efforts as long as the acts are characterized as crime by a competent authority. I pointed out at the beginning of this essay that my purpose was not to question why such an offense is made punishable. The purpose of this essay is to discuss what should be done in case the court that characterized an act as genocide is not duly authorized to do so.

The provisions that are likely to create problems for Turkey are contained in the underlined phrase of Article 1 (4). This article authorizes the Member States to opt for either of the following two alternatives:

a) to punish the denial of crime only in case an act is characterized as genocide by an international court;

or

b) to punish the denial of crime if such an act is characterized by the national court of the Member State in question.

Any Member State will be able to make a statement, on adoption of this Framework

Decision or later, *"that it will make punishable the act of denying the crimes defined in the Rome Statute only if this crime has been established by a final decision of a national court of this Member State"*. After having made such a statement it will have to pass a law that makes the denial of crime a punishable act. In Article 10, the Framework Decision has tied to a timetable the preparations required to pass the necessary laws. The said article reads as follows:

Article 10

Implementation and review

1. *Member States shall take the necessary measures to comply with the provisions of this Framework Decision by 28 November 2010.*

2. *By the same date Member States shall transmit to the General Secretariat of the Council and to the Commission the text of the provisions transposing into their national law the obligations imposed on them under this Framework Decision. On the basis of a report established using this information by the Council and a written report from the Commission, the Council shall, by 28 November 2013, assess the extent to which Member States have complied with the provisions of this Framework Decision.*

3. *Before 28 November 2013, the Council shall review this Framework Decision. For the preparation of this review, the Council shall ask Member States whether they have experienced difficulties in judicial cooperation with regard to the conduct under Article 1(1). In addition, the Council may request Eurojust to submit a report, on whether differences between national legislations have resulted in any problems regarding judicial cooperation between the Member States in this area.*

The Framework Decision did not leave the nature of the punishment to the discretion of the Member States and rightly introduced uniformity in this field. The punishment to be imposed on the perpetrators is explained in Article 3 of the Framework Decision that reads as follows:

Article 3

Criminal penalties

1. *Each Member State shall take the necessary measures to ensure that the conduct referred to in Articles 1 and 2 is punishable by effective, proportionate and dissuasive criminal penalties.*

2. *Each Member State shall take the necessary measures to ensure that the conduct referred to in Article 1 is punishable by criminal penalties of a maximum of at least between 1 and 3 years of imprisonment.*

In addition to the perpetrator, the Framework Decision penalizes as well the instigators. Article 2 of the Framework Decision provides that:

Article 2

Instigation, aiding and abetting

1. *Each Member State shall take the measures necessary to ensure that instigating the conduct referred to in Article 1(1)(c) and (d) is punishable.*

2. *Each Member State shall take the measures necessary to ensure that aiding and abetting in the commission of the conduct referred to in Article 1 is punishable.*

Article 5 of the Framework Decision provides that in case the offense is committed by a legal person, it will also be subject to punishment. The said article reads as follows:

Article 5

Liability of legal persons

1. *Each Member State shall take the necessary measures to ensure that a legal person can be held liable for the conduct referred to in Articles 1 and 2, committed for its benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:*

   (a) *a power of representation of the legal person;*

   (b) *an authority to take decisions on behalf of the legal person;*

   or

   (c) *an authority to exercise control within the legal person.*

2. *Apart from the cases provided for in paragraph 1 of this Article, each*

Member State shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a person referred to in paragraph 1 of this Article has made possible the commission of the conduct referred to in Articles 1 and 2 for the benefit of that legal person by a person under its authority.

3. *Liability of a legal person under paragraphs 1 and 2 of this Article shall not exclude criminal proceedings against natural persons who are perpetrators or accessories in the conduct referred to in Articles 1 and 2.*

4. *'Legal person' means any entity having such status under the applicable national law, with the exception of States or other public bodies in the exercise of State authority and public international organisations.*

7. Difference Between "Denial and Trivialisation" and "Condoning"

There is another point worth noting in Article 1(4) of the Framework Decision. While "*condoning", "denial"* and *"trivialisation*" are mentioned as punishable acts in the paragraphs 1 (c) and 1(d), a different approach is adopted in the paragraph 4 of the article. The word *"condoning*" is missing in this paragraph. Therefore the analysis that I will make in this chapter is valid only for the cases covered by Article 1(4). Whether this omission is intentional or not, it will have the following effect in practice:

If we stick to the words of the Framework Decision, the Member State can include in its statement on adoption of the Framework Decision, that it will punish the "*denial*" and *"trivialization*" of the crimes, but it cannot include in this statement that it will also punish the "*condoning"* of the same crimes, because the word *"condoning*" is not mentioned in the text. It looks like a legal problem to sort out whether a Member State can point out that it will also make punishable the act of *"condoning*" despite the fact that this offense is not mentioned in the text. If the Member State cannot, on its own initiative, add to its statement that *"condoning*" a crime will also be made punishable, this may lead to an unbalanced practice for the following reason:

Condoning is a more negative attitude than the denial. In the denial you believe that the punishable act did not take place at all in the first place while in the condoning you admit that the act has taken place but that you do not believe that it was wrong to commit such an act. For instance, it is a more negative attitude to *"condone"* an act by saying "*I don't believe that it was a mistake to massacre millions of people in Rwanda*", than "*denying"* it by saying *"I do not believe that what has happened in Rwanda is genocide."*

The Framework Decision punishes to a prison sentence of 1 to 3 years a person who says he does not believe that what has happened in Rwanda is genocide, while it does not punish a person who says that it was not a mistake to massacre millions of people in Rwanda.

This illogical consequence gives the impression that this article was drafted in a hasty manner and incorporated in the text at the last moment.

8. Assessment of the Framework Decision

The provisions of the Framework Decision constitute a violation of the international law, because they authorise the Member States to take an action that is denied to them by the Genocide Convention. All EU Member States are at the same time party to the Genocide Convention and this convention does not allow the parties to authorize tribunals other than the ones enumerated in the Convention to establish whether an act could be characterized as genocide. Therefore the EU Member States cannot put aside their obligations stemming from the Genocide Convention and develop a new set of rules.

France noticed this contradiction and used the option made available in Article 1 (4) by stating that it will make punishable the denial of crime only if the said crime has been established by a final decision of an international court. It is hoped that more countries will be inspired by this logical approach of France.

9. EU Attitude on the Framework Decision

9.1. Attitude of the EU authorities

I discussed this subject with various EU authorities including many members of the European Parliament in the context of Turkey's sensitivities on the genocide issue. Their attitude could be summarized as follows:

> *The provisions of the Framework Decision are not in contradiction with the Genocide Convention, because the Convention sets only the minimum standards and provides for the prevention and punishment of genocide as defined in its Article 2. The Convention does not prevent the countries who want to go beyond these minimum standards and punish also those who deny these crimes.*

This attitude shifts the focus of the debate from the question of competence to the question of the minimum criteria. Turkey's contention is not there. Turkey does not question the right of the countries to punish the way they wish any person who

denies a crime duly established by an authorised body. The focus of Turkey's contention is on the authority that will establish whether the crime of genocide is committed or not.

The attitude of the EU authorities gives green light to punish the denial of genocide even if it was not established by an authorized tribunal that genocide had actually taken place. It contradicts the wisdom of signing international agreements in the field of penal matters. The need to sign such agreements stems from the requirement to provide for similar punishments in all countries for similar violations. Otherwise, potential criminals may commit the crime that they plan in the country where the punishment for such act is the lightest.

The attitude of the EU authorities gives green light to punish the denial of genocide even if it was not established by an authorized tribunal that genocide had actually taken place.

9.2. The attitude of Turkey-EU Joint Parliamentary Commission

There is a Joint Commission that brings together equal number of Turkish parliamentarians and Members of the European Parliament (EP). It is called Turkey-EU Joint Parliamentary Commission (JPC). The main task of this Commission is to discuss issues related to all aspects of the Turkey-EU relations. Turkish wing of the JPC proposed the discussion of this issue in one of its sessions with a view to explaining the wisdom of the French attitude on the question the Framework Decision. One expert from both wings of the JPC were tasked to discuss the subject and report their conclusion to the plenary meeting of the JPC. Turkey designated for this task a prominent member of the Turkish Parliament, the retired Ambassador Dr. Şükrü Elekdağ, and the EP wing designated Mrs Arlene McCarty. What these two experts were going to do was simple: The Framework Decision was offering the EU Member States two alternatives on the question of which court will be authorized to establish whether a given act could be characterized as genocide. France had already made the logical choice and opted to give this task to an international court. The two experts were going to explain in a report the wisdom of this choice and submit this report to the plenary session of the JPC.

The experts drafted their report and submitted it to the plenary. According to the EP format this report had to be transformed into a Draft Resolution. Upon this, the members of the EP wing of the JPC grabbed this opportunity to dilute it as much as possible. 46 amendments are proposed for this short text that was composed of 7 operative paragraphs. 39 of these amendments were submitted by the Greek

parliamentarians either from the mainland Greece or from the Greek part of Cyprus (Cypriot Greeks and mainland Greeks are largely over-represented in the EP wing of the JPC. 6 out of the 24 members of the JPC are Greeks and Greek Cypriots. As a result of this, Greeks and Greek Cypriots constitute 25 % of the EP wing of the JPC while the combined population of Greece and Greek Cypriots constitutes less than 2.5 % of the entire population of the EU).

During the 2011 spring session of the JPC the subject has become so diluted that Turkey had to withdraw the proposal that it has tabled. The EP wing of the JPC thus demonstrated the degree of its opposition to a logical proposal. Therefore Turkey's initiative to invite the EU Member States to be inspired from the French example failed.

The Framework Decision may lead to a diversified practice in the EU countries and in the world at large. When the national courts are authorized to establish whether an act is genocide, nothing will prevent the penal court of an EU Member State from defining it the way it prefers. The national court of one State may characterize an act as genocide but the national court of another country may not characterize it the same way. As a result of this, each country may have its own definition of genocide with all negative consequences that it may entail.

10. Implications on International Relations

The provisions of Article 1(4) may have several consequences, but two of them are important:

a) It may lead other countries to pass similar laws in their respective parliaments to authorize their national courts to determine whether a historical event could be characterized as genocide. When the EU Member States authorize their national court to take such a decision it may not be possible to deny the same rights to any State in the world. As a consequence of this, a multitude of definitions of genocide may emerge.

b) This may pave the way to retaliation among the countries. If the penal court of an EU Member State characterizes a certain act as genocide, another country may characterize as genocide other acts that were committed in the past by that EU Member State. Some EU Member States are more vulnerable in this field that the non-European countries. Retaliation cannot be easily avoided if the courts of every State are authorized to make its own definition of genocide. We should not ignore the chaos that such a practice will cause in the international relations. The reason for the United Nations

to draft a convention in this field must have stemmed from the need to have a uniform practice that will be valid for all countries, EU member or non-EU member alike.

The EU introduced the Framework Decision in order to secure an approximation of laws and regulations among its Member States. The international community has taken a similar step, by adopting the Genocide Convention in 1948, to approximate practices among the member countries of the United Nations. Now the EU is undoing what was done by the United Nations in 1948. It seems to be willing to develop its own criteria for the definition of genocide. If the EU does so, it may not be easy to prevent the Arab League, ASEAN, Islamic Conference Organization or other international organizations to develop their own criteria in their turn.

11. The Attitude of France

France opted to authorize only the international courts to establish genocide. However there were other interesting developments in France on this subject.

The French parliament adopted on 29 January a law that characterized as genocide the events that took place in Ottoman Turkey in 1915. This law says that France recognises the Armenian genocide of 1915 but does not provide for any sanction for those who deny it. On 12 October 2006 the French National Assembly adopted a law to fill this gap, but the upper chamber, the Senate, refused to include this draft law in its agenda.

Another important development took place in the meantime. A commission was established under the chairmanship of Mr. Accoyer, the Speaker of the French National Assembly, to examine a subject that is called in France *"lois mémorielles*". The main task of the commission was to look into the subject of France's reconciliation with its own past. The Accoyer Commission published its report on 18 November 2008.[5] The report concludes that it is not the task of the parliaments to write history. One may expect that any future attempt in this field in France will be inspired by this conclusion.

On 15 July 2010, a group of senators from the French Socialist party tabled a draft law that provided for the punishment of the denial of the so-called "Armenian genocide". The Legal Affairs Committee of the French Senate opposed by unanimous decision to the inclusion of this draft law in the agenda of the plenary session of the Senate. On 26 May 2011 the French Senate supported the report of

5 The text of this report could be reached in the following link: http://www.assemblee-nationale.fr/13/pdf/rap-info/i1262.pdf

the Legal Affairs Committee and refused with an overwhelming majority the inclusion of this draft law in its agenda. The main reason of the refusal was that the draft law contradicted the constitutional provisions on the freedom of expression.

The most important development relevant to this subject is of course the statement that France made on adoption of the Framework Decision to the effect that it will seek the final decision of an international court before punishing a person for the denial of crimes enumerated in the Framework Decision.

12. Denial of a Crime and the Freedom of Expression

Article 7 of the Framework Decision lays down with due emphasis certain rules to protect the freedom of expression. The said article reads as follows:

Article 7

Constitutional rules and fundamental principles

1. *This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles, including freedom of expression and association, as enshrined in Article 6 of the Treaty on European Union.*

2. *This Framework Decision shall not have the effect of requiring Member States to take measures in contradiction to fundamental principles relating to freedom of association and freedom of expression, in particular freedom of the press and the freedom of expression in other media as they result from constitutional traditions or rules governing the rights and responsibilities of, and the procedural guarantees for, the pres or other media where these rules relate to the determination or limitation of liability.*

The dividing line between the denial of a crime and the freedom of expression is also underlined in the Recital (15) of the Framework Decision that reads as follows:

> *(15) Considerations relating to freedom of association and freedom of expression, in particular freedom of the press and freedom of expression in other media have led in many Member States to procedural guarantees and to special rules in national law as to the determination or limitation of liability.*

Recital 14 of the Framework Decision refers to various international instruments that contain provisions on the freedom of expression:

> *(14) This Framework Decision respects the fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, in particular Articles 10 and 11 thereof, and reflected in the Charter of Fundamental Rights of the European Union, and notably Chapters II and VI thereof.*

Despite this emphasis there are decisions made by the courts of certain EU Member States that take little account of the freedom of expression. For instance Mr. Bernard Lewis, an American historian, made a comment on the Armenian claim of genocide in the Ottoman Turkey in 1915. Prof. Lewis said that this was *"Armenian version of history*". A Paris court fined Mr. Lewis in 1995 to pay 1 (one) French Frank for having denied the Armenian genocide. The court further decided that Mr. Lewis should also pay the sum necessary for the publication of the text of this court decision in the French daily *Le Monde*. The court gave the following explanation for its decision: *"Mr. Lewis stated that there was no reliable evidence to prove the Armenian genocide. The court reasoned that he made this statement by avoiding the elements that contradict his thesis and that he thus neglected his duty to be objective and sagacious on such a sensitive issue."*

12.1 The approach of the European Court of Human Rights

This reasoning behind the decision of the Paris court is in contradiction with several verdicts of the European Court of Human Rights (ECHR). I will pick three cases that are relevant to our subject:

- *Garaudy vs France* case (Application no: 65831/01, Decision on admissibility of 24 June 2003),

- *Lebideux and Isorni vs France* case (Application no: 24662/1998, Judgement of 23 September 1998),

- *Chauvy vs France* case (Application no: 64915/01, Judgement of 29 June 2004).

The first two of these three cases were brought to the court by the prosecution under a law that is called in France *Loi Gayssot* (Law no: 90-615 of 13 July 1990). The ECHR decided in the first case that the applicant Garaudy was guilty under *Loi Gayssot*, for having denied a fact that was established by the Nürnberg court. However the same court, decided in the second case that Lebideux was innocent, under the same *Loi Gayssot*, for having published an advertisement to call for the

rehabilitation of the Marshal Pétain. In the third case the Court points out the inappropriateness for a penal court to arbitrate historical issues. A closer examination of these three cases will shed more light on the subject:

12.1.1. The *Garaudy vs France* case

The French public prosecutor took action against Garaudy who published a book that questioned various historical truths about the persecution of Jews during the Second World War and he was convicted for this act. Garaudy took the case to the ECHR. The ECHR reasoned that the application of Garaudy was inadmissible on the following grounds:

> *"There can be no doubt that denying the reality of clearly established historical facts, such as the Holocaust, as the applicant does in his book, does not constitute historical research akin to the quest for the truth. The aim and the result of that approach are completely different, the real purpose being to rehabilitate the Nationalist-Socialist t regime and, as a consequence, accuse the victims themselves of falsifying history. Denying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement to hatred of them The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to the public order. Such acts are incompatible with democracy and human rights because they infringe the rights of others. Its proponents indisputably have designs that fall into the category of aims prohibited by Article 17 of the Convention.*
>
> *Accordingly the Court considers that, in accordance with Article 17 of the Convention, the applicant cannot rely on the provisions of Article 10 of the Convention regarding his conviction for denying crimes against humanity."*

12.1.2. The Lebideux and Isorni vs. France case

Lebideux and Isorni published an advertisement in the French daily *Le Monde* calling for the rehabilitation of Marshal Pétain (who cooperated with the German occupation forces in France between 1940 and 1944). The French public prosecutor took action against them and the French court convicted them. Lebideux and Isorni took the case to the ECHR who acquitted them on the following grounds:

> "*The applicants did not call into question the category of clearly established*

historical facts (by the Nürnberg Court) –such as holocaust- whose negation or revision would be removed from the protection of Article 10 by Article 17 (of the European Convention of Human Rights).

55. ……The Court further notes that the events referred to in the publication in issue had occurred more than forty years before. Even though remarks like those the applicants made are always likely to reopen the controversy and bring back memories of past sufferings, the lapse of time makes it disproportionate to deal with such remarks, forty years on, with the same severity as ten or twenty years previously. That forms part of the efforts that every country must make to debate its own history openly and dispassionately. The court reiterates in that connection that, subject to paragraph 2 of the Article 10, freedom of expression is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb, such as the demands of that pluralism and broadmindedness without which there is no "democratic society."

These two verdicts of the ECHR indicate that the Court makes a distinction between the denial of a fact that is established by a court and other cases of debatable nature.

12.1.3. Chauvy vs France case

The third case is more relevant to this essay because in this particular case the ECHR emphasizes the importance of the freedom of expression for a genuine historical research. The relevant part of the court's opinion is as follows:

"60. The Court considers that it is an integral part of freedom of expression to seek historical truth and it is not the Court's role to arbitrate the underlying historical issues, which are part of a continuing debate between historians that shape opinion as to the events which took place and their interpretation. As such, and regardless of the doubts one might have as to the probative value or otherwise of the document known as "Barbie's written submission" or the "Barbie testament", the issue does not belong to the category of clearly established historical facts -such as the holocaust- whose negation or revision is removed from the protection of Article 10 by Article 17 of the Convention."

12.2. Lewis case in light of ECHR decisions

Would the Paris court make the same decision if it were to judge Bernard Lewis after the above mentioned three decisions of the ECHR? There are several reasons to believe that it could decide differently:

1. The ECHR makes a clear distinction between historical events that were sanctioned with the verdict of an authorized international court, namely the Nürnberg Court, on the one hand and other historical events that are still disputed on the other. The Court points out for this reason that the negation of the holocaust is removed from the protection of Article 10 by Article 17 of the European Convention of Human Rights.

2. The said articles read as follows:

Article 10 – Freedom of expression

> *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 rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

Article 17 – Prohibition of abuse of rights

> *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.*

3. The ECHR points out that the court's role is not to arbitrate the historical events that are still being disputed by the historians.

4. In the *Lebideux and Isorni vs France* case, the ECHR emphasizes the importance of the lapse of time. It considers that events that have taken place 40 years ago should not be assessed with the same severity as the events of 10 or 20 years ago. This assessment raise doubt about the fairness of the decision on the Lewis case where the defendant was convicted for having expressed doubts about historical events that had taken place 80 years ago.

Since France made a statement on adopting the Framework Decision that it will make punishable the denial of a crime only if there is a final decision of an international court to this effect, one may hope that in the future the French courts will not make decision like the one in the Lewis case.

13. Conclusion

Regrettable incidences may become unavoidable if the wisdom does not prevail and if the law enforcement officials in the EU Member States fail to show due diligence in the implementation of the Framework Decision.

Many events that took place in the former colonies of some EU Member States could be characterized as genocide if this task is entrusted to the national courts. The reactions and counter-reactions to such a development may ignite nationalistic racist and xenophobic rhetoric. This is exactly the opposite of what the EU was planning to achieve at the outset.

There are more than 4 million Turks or ethnic Turks in various EU Member States. If the national court of one of the EU Member States takes a decision that characterizes the 1915 events as genocide such a decision may set the floor for the rise of ethnic tension. It will not be unconceivable that one or more Turks or ethnic Turks state that they do not consider the 1915 events as genocide. If the public prosecutors or other zealous officials take a legal action against such a person this may open Pandora's Box.

In other words an initiative that started in 1990s with the best intention to combat racism and xenophobia may become a good recipe to do just the opposite and to incite racism and xenophobia in the EU countries and a race for retaliation among EU countries and their former colonies.