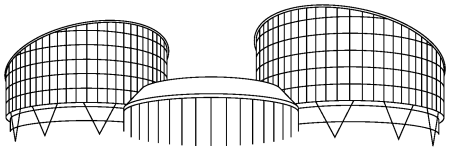

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

# CASE OF PERİNÇEK v. SWITZERLAND

*(Application no. 27510/08)*

JUDGMENT

STRASBOURG

17 December 2013

THIS CASE WAS REFERRED TO THE GRAND CHAMBER
WHICH DELIVERED JUDGMENT IN THE CASE ON
15/10/2015

*This judgment may be subject to editorial revision.*

**In the case of Perinçek v. Switzerland,**

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Guido Raimondi, *President*,
Peer Lorenzen,
Dragoljub Popović,
András Sajó,
Nebojša Vučinić,
Paulo Pinto de Albuquerque,
Helen Keller, *judges*,
and Stanley Naismith, *Section Registrar*,

Having deliberated in private on 12 November 2013,

Delivers the following judgment, which was adopted on that date:

# PROCEDURE

1. The case originated in an application (no. 27510/08) against the Swiss Confederation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Mr Doğu Perinçek ("the applicant"), on 10 June 2008.

2. The applicant was represented by Mr M. Cengiz, a lawyer practising in Ankara. The Swiss Government ("the Government") were represented by their Deputy Agent, Mr A. Scheidegger, of the European Law and International Human Rights Protection Unit, Federal Office of Justice.

3. The applicant alleged, in particular, that he had been wrongfully convicted by the Swiss courts for having stated publicly at various events that the Armenian genocide was an "international lie".

4. On 10 September 2010 notice of the application was given to the Government. It was also decided that the Chamber would rule on the admissibility and merits of the application at the same time (Article 29 § 1 of the Convention).

5. Availing themselves of their right under Article 36 § 1 of the Convention to intervene in the proceedings, the Turkish Government filed observations on 15 September 2011.

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1942 and lives in Ankara.

7. The applicant is a doctor of laws and chairman of the Turkish Workers' Party. On 7 May, 22 July and 18 September 2005 he took part in a series of events in Lausanne (Canton of Vaud), Opfikon (Canton of Zürich) and Köniz (Canton of Berne) respectively, during which he publicly denied that there had been any genocide of the Armenian people by the Ottoman Empire in 1915 and subsequent years. In particular, he described the idea of an Armenian genocide as an "international lie". His comments were made in several different contexts: at a press conference in Lausanne (in Turkish), at a conference in Opfikon commemorating the 1923 Treaty of Lausanne and at a meeting of his party in Köniz.

8. On 15 July 2005 the Switzerland-Armenia Association lodged a criminal complaint against the applicant on account of the above-mentioned comments.

9. In a judgment of 9 March 2007 the Lausanne District Police Court found the applicant guilty of racial discrimination within the meaning of Article 261 *bis* § 4 of the Swiss Criminal Code (see paragraph 14 below) and ordered him to pay ninety day-fines of 100 Swiss francs (CHF – approximately 85 euros (EUR)), suspended for two years, a fine of CHF 3,000 (approximately EUR 2,500), which could be replaced by thirty days' imprisonment, and the sum of CHF 1,000 (approximately EUR 850) in compensation to the Switzerland-Armenia Association for non-pecuniary damage. It observed that the Armenian genocide was a proven fact acknowledged by the Swiss public and in more general terms, referring in that connection to various parliamentary instruments (among them the motion tabled by Mr de Buman – see paragraph 16 below), legal publications and various statements by federal and cantonal political authorities. It also mentioned the recognition of the genocide by various international bodies, such as the Council of Europe[1] and the European Parliament. In addition, it concluded that the applicant's motives appeared to be of a racist nature and did not contribute to the historical debate.

10. The applicant appealed against that judgment. In particular, he sought to have the judgment set aside and additional investigative measures taken to establish the state of research and the position of historians on the Armenian question.

11. On 13 June 2007 the Criminal Cassation Division of the Vaud Cantonal Court dismissed the applicant's appeal. It held that from the date

[1] The Armenian genocide has not been recognised by the Council of Europe as such, as distinct from certain members of the Parliamentary Assembly (see paragraph 29 below).

of the enactment of Article 261 *bis* § 4 of the Swiss Criminal Code, the Armenian genocide had, in the same way as the Jewish genocide, been recognised by the Swiss legislature as a proven historical fact. Accordingly, the courts did not need to refer to the work of historians in order to accept its existence. The Cantonal Court further pointed out that the applicant had simply denied that the events in question constituted genocide, without ever disputing the existence of massacres and deportations of Armenians.

12. The applicant lodged a criminal-law appeal with the Federal Court against that judgment. In particular, he sought to have the judgment set aside so that he would be acquitted and cleared of all criminal charges and civil liability. In substance, he argued that, for the purposes of applying Article 261 *bis* § 4 of the Swiss Criminal Code and examining the alleged violation of his fundamental rights, the Swiss courts had not carried out a sufficient examination of whether the factual circumstances had been such as to warrant classifying the events of 1915 as genocide.

13. In a judgment of 12 December 2007 (ATF 6B_398/2007), the relevant extracts of which are set out below, the Federal Court dismissed the applicant's appeal:

> "3.1 Article 261 *bis* § 4 of the Criminal Code punishes conduct on the part of anyone who publicly denigrates or discriminates against a person or group of persons on the grounds of their race, ethnic origin or religion in a manner that violates human dignity, whether through words, written material, images, gestures, acts of aggression or any other means, or who on the same grounds denies, grossly trivialises or seeks to justify a genocide or other crimes against humanity. An initial literal and grammatical approach shows that the wording of the law (through the use of the indefinite article 'a genocide' ['*un génocide*']) makes no explicit reference to any specific historical event. The law therefore does not preclude punishment of denial of genocides other than that perpetrated by the Nazi regime; nor does it explicitly classify denial of the Armenian genocide as an act of racial discrimination under criminal law.
>
> 3.2 Article 261 *bis* § 4 of the Criminal Code was enacted when Switzerland acceded to the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965 (RS [*Recueil systématique* – Compendium of Federal Law] 0.104). The wording initially proposed in the Bill tabled by the Federal Council did not refer specifically to genocide denial (see FF [*Feuille fédérale*] 1992 III 326). The offence of revisionism, or Holocaust denial, was intended to be included within the constituent element of dishonouring the memory of a deceased person, appearing in the fourth paragraph of the draft Article 261 *bis* of the Criminal Code (Memorandum by the Federal Council of 2 March 1992 concerning Switzerland's accession to the 1965 International Convention on the Elimination of All Forms of Racial Discrimination and the corresponding revision of criminal law; FF 1992 III 265 et seq., specifically 308 et seq.). The memorandum does not contain any specific reference to the events of 1915.
>
> During the parliamentary debates, the National Council's Legal Affairs Committee proposed inserting the following wording in Article 261 *bis* § 4 of the Criminal Code: '... or who on the same grounds grossly trivialises or seeks to excuse genocide or other crimes against humanity' .... The Committee's French-language rapporteur, National Councillor Comby, explained that there was a discrepancy between the German and French versions, pointing out that the wording was obviously referring to any

genocide and not only the Holocaust (BO/CN [Official Gazette/National Council] 1992 II 2675 et seq.). The National Council nevertheless adopted the Committee's proposal as it stood (BO/CN 1992 II 2676). Before the Council of States, the proposal by the latter's Legal Affairs Committee to maintain the wording of Article 261 *bis* § 4 of the Criminal Code approved by the National Council was set against a proposal by Mr Küchler, which did not, however, call into question the phrase 'or who on the same grounds denies, grossly trivialises or seeks to justify genocide or other crimes against humanity' (BO/CE [Official Gazette/Council of States] 1993 96; as to the scope of this proposal, see ATF [Judgments of the Swiss Federal Court] 123 IV 202, point 3c, p. 208, and Poncet, ibid.). That proposal was adopted without any more detailed reference being made to denial of the Armenian genocide during the debate. During the elimination of divergences, the National Council's Legal Affairs Committee proposed, through Mr Comby, that the amendments inserted by the Council of States be adopted, with the exception of the fourth paragraph, where the Committee proposed the wording 'a genocide', by way of reference to any that might occur. The French-language rapporteur observed that some people had mentioned massacres of Kurds or other populations, for example Armenians, and that all these genocides should be covered (BO/CN 1993 I 1075 et seq.). Further brief comments were made in relation to the definition of genocide and how a Turkish citizen might refer to the Armenian tragedy, and it was also observed that the Committee did not intend the provision to apply to one particular genocide alone but to all genocides, for example in Bosnia and Herzegovina (BO/CN 1993 I 1077; statement by Ms Grendelmeier). The National Council ultimately adopted the following wording of paragraph 4: '... or any other means, violates the human dignity of a person or group of persons on the grounds of their race, ethnic origin or religion, or who on the same grounds denies, grossly trivialises or seeks to justify a genocide...' (BO/CN 1993 I 1080). In the subsequent parliamentary proceedings, the Council of States maintained its position, adopting the wording 'a genocide' ('*un génocide*') as a simple editorial amendment in the French version, and the National Council eventually endorsed the Council of States' decision, without any further reference being made to denial of the Armenian genocide (BO/CN 1993 I 1300, 1451; BO/CE 1993 452, 579).

It is therefore clear from the above-mentioned parliamentary proceedings that Article 261 *bis* § 4 of the Criminal Code does not apply exclusively to denial of Nazi crimes but also to other genocides.

...

3.4 However, these parliamentary proceedings cannot be interpreted as meaning that the criminal-law provision in question applies to certain specific genocides which the legislature had in mind at the time of enacting it, as is suggested by the judgment appealed against.

3.4.1 The desire to combat negationist and revisionist opinions in relation to the Holocaust was, admittedly, a central factor in the drafting of Article 261 *bis* § 4 of the Criminal Code. In its case-law, however, the Federal Court has held that Holocaust denial objectively constitutes the factual element of the offence provided for in Article 261 *bis* § 4 of the Criminal Code since it concerns a historical fact that is generally acknowledged as established (ATF 129 IV 95, point 3.4.4, pp. 104 et seq.), although the judgment in question makes no reference to the historical intention of the legislature. Similarly, many authors have viewed the Holocaust as a matter of common knowledge for the criminal courts (Vest, *Delikte gegen den öffentlichen Frieden*, note 93, p. 157), as an indisputable historical fact (Rom, op. cit., p. 140), or as a classification ('genocide') that is beyond doubt (Niggli, *Discrimination raciale*, note 972, p. 259, who simply notes that this genocide was what prompted the

introduction of the provision in question; to similar effect, see Guyaz, op. cit., p. 305). Only a few voices have referred to the intention of the legislature to recognise it as a historical fact (see, for example, Ulrich Weder, *Schweizerisches Strafgesetzbuch, Kommentar* (ed. Andreas Donatsch), Zürich 2006, Art. 261 *bis* § 4, p. 327; Chaix/Bertossa, op. cit., p. 184).

3.4.2 The process of ascertaining what genocides the legislature had in mind when formulating the provision is, moreover, thwarted by a literal interpretation (see point 3.1 above), which clearly shows the legislature's intention to favour an open-ended wording of the law in this regard, as opposed to the technique of 'memorial' laws such as those passed in France (Law no. 90-615 of 13 July 1990, known as the 'Gayssot Act'; Law no. 2001-434 of 21 May 2001 on recognition of trafficking and slavery as a crime against humanity, known as the 'Taubira Act'; Law no. 2001-70 of 29 January 2001 on recognition of the 1915 Armenian genocide). The fact that Holocaust denial constitutes a criminal offence under Article 261 *bis* § 4 of the Criminal Code therefore stems less from the legislature's specific intention to outlaw negationism and revisionism when it formulated this rule of criminal law than from the observation that there is a very general consensus on this matter, to which the legislature undoubtedly had regard. Nor is there, accordingly, any reason to determine whether the legislature was guided by any such intention regarding the Armenian genocide (contrast Niggli, *Rassendiskriminierung*, 2nd ed., Zürich 2007, note 1445 et seq., pp. 447 et seq.). Indeed, it should be noted in this connection that while certain aspects of the wording prompted fierce discussion among the members of parliament, the categorisation of the events of 1915 did not give rise to any debate in this context, and was ultimately mentioned by only two speakers in justifying the adoption of a French version of Article 261 *bis* § 4 of the Criminal Code that did not allow an excessively restrictive interpretation of the text, which did not follow from the German version.

3.4.3 Legal writers and the courts have, moreover, inferred from the well-known, undeniable or indisputable character of the Holocaust that proof of it is no longer required in criminal proceedings (Vest, ibid.; Schleiminger, op. cit., Article 261 *bis* § 4 of the Criminal Code, note 60). Hence there is no need for the courts to have recourse to the work of historians on this matter (Chaix/Bertossa, ibid.; unreported judgment 6S.698/2001, point 2.1). As a further consequence, the basis thus determined for the criminalisation of Holocaust denial dictates the method which the courts must adopt in considering the denial of other genocides. The first question arising is therefore whether there is a comparable consensus regarding the events denied by the appellant.

4. The question thus raised relates to findings of fact. It is less directly concerned with the assessment of whether the massacres and deportations attributed to the Ottoman Empire are to be characterised as genocide than with the general assessment of this characterisation, both among the public and within the community of historians. This is how we are to understand the approach adopted by the Police Court, which emphasised that its task was not to write history but to determine whether the genocide in question was 'known and acknowledged' or indeed 'proven' (see the judgment, point II, p. 14) before forming its opinion on this latter factual issue (judgment, point II, p. 17), which forms an integral part of the Cantonal Court's judgment (Cantonal Court judgment, point B, p. 2).

4.1 A factual finding of this nature is binding on the Federal Court ...

4.2 As regards the decisive factual issue, the Police Court not only based its opinion on the existence of political declarations of recognition, but it also pointed out that the

opinion of the authorities issuing such declarations had been formed on the basis of expert opinion (for example, a panel of approximately one hundred historians in the case of the French National Assembly when it passed the Law of 29 January 2001) or reports described as cogently argued and substantiated (European Parliament). Thus, as well as relying on the existence of political recognition, this line of argument notes the existence in practice of a broad consensus within the community, which is reflected in the political declarations and is itself based on a wide academic consensus as to the classification of the events of 1915 as genocide. It may also be noted, in the same vein, that during the debate leading to the official recognition of the Armenian genocide by the National Council, reference was made to the international research published under the title *Der Völkermord an den Armeniern und die Shoah* (BO/CN 2003 2017; statement by Mr Lang). Lastly, the Armenian genocide is portrayed as one of the 'classic' examples in general literature on international criminal law, or on genocide research (see Marcel Alexander Niggli, *Rassendiskriminierung*, note 1418 et seq., p. 440, and the numerous references cited therein; see also note 1441, p. 446, and references).

4.3 To the extent that the appellant's submissions seek to deny the existence of a genocide or the legal characterisation of the events of 1915 as genocide – in particular by pointing to the lack of a judgment from an international court or specialist commission, or the lack of irrefutable evidence proving that the facts correspond to the objective and subjective requirements laid down in Article 264 of the Criminal Code or in the 1948 UN Convention, and by arguing that to date, there have been only three internationally recognised genocides – they are irrelevant to the determination of the case, seeing that it is necessary in the first place to establish whether there is enough of a general consensus, especially among historians, to exclude the underlying historical debate as to the classification of the events of 1915 as genocide from the criminal proceedings concerning the application of Article 261 *bis* § 4 of the Criminal Code. The same applies in so far as the appellant is accusing the Cantonal Court of having acted arbitrarily by not examining the pleas of nullity raised in the cantonal appeal in relation to the same facts and the investigative measures he had sought. It is therefore unnecessary to examine his submissions except to the extent that they relate specifically to the establishment of such a consensus.

4.4 The appellant observes that he has sought further investigative measures to ascertain the current state of research and the current position of historians worldwide on the Armenian question. His submissions also appear at times to suggest that he believes there to be no unanimity or consensus among either States or historians as to the classification of the events of 1915 as genocide. However, his arguments are limited to setting his own opinion against that of the cantonal authority. In particular, he does not cite any specific evidence showing that the consensus found by the Police Court does not exist, let alone that that court's finding is arbitrary.

Admittedly, the appellant does mention that a number of States have refused to recognise the existence of an Armenian genocide. It should be pointed out in this connection, however, that even the UN's Resolution 61/L.53 condemning Holocaust denial, adopted in January 2007, received only 103 votes from among the 192 member States. The mere observation that certain States refuse to declare in the international arena that they condemn Holocaust denial is manifestly insufficient to cast doubt on the existence of a very general consensus that the acts in question amount to genocide. Consensus does not mean unanimity. The choice of certain States to refrain from publicly condemning the existence of a genocide or from voting for a resolution condemning the denial of a genocide may be dictated by political considerations that are not directly linked to those States' actual evaluation of the way

in which historical events should be categorised, and in particular cannot cast doubt on the existence of a consensus on this matter, especially within the academic community.

4.5 The appellant also argues that it would be contradictory for Switzerland to acknowledge the existence of the Armenian genocide while supporting the establishment of a panel of historians in the context of its relations with Turkey. This, in his submission, shows that the existence of genocide is not established.

However, it cannot be inferred either from the Federal Council's repeated refusal to acknowledge the existence of an Armenian genocide by means of an official declaration or from the approach chosen – namely recommending to the Turkish authorities that an international panel of experts be set up – that the conclusion that there is a general consensus as to the characterisation of the events in question as genocide is arbitrary. In accordance with the clearly expressed wish of the Federal Council, its approach is guided by the concern to prompt Turkey to engage in collective remembrance of its past (BO/CN 2001 168: response by Federal Councillor Deiss to the non-binding motion by Mr Zisyadis; BO/CN 2003 2021 et seq.: response by Federal Councillor Calmy-Rey to the non-binding motion by Mr Vaudroz on recognition of the 1915 Armenian genocide). This attitude of openness to dialogue cannot be construed as denial of the existence of a genocide and there is nothing to suggest that the support expressed by the Federal Council in 2001 for the setting up of an international commission of inquiry did not stem from the same approach. It cannot be inferred in general that there is sufficient doubt within the community, particularly among academics, as to the classification of the events of 1915 as genocide to render the finding of such a consensus arbitrary.

4.6 That being so, the appellant has not shown how the Police Court acted arbitrarily in finding that there was a general consensus, particularly among academics, as to the classification of the events of 1915 as genocide. It follows that the cantonal authorities were correct in refusing to allow the appellant's attempt to open a historical and legal debate on this issue.

5. As to the subjective element, the offence provided for in Article 261 *bis* §§ 1 and 4 of the Criminal Code requires intentional conduct. In judgments ATF 123 IV 202, point 4c, p. 210, and 124 IV 121, point 2b, p. 125, the Federal Court held that such intentional conduct had to be guided by motives of racial discrimination. This question, which has prompted debate among legal writers, was subsequently left open in judgments ATF 126 IV 20, point 1d, in particular p. 26, and 127 IV 203, point 3, p. 206. It can likewise be left open in the instant case, as will be shown below.

5.1 With regard to intent, the Criminal Court found that [the applicant], a doctor of laws, politician and self-styled writer and historian, had acted in full knowledge of the consequences, stating that he would never change his position, even if a neutral panel should one day conclude that the Armenian genocide did indeed take place. These findings as to the appellant's internal volition to deny a genocide relate to matters of fact (see ATF 110 IV 22, point 2, 77, point 1c, 109 IV 47, point 1, 104 IV 36, point 1 and citations), with the result that the Federal Court is bound by them (section 105(1) of the Federal Court Act). Moreover, the appellant has not submitted any complaints on that issue. He has not sought to demonstrate that these findings of fact are arbitrary or the result of a violation of his rights under the Constitution or the Convention, so there is no need to consider this question (section 106(2) of the Federal Court Act). It is unclear in any event how the cantonal authorities, which inferred the appellant's intention from external considerations (cf. ATF 130 IV 58, point 8.4, p. 62), could

have disregarded the very concept of intention under federal law in relation to this issue.

5.2 As to the appellant's motives, the Criminal Court found that they appeared to be of a racist and nationalistic nature and did not contribute to the historical debate, noting in particular that he had described the Armenians as aggressors of the Turkish people and that he claimed to be a follower of [Talaat] Pasha, who together with his two brothers was historically the initiator, the instigator and the driving force of the Armenian genocide (Criminal Court judgment, point II, pp. 17 et seq.).

It has not been disputed in the instant case that the Armenian community constitutes a people, or at the very least an ethnic group (as to this concept, see Niggli, *Rassendiskriminierung*, 2nd ed., note 653, p. 208), which identifies itself in particular through its history, marked by the events of 1915. It follows that denial of the Armenian genocide – or the representation of the Armenian people as the aggressor, as put forward by the appellant – in itself constitutes a threat to the identity of the members of this community (Schleiminger, op. cit., Article 261 *bis* of the Criminal Code, note 65 and reference to Niggli). The Criminal Court, which found that there had been motives linked to racism, likewise ruled out that the approach pursued by the appellant pertained to historical debate. These findings of fact, about which the appellant raised no complaint (section 106(2) of the Federal Court Act), are binding on the Federal Court (section 105(1) of the Federal Court Act). They provide sufficient evidence of the existence of motives which, above and beyond nationalism, can only be viewed as racial, or ethnic, discrimination. It is consequently unnecessary in the present case to settle the debate among legal writers mentioned in point [5] above. In any event, the appellant has not raised any complaints concerning the application of federal law in relation to this matter.

6. The appellant further relies on the freedom of expression enshrined in Article 10 of the ECHR, in connection with the cantonal authorities' interpretation of Article 261 *bis* § 4 of the Criminal Code.

However, it appears from the records of the questioning of the appellant by the Winterthur/Unterland public prosecutor's office (23 July 2005) that in making public statements, particularly in Glattbrugg, the appellant was intending to 'help the Swiss people and the National Council to rectify the error' (that is to say, recognition of the Armenian genocide). Furthermore, he was aware that genocide denial was a criminal offence and stated that he would never change his position, even if a neutral panel should one day conclude that the Armenian genocide did indeed take place (Criminal Court judgment, point II, p. 17). It can be inferred from these aspects that the appellant was not unaware that by describing the Armenian genocide as an 'international lie' and by explicitly denying that the events of 1915 amounted to genocide, he was liable to face a criminal penalty in Switzerland. The appellant cannot therefore draw any favourable inferences from the lack of foreseeability of the law he cites. These considerations, moreover, support the conclusion that the appellant is in essence seeking, by means of provocation, to have his assertions confirmed by the Swiss judicial authorities, to the detriment of the members of the Armenian community, for whom this question plays a central role in their identity. The applicant's conviction is thus intended to protect the human dignity of members of the Armenian community, who identify themselves through the memory of the 1915 genocide. Criminalisation of genocide denial is, lastly, a means of preventing genocides for the purposes of Article I of the Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature in New York on 9 December 1948 and approved by the Federal Assembly on 9 March 2000 (RS 0.311.11).

7. It should be noted, moreover, that the appellant has not denied the existence either of massacres or of deportations (see point A. above), which cannot be categorised, even if one exercises restraint, as anything other than crimes against humanity (Niggli, *Discrimination raciale*, note 976, p. 262). Justification of such crimes, even with reference to the law of war or alleged security considerations, will in itself fall foul of Article 261 *bis* § 4 of the Criminal Code, so that even from this perspective, regardless of whether these same acts are characterised as genocide, the appellant's conviction on the basis of Article 261 *bis* § 4 of the Criminal Code does not appear arbitrary in its outcome, any more than it breaches federal law."

## II. RELEVANT DOMESTIC AND INTERNATIONAL LAW AND PRACTICE

### A. Relevant domestic law and practice

14. Article 261 *bis* of the Criminal Code, concerning the offence of racial discrimination, is worded as follows:

"Any person who publicly stirs up hatred or discrimination against a person or group of persons on the grounds of their race, ethnic origin or religion;

any person who publicly disseminates an ideology aimed at systematic denigration or defamation of the members of a race, ethnic group or religion;

any person who with the same objective organises, encourages or participates in propaganda campaigns;

any person who publicly denigrates or discriminates against a person or group of persons on the grounds of their race, ethnic origin or religion in a manner that violates human dignity, whether through words, written material, images, gestures, acts of aggression or other means, or any person who on the same grounds denies, grossly trivialises or seeks to justify a genocide or other crimes against humanity;

any person who refuses to provide a service to a person or group of persons on the grounds of their race, ethnic origin or religion when that service is intended to be provided to the general public;

shall be punishable by a custodial sentence of up to three years or a fine."

15. Article 264 of the Criminal Code, entitled "Genocide", defines this offence as follows:

"Anyone who commits any of the following acts with the intent to destroy, in whole or in part, a national, racial, religious or ethnic group shall be punishable by life imprisonment or a custodial sentence of not less than ten years:

(a) killing members of the group or causing them serious bodily or mental harm;

(b) inflicting on members of the group living conditions calculated to bring about its physical destruction in whole or in part;

(c) ordering or taking measures intended to prevent births within the group;

(d) forcibly transferring or arranging for the transfer of children of the group to another group.

A person who has acted abroad but is currently in Switzerland and cannot be extradited shall likewise be punishable. Article 6 *bis* § 2 shall be applicable.

The provisions concerning authorisation to prosecute as set out in Article 366 § 2 (b), sections 14 and 15 of the Liability Act of 14 March 1958 and sections 1 and 4 of the Political Guarantees Act of 26 March 1934 shall not be applicable to genocide."

16. Non-binding motion (*postulat*) no. 02.3069, tabled before the National Council by Mr Dominique de Buman on 18 March 2002 and passed by the National Council on 16 December 2003 by 107 votes to 67, is worded as follows:

"The National Council recognises the Armenian genocide of 1915. It requests the Federal Council to take note thereof and to convey its position by the usual diplomatic channels."

17. In a judgment of 14 September 2001 the applicant and eleven other Turkish nationals were acquitted by the Berne-Laupen District Court on charges of genocide denial within the meaning of Article 261 *bis* of the Criminal Code. The court found that there had been no intent to discriminate on the part of the accused. Subsequent appeals against that judgment were declared inadmissible by the Court of Appeal of the Canton of Berne, and subsequently by the Federal Court on 7 November 2002.

## B. International law and practice

18. The relevant provisions of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 read as follows:

**Article I**

"The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."

**Article II**

"In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group."

**Article 3**

"The following acts shall be punishable:

(a) Genocide;

(b) Conspiracy to commit genocide;

(c) Direct and public incitement to commit genocide;

(d) Attempt to commit genocide;

(e) Complicity in genocide."

**Article 5**

"The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III."

19. Article 6 of the Charter of the International Military Tribunal, annexed to the London Agreement of 8 August 1945, concerned crimes against peace (sub-paragraph (a)), war crimes (sub-paragraph (b)) and crimes against humanity (sub-paragraph (c)) and reads as follows, in so far as relevant:

**Article 6**

"The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

...

(c) 'Crimes against humanity' – namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."

20. The relevant provisions of the Rome Statute of the International Criminal Court, which was adopted on 17 July 1998 and came into force in respect of Switzerland on 1 July 2002, are worded as follows:

**Article 5: Crimes within the jurisdiction of the Court**

"1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

(a) The crime of genocide;

(b) Crimes against humanity;

(c) War crimes;

(d) The crime of aggression.

2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations."

**Article 6: Genocide**

"For the purpose of this Statute, 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group."

**Article 7: Crimes against humanity**

"1. For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation or forcible transfer of population;

(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

(i) Enforced disappearance of persons;

(j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

..."

21. In its judgment of 2 September 1998 in the case of *The Prosecutor v. Akayesu* (no. ICTR-96-4-T) the Trial Chamber of the International Criminal Tribunal for Rwanda highlighted the distinguishing feature of the crime of genocide:

"498. Genocide is distinct from other crimes inasmuch as it embodies a special intent or *dolus specialis*. Special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks

to produce the act charged. Thus, the special intent in the crime of genocide lies in 'the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such'."

22. In the same case, the Tribunal elaborated on the crime of genocide in relation to the other crimes provided for by its Statute (cumulative charges):

"469. Having regard to its Statute, the Chamber believes that the offences under the Statute – genocide, crimes against humanity, and violations of article 3 common to the Geneva Conventions and of Additional Protocol II – have different elements and, moreover, are intended to protect different interests. ... Thus it is legitimate to charge these crimes in relation to the same set of facts. It may, additionally, depending on the case, be necessary to record a conviction for more than one of these offences in order to reflect what crimes an accused committed. If, for example, a general ordered that all prisoners of war belonging to a particular ethnic group should be killed, with the intent thereby to eliminate the group, this would be both genocide and a violation of common article 3, although not necessarily a crime against humanity. Convictions for genocide and violations of common article 3 would accurately reflect the accused general's course of conduct.

470. Conversely, the Chamber does not consider that any [act] of genocide, crimes against humanity, and violations of article 3 common to the Geneva Conventions and of Additional Protocol II are lesser included forms of each other. The ICTR Statute does not establish a hierarchy of norms, but rather all three offences are presented on an equal footing. While genocide may be considered the gravest crime, there is no justification in the Statute for finding that crimes against humanity or violations of common article 3 and additional protocol II are in all circumstances alternative charges to genocide and thus lesser included offences. As stated, and it is a related point, these offences have different constituent elements. Again, this consideration renders multiple convictions for these offences in relation to the same set of facts permissible."

23. In its judgment of 26 February 2007 in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (*ICJ Reports* 2007), the International Court of Justice (ICJ) noted the following:

"(8) *The Question of Intent to Commit Genocide*

186. The Court notes that genocide as defined in Article II of the Convention comprises 'acts' and an 'intent'. It is well established that the acts –

'*(a)* Killing members of the group;

*(b)* Causing serious bodily or mental harm to members of the group;

*(c)* Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

*(d)* Imposing measures intended to prevent births within the group; [and]

*(e)* Forcibly transferring children of the group to another group' –

themselves include mental elements. 'Killing' must be intentional, as must 'causing serious bodily or mental harm'. Mental elements are made explicit in paragraphs *(c)* and *(d)* of Article II by the words 'deliberately' and 'intended', quite apart from the

implications of the words 'inflicting' and 'imposing'; and forcible transfer too requires deliberate intentional acts. The acts, in the words of the ILC, are by their very nature conscious, intentional or volitional acts (Commentary on Article 17 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind, ILC Report 1996, *Yearbook of the International Law Commission, 1996*, Vol. II, Part Two, p. 44, para. 5).

187. In addition to those mental elements, Article II requires a further mental element. It requires the establishment of the 'intent to destroy, in whole or in part, ... [the protected] group, as such'. It is not enough to establish, for instance in terms of paragraph *(a)*, that deliberate unlawful killings of members of the group have occurred. The additional intent must also be established, and is defined very precisely. It is often referred to as a special or specific intent or *dolus specialis*; in the present Judgment it will usually be referred to as the 'specific intent (*dolus specialis*)'. It is not enough that the members of the group are targeted because they belong to that group, that is because the perpetrator has a discriminatory intent. Something more is required. The acts listed in Article II must be done with intent to destroy the group as such in whole or in part. The words 'as such' emphasize that intent to destroy the protected group.

188. The specificity of the intent and its particular requirements are highlighted when genocide is placed in the context of other related criminal acts, notably crimes against humanity and persecution, as the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (hereinafter 'ICT' or 'the Tribunal') did in the *Kupreškić et al.* case:

> 'the *mens rea* requirement for persecution is higher than for ordinary crimes against humanity, although lower than for genocide. In this context the Trial Chamber wishes to stress that persecution as a crime against humanity is an offence belonging to the same *genus* as genocide. Both persecution and genocide are crimes perpetrated against persons that belong to a particular group and who are targeted because of such belonging. In both categories what matters is the intent to discriminate: to attack persons on account of their ethnic, racial, or religious characteristics (as well as, in the case of persecution, on account of their political affiliation). While in the case of persecution the discriminatory intent can take multifarious inhumane forms and manifest itself in a plurality of actions including murder, in the case of genocide that intent must be accompanied by the intention to destroy, in whole or in part, the group to which the victims of the genocide belong. Thus, it can be said that, from the viewpoint of *mens rea*, genocide is an extreme and most inhuman form of persecution. To put it differently, when persecution escalates to the extreme form of wilful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide.' (IT-95-16-T, Judgment, 14 January 2000, para. 636.)"

24. The United Nations (UN) International Convention on the Elimination of All Forms of Racial Discrimination was adopted in New York on 21 December 1965. It was ratified by Switzerland on 29 November 1994 and came into force in respect of that State on 29 December 1994. Articles 2 and 3 are worded as follows:

**Article 2**

"1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:

(a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to en sure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;

(b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;

(c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;

(d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;

(e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.

2. States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved."

**Article 3**

"States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction."

25. The UN International Covenant on Civil and Political Rights was adopted in New York on 16 December 1966. It was ratified by Switzerland on 18 June 1992 and came into force in respect of that State on 18 September 1992. Articles 19 and 20 are worded as follows:

**Article 19**

"1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(*a*) For respect of the rights or reputations of others;

(*b*) For the protection of national security or of public order (*ordre public*), or of public health or morals."

**Article 20**

"1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

26. At its 102nd session (2011) the UN Human Rights Committee adopted General Comment no. 34 concerning Article 19 of the Covenant. The following paragraphs are relevant to the present case:

"**Freedom of opinion**

9. Paragraph 1 of article 19 requires protection of the right to hold opinions without interference. This is a right to which the Covenant permits no exception or restriction. Freedom of opinion extends to the right to change an opinion whenever and for whatever reason a person so freely chooses. No person may be subject to the impairment of any rights under the Covenant on the basis of his or her actual, perceived or supposed opinions. All forms of opinion are protected, including opinions of a political, scientific, historic, moral or religious nature. It is incompatible with paragraph 1 to criminalize the holding of an opinion.[2] The harassment, intimidation or stigmatization of a person, including arrest, detention, trial or imprisonment for reasons of the opinions they may hold, constitutes a violation of article 19, paragraph 1.[3]

10. Any form of effort to coerce the holding or not holding of any opinion is prohibited.[4] Freedom to express one's opinion necessarily includes freedom not to express one's opinion.

**Freedom of expression**

11. Paragraph 2 requires States parties to guarantee the right to freedom of expression, including the right to seek, receive and impart information and ideas of all kinds regardless of frontiers. This right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, subject to the provisions in article 19, paragraph 3, and article 20.[5] It includes political discourse,[6] commentary on one's own[7] and on public affairs,[8] canvassing,[9] discussion

[2] See communication No. 550/93, *Faurisson v. France*, Views adopted on 8 November 1996.

[3] See communication No. 157/1983, *Mpaka-Nsusu v. Zaire*, Views adopted on 26 March 1986; No. 414/1990, *Mika Miha v. Equatorial Guinea*, Views adopted on 8 July 1994.

[4] See communication No. 878/1999, *Kang v. Republic of Korea*, Views adopted on 15 July 2003.

[5] See communications Nos. 359/1989 and 385/1989, *Ballantyne, Davidson and McIntyre v. Canada*, Views adopted on 18 October 1990.

[6] See communication No. 414/1990, *Mika Miha v. Equatorial Guinea*.

[7] See communication No. 1189/2003, *Fernando v. Sri Lanka*, Views adopted on 31 March 2005.

of human rights,[10] journalism,[11] cultural and artistic expression,[12] teaching,[13] and religious discourse.[14] It may also include commercial advertising. The scope of paragraph 2 embraces even expression that may be regarded as deeply offensive,[15] although such expression may be restricted in accordance with the provisions of article 19, paragraph 3 and article 20.

...

**The application of article 19 (3)**

...

28. The first of the legitimate grounds for restriction listed in paragraph 3 is that of respect for the rights or reputations of others. The term 'rights' includes human rights as recognized in the Covenant and more generally in international human rights law. For example, it may be legitimate to restrict freedom of expression in order to protect the right to vote under article 25, as well as rights article under 17 (see para. 37).[16] Such restrictions must be constructed with care: while it may be permissible to protect voters from forms of expression that constitute intimidation or coercion, such restrictions must not impede political debate, including, for example, calls for the boycotting of a non-compulsory vote.[17] The term 'others' relates to other persons individually or as members of a community.[18] Thus, it may, for instance, refer to individual members of a community defined by its religious faith[19] or ethnicity.[20]

..."

27. The following paragraph of General Comment no. 34 is devoted more specifically to the question of criminal penalties for the expression of opinions about historical facts:

"49. Laws that penalize the expression of opinions about historical facts are incompatible with the obligations that the Covenant imposes on States parties in relation to the respect for freedom of opinion and expression.[21] The Covenant does not

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[8] See communication No. 1157/2003, *Coleman v. Australia*, Views adopted on 17 July 2006.

[9] Concluding observations on Japan (CCPR/C/JPN/CO/5).

[10] See communication No. 1022/2001, *Velichkin v. Belarus*, Views adopted on 20 October 2005.

[11] See communication No. 1334/2004, *Mavlonov and Sa'di v. Uzbekistan*, Views adopted on 19 March 2009.

[12] See communication No. 926/2000, *Shin v. Republic of Korea*, Views adopted on 16 March 2004.

[13] See communication No. 736/97, *Ross v. Canada*, Views adopted on 18 October 2000.

[14] Ibid.

[15] Ibid.

[16] See communication No. 927/2000, *Svetik v. Belarus*, Views adopted on 8 July 2004.

[17] Ibid.

[18] See communication No. 736/97, *Ross v. Canada*, Views adopted on 18 October 2000.

[19] See communication No. 550/93, *Faurisson v. France*; concluding observations on Austria (CCPR/C/AUT/CO/4).

[20] Concluding observations on Slovakia (CCPR/CO/78/SVK); concluding observations on Israel (CCPR/CO/78/ISR).

[21] So called "memory-laws", see communication No. 550/93, *Faurisson v. France*. See also concluding observations on Hungary (CCPR/C/HUN/CO/5) paragraph 19.

permit general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events. Restrictions on the right of freedom of opinion should never be imposed and, with regard to freedom of expression, they should not go beyond what is permitted in paragraph 3 or required under article 20."

28. On 30 October 1997 the Committee of Ministers of the Council of Europe adopted Recommendation 97/20 on "Hate speech", which reads:

"The Committee of Ministers, under the terms of Article 15.*b* of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is to achieve a greater unity between its members, particularly for the purpose of safeguarding and realising the ideals and principles which are their common heritage;

Recalling the Declaration of the Heads of State and Government of the member states of the Council of Europe, adopted in Vienna on 9 October 1993;

Recalling that the Vienna Declaration highlighted grave concern about the present resurgence of racism, xenophobia and antisemitism and the development of a climate of intolerance, and contained an undertaking to combat all ideologies, policies and practices constituting an incitement to racial hatred, violence and discrimination, as well as any action or language likely to strengthen fears and tensions between groups from different racial, ethnic, national, religious or social backgrounds;

Reaffirming its profound attachment to freedom of expression and information as expressed in the Declaration on the Freedom of Expression and Information of 29 April 1982;

Condemning, in line with the Vienna Declaration and the Declaration on Media in a Democratic Society, adopted at the 4th European Ministerial Conference on Mass Media Policy (Prague, 7-8 December 1994), all forms of expression which incite to racial hatred, xenophobia, antisemitism and all forms of intolerance, since they undermine democratic security, cultural cohesion and pluralism;

Noting that such forms of expression may have a greater and more damaging impact when disseminated through the media;

Believing that the need to combat such forms of expression is even more urgent in situations of tension and in times of war and other forms of armed conflict;

Believing that it is necessary to lay down guidelines for the governments of the member states on how to address these forms of expression, while recognising that most media cannot be blamed for such forms of expression;

Bearing in mind Article 7, paragraph 1, of the European Convention on Transfrontier Television and the case-law of the organs of the European Convention on Human Rights under Articles 10 and 17 of the latter Convention;

Having regard to the United Nations Convention on the Elimination of All Forms of Racial Discrimination and Resolution (68) 30 of the Committee of Ministers on Measures to be taken against incitement to racial, national and religious hatred;

Noting that not all member states have signed and ratified this Convention and implemented it by means of national legislation;

Aware of the need to reconcile the fight against racism and intolerance with the need to protect freedom of expression so as to avoid the risk of undermining democracy on the grounds of defending it;

Aware also of the need to respect fully the editorial independence and autonomy of the media,

Recommends that the governments of member states:

1. take appropriate steps to combat hate speech on the basis of the principles laid down in this recommendation;

2. ensure that such steps form part of a comprehensive approach to the phenomenon, which also targets its social, economic, political, cultural and other root causes;

3. where they have not done so, sign, ratify and effectively implement in national law the United Nations Convention on the Elimination of All Forms of Racial Discrimination, in accordance with Resolution (68) 30 of the Committee of Ministers on Measures to be taken against incitement to racial, national and religious hatred;

4. review their domestic legislation and practice in order to ensure that they comply with the principles set out in the appendix to this recommendation.

..."

29. Within the Council of Europe, the question of the atrocities committed against the Armenian people has been discussed on many occasions. In a declaration of 24 April 2013 (no. 542, Doc. 13192), for example, some twenty members of the Parliamentary Assembly of the Council of Europe stated the following:

**Recognition of the Armenian Genocide**

"[This written declaration commits only those who have signed it]

Recognition of genocides is an act which contributes to the respect for human dignity and the prevention of crimes against humanity;

The fact of the Armenian Genocide by the Ottoman Empire has been documented, recognised, and affirmed in the form of media and eyewitness reports, laws, resolutions, and statements by the United Nations, the European Parliament and Parliaments of the Council of Europe member States, including Sweden, Lithuania, Germany, Poland, the Netherlands, Slovakia, Switzerland, France, Italy, Belgium, Greece, Cyprus, the Russian Federation, as well as the US House of Representatives and 43 US States, Chile, Argentina, Venezuela, Canada, Uruguay and Lebanon.

The undersigned, members of the Parliamentary Assembly, call upon all members of the Parliamentary Assembly of the Council of Europe to take the necessary steps for the recognition of the genocide perpetrated against Armenians and other Christians in the Ottoman Empire at the beginning of the 20th century, which will strongly contribute to an eventual similar act of recognition by the Turkish authorities of this odious crime against humanity and, as a result, will lead to the normalisation of relations between Armenia and Turkey and thus contribute to regional peace, security and stability."

## C. Comparative law and practice

30. In a comparative study (opinion 06-184) dated 19 December 2006, produced to the Court by the respondent Government, the Swiss

Institute of Comparative Law (*Institut suisse de droit comparé* – ISDC) analysed the legislation of fourteen European countries (Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Italy, Luxembourg, the Netherlands, Norway, Spain, Sweden and the United Kingdom), the United States and Canada regarding the offence of denial of crimes against humanity, in particular genocide. The summary of the study reads as follows:

"A study of denial of crimes against humanity and genocide in the different countries under examination reveals considerable variation.

Spain, France and Luxembourg have all adopted an extensive approach to the prohibition of denial of these crimes. Spanish legislation refers generically to the denial of acts with the proven purpose of fully or partially eliminating an ethnic, racial or religious group. The perpetrator faces a sentence of one to two years' imprisonment. In France and Luxembourg, the legislation refers to denial of crimes against humanity, as defined in Article 6 of the Charter of the International Military Tribunal, annexed to the London Agreement of 8 August 1945 ... This limitation of the substantive scope of the offence of denial of crimes against humanity is offset in Luxembourg by the fact that there is a special provision concerning denial of crimes of genocide. Denial of such crimes is punishable by the same sentences [imprisonment from eight days to six months and/or a fine ranging from 251 to 25,000 euros] as denial of crimes against humanity but the definition of genocide used for these purposes is that of the Luxembourg Law of 8 August 1985, which is general and abstract, not being limited to acts committed during the Second World War. The limited scope of the relevant provisions in France has been criticised and it should be noted in this connection that a Bill aimed at criminalising denial of the existence of the Armenian genocide was approved at its first reading by the National Assembly on 12 October 2006. Accordingly, it appears that only Luxembourg and Spain criminalise denial of crimes of genocide in their legislation, generically and without restricting themselves to particular episodes in history. In addition, denial of crimes against humanity in general is not currently a criminal offence in any country.

**In this connection, in a group of countries – among which France can be included, from an analysis of its laws – only the denial of acts committed during the Second World War is a criminal offence**. In **Germany**, for example, anyone who, publicly or at a meeting, denies or trivialises acts committed with the aim of totally or partially eliminating a national, religious or ethnic group during the National Socialist regime is punishable by up to five years' imprisonment or a fine. In **Austria**, anyone who, acting in such a way that his or her position may be known by a large number of people, denies or severely trivialises genocide or other crimes against humanity committed by the National Socialist regime is punishable by up to ten years' imprisonment. Following the same approach, **Belgian** law punishes by imprisonment for between eight days and one year anyone who denies or grossly trivialises, seeks to justify or approves of the genocide committed by the German National Socialist regime.

In other countries, in the absence of special statutory provision for criminal offences, the courts have intervened to ensure that negationism is punished. In particular, the Netherlands Supreme Court has held that the provisions of the Criminal Code prohibiting discriminatory acts were to be applied to punish denial of crimes against humanity. In addition, a Bill aimed at criminalising negationism is currently being examined in that country. The Canadian Human Rights Tribunal has referred to

the criminal offence of exposing others to hatred or contempt, as provided for in the Canadian Human Rights Act, as a basis for condemning the content of a negationist website. The position of the judges in the United States is less settled, since that country affords extremely strict protection of freedom of expression, for historical and cultural reasons. However, it may be noted that in general, victims of offensive speech have to date succeeded in obtaining damages where they may legitimately have felt that their physical integrity was under threat.

In addition, there are a range of countries in which denial of crimes against humanity is not directly contemplated by the law. For some of those countries, it is conceivable that this might be covered by the definition of more general criminal offences. **For example, under Italian law it is an offence to condone crimes of genocide; however, the boundary between condoning, trivialising and denying crimes is extremely thin. Norwegian law punishes anyone who makes an official statement that is discriminatory or hateful. This definition could conceivably apply to negationism.** The Supreme Court has not yet had occasion to rule on this issue. **In other countries, for example Denmark and Sweden, the trial courts have taken a position, having agreed to review whether the provisions of criminal law concerning discriminatory or hateful statements may be applied to cases of negationism, although they have not found them to be applicable in the cases before them. In Finland, the political authorities have expressed the view that such provisions are not applicable to negationism. Lastly, neither United Kingdom law nor Irish law deals with negationism.**"

31. Since the publication of this study in 2006, there have been significant developments in France and Spain. In France, firstly, it should be noted that a law was passed on 29 January 2001 with a single section, recognising the Armenian genocide perpetrated in 1915 (Law no. 2001-70):

**Section 1**

"France publicly recognises the Armenian genocide of 1915."

32. On 23 January 2012 the Law on criminalising denial of the existence of genocides recognised by law was passed:

**Section 1**

"The first subsection of section 24 *bis* of the Freedom of the Press Act of 29 July 1881 shall be replaced by five subsections worded as follows:

'The penalties provided for in the sixth subsection of section 24 shall be imposed on anyone who publicly condones, denies or grossly trivialises crimes of genocide, crimes against humanity and war crimes, as defined non-exhaustively:

(1) in Articles 6, 7 and 8 of the Statute of the International Criminal Court established in Rome on 17 July 1998;

(2) in Articles 211-1 and 212-1 of the Criminal Code;

(3) in Article 6 of the Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945;

and as recognised by law, in an international treaty signed and ratified by France or to which France has acceded, in a decision taken by a European Union or

international institution, or as characterised by a French court, such decision being enforceable in France.'"

**Section 2**

"Section 48-2 of the Freedom of the Press Act of 29 July 1881 shall be amended as follows:

(1) After the word 'deportees', insert the words: ', or of any other victim of crimes of genocide, war crimes, crimes against humanity or crimes of collaboration with the enemy';

(2) After the term 'public defence', insert the words 'of genocides,'."

33. On 28 February 2012 the French Constitutional Council declared the above-mentioned law unconstitutional, holding as follows:

"1. The applicant members of the National Assembly and the Senate have referred to the Constitutional Council the Law on criminalising denial of the existence of genocides recognised by law.

2. Section 1 of the referred law adds a section 24 *ter* to the Freedom of the Press Act of 29 July 1881; this section primarily provides for a sentence of one year's imprisonment and a fine of EUR 45,000 as the penalty for anyone who has 'disputed or excessively downplayed', irrespective of the means of expression or public communication employed, 'the existence of one or more crimes of genocide as defined in Article 211-1 of the Criminal Code which are recognised as such under French law'. Section 2 of the referred law amends section 48-2 of the same Law of 29 July 1881; it extends the right granted to certain associations to join criminal proceedings as a civil party, in particular to give practical effect to the creation of this new offence.

3. In the applicants' submission, the referred law infringes the freedom of expression and communication set forth in Article 11 of the 1789 Declaration of the Rights of Man and the Citizen, as well as the principle that criminal offences and penalties must be defined by law, as enshrined in Article 8 of the Declaration. In so far as they apply, firstly, only to genocides recognised by French law and, secondly, to genocides alone, excluding other crimes against humanity, these provisions also infringe the principle of equality. The applicant parliamentarians further argue that Parliament has exceeded its own authority and breached the principle of separation of powers enshrined in Article 16 of the 1789 Declaration; they likewise allege a breach of the principle of the necessity of punishments as set forth in Article 8 of the 1789 Declaration, freedom of research and the principle that political parties are free to carry on their activities, as enshrined in Article 4 of the Constitution.

4. Firstly, Article 6 of the 1789 Declaration of the Rights of Man and the Citizen provides: 'Law is the expression of the general will ...' It follows from that Article and from all the other provisions of constitutional status relating to the purpose of the law that, without prejudice to any special provisions envisaged by the Constitution, the law has the function of laying down rules and must accordingly have a normative scope.

5. Secondly, under Article 11 of the 1789 Declaration: 'The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law.' Article 34 of the Constitution provides: 'The law shall lay down the rules regarding ... civic rights and the

fundamental guarantees afforded to citizens for the exercise of their civil liberties'. On that basis, Parliament is at liberty to enact rules regulating the exercise of the right of free communication, freedom of speech, freedom of written expression and freedom of the press; it is also at liberty on that account to establish criminal offences punishing abuses of the exercise of the freedom of expression and communication which undermine public order and the rights of others. However, freedom of expression and communication is all the more precious since its exercise is a precondition for democracy and one of the guarantees of respect for other rights and freedoms. Any restrictions imposed on the exercise of this freedom must be necessary, appropriate and proportionate to the aim pursued.

6. A legislative provision with the purpose of 'recognising' a crime of genocide cannot in itself have the normative scope attaching to the law. However, section 1 of the referred law makes it an offence to dispute or downplay the existence of one or more crimes of genocide 'recognised as such under French law'. In thereby making it an offence to dispute the existence and the legal characterisation of crimes which it has itself recognised and characterised as such, Parliament has interfered in an unconstitutional manner with the exercise of freedom of expression and communication. Accordingly, there being no need to examine the other complaints, section 1 of the referred law must be declared unconstitutional; and section 2, which is inseparably linked to it, must likewise be declared unconstitutional.

D E C I D E S:

Article 1.- The Law on criminalising denial of the existence of genocides recognised by law is unconstitutional.

Article 2.- This decision shall be published in the Official Gazette of the French Republic.

..."

34. Significant developments have also been observed in Spain. In a judgment of 7 November 2007 (no. 235/2007) the Constitutional Court declared unconstitutional the offence of "denial" of genocide laid down in the first sub-paragraph of Article 607.2 of the Criminal Code.

35. The offence of genocide is provided for in Article 607 of the Criminal Code. In its wording prior to the Constitutional Court's judgment no. 235/2007, this Article was worded as follows:

"1. The pursuit of an aim of total or partial destruction of a national, ethnic, racial or religious group shall give rise to the following penalties:

- a sentence of fifteen to twenty years' imprisonment for killing one of its members;

...

- a sentence of fifteen to twenty years' imprisonment for sexually assaulting one of its members or inflicting injuries as described in Article 149;

...

2. Dissemination, by any means, of ideas or doctrines denying or justifying the offences provided for in the preceding paragraph of this Article or seeking to restore regimes or institutions that advocate practices constituting such offences shall be punishable by one to two years' imprisonment."

36. Since the Constitutional Court's judgment no. 235/2007, mere "denial" of a genocide has thus ceased to be a criminal offence, and Article 607.2 has been amended to read as follows:

> "Dissemination, by any means, of ideas or doctrines justifying the offences provided for in the preceding paragraph of this Article or seeking to restore regimes or institutions that advocate practices constituting such offences shall be punishable by one to two years' imprisonment."

37. In its judgment no. 235/2007 the Constitutional Court made a distinction between "denial" of genocide, which could be understood as simply expressing a point of view about certain acts by maintaining that they had not taken place or they had not been carried out in such a way as to be classified as genocide, and "justification", which did not entail denying outright the existence of a specific crime of genocide, but rather relativising it or denying that it was illegal, by identifying to a certain extent with the perpetrators of the crimes in question. Where the conduct being punished necessarily involved direct incitement to violence against certain groups or contempt towards the victims of crimes of genocide, Parliament had expressly provided for penalties linked to the notion of condoning genocide, specifically in Article 615 of the Criminal Code, which criminalised incitement, conspiracy and encouragement to commit genocide (*la provocación, la conspiración y la proposición*). The fact that the penalty provided for in Article 607.2 was less severe than the one for condoning genocide meant that it could not have been Parliament's intention to introduce an aggravated penalty.

38. The Constitutional Court also examined whether the types of conduct punishable under Article 607.2 came under the concept of "hate speech". It held that mere denial of a crime of genocide did not presuppose direct incitement to violence against citizens or against specific races or beliefs. It stated that simply disseminating conclusions as to the existence or otherwise of specific acts, without making any value judgments about them or about their illegality, fell within the scope of academic freedom, as enshrined in paragraph (b) of Article 20.1 of the Constitution. It pointed out that that freedom was afforded enhanced protection under the Constitution in relation to freedom of expression or freedom of information. Lastly, it stated that this position was justified by the needs of historical research, which was by definition subject to controversy and dispute since it was built around assertions and value judgments from which it was impossible to derive the objective truth with absolute certainty.

39. Mention should also be made of the case of Luxembourg, which is the only country among those taken into account in the ISDC study that provides in general for a criminal penalty for genocide denial. The relevant provisions of the Criminal Code are worded as follows:

**Article 457-3**

"1. A sentence of imprisonment from eight days to six months and/or a fine of between 251 and 25,000 euros shall be imposed on anyone who ...

2. The same penalties, or only one of them, shall be imposed on anyone who, by one of the means referred to in the preceding paragraph, has disputed, downplayed, justified or denied the existence of one or more genocides as defined in Article 136 *bis* of the Criminal Code, and of crimes against humanity and war crimes, as defined in Articles 136 *ter* to 136 *quinquies* of the Criminal Code and as recognised by a Luxembourg or international court."

**Article 136 *bis***

"Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such shall be categorised as genocide:

1. killing members of the group;

2. causing serious bodily or mental harm to members of the group;

3. deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

4. imposing measures intended to prevent births within the group;

5. forcibly transferring children of the group to another group.

The crime of genocide is punishable by life imprisonment."

# THE LAW

## I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

40. Relying on Article 10 of the Convention, the applicant complained that the Swiss courts had breached his freedom of expression by convicting him for having publicly stated that there had never been an Armenian genocide. He argued, in particular, that Article 261 *bis* § 4 of the Swiss Criminal Code was not sufficiently foreseeable in its application, that his conviction had not been justified by the pursuit of a legitimate aim and that the alleged breach of his freedom of expression had not been "necessary in a democratic society". Article 10 provides:

"1. 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.

2. 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."

41. The Government contested that argument.

## A. Admissibility

### *1. Application of Article 17 of the Convention*

#### (a) The applicable principles

42. The Court reiterates that Article 17 empowers it to declare an application inadmissible if it considers that one of the parties to the proceedings has relied on the provisions of the Convention to engage in an abuse of rights. Article 17 is worded as follows:

> "Nothing in [the] 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."

43. The Court observes that the respondent Government have not argued that the application falls within the ambit of Article 17. It nevertheless considers it appropriate to examine whether the applicant's statements should be excluded from the protection of freedom of expression on the basis of that Article.

44. The Court reiterates at the outset that "the purpose of Article 17, in so far as it refers to groups or to individuals, is to make it impossible for them to derive from the Convention a right to engage in any activity or perform any act aimed at destroying any of the rights and freedoms set forth in the Convention; ... therefore, no person may be able to take advantage of the provisions of the Convention to perform acts aimed at destroying the aforesaid rights and freedoms" (see *Lawless v. Ireland*, 1 July 1961, p. 45, § 7, Series A no. 3).

45. The Court has held in particular that a "remark directed against the Convention's underlying values" is removed from the protection of Article 10 by Article 17 (see *Lehideux and Isorni v. France*, 23 September 1998, §§ 53 and 47, *Reports of Judgments and Decisions* 1998-VII, and *Orban and Others v. France*, no. 20985/05, § 34, 15 January 2009). Thus, in the case of *Garaudy v. France* ((dec.), no. 65831/01, ECHR 2003-IX (extracts)), which concerned, *inter alia*, the conviction for denial of crimes against humanity of the author of a book that systematically disputed such crimes perpetrated by the Nazis against the Jewish community, the Court found the applicant's Article 10 complaint incompatible *ratione materiae* with the provisions of the Convention. It based that conclusion on the finding that the main content and general tenor of the applicant's book, and thus its "aim", were markedly revisionist and therefore ran counter to

the fundamental values of the Convention, namely justice and peace, and inferred from that observation that he had attempted to deflect Article 10 from its real purpose by using his right to freedom of expression for ends which were contrary to the text and spirit of the Convention. The Court reached the same conclusion in *Norwood v. the United Kingdom* ((dec.), no. 23131/03, ECHR 2004-XI) and *Pavel Ivanov v. Russia* ((dec.), no. 35222/04, 20 February 2007), which concerned the use of freedom of expression for Islamophobic and anti-Semitic purposes respectively.

46. The Court draws attention to the vital importance of combating racial discrimination in all its forms and manifestations (see *Jersild v. Denmark*, 23 September 1994, § 30, Series A no. 298). It notes in this connection that incitement to hatred does not necessarily require a call for specific acts of violence or other offences. Personal attacks by means of insults, ridicule or defamation directed at certain specified sectors or groups of the population, or incitement to discrimination, are sufficient for the authorities to make it a priority to combat racist discourse when faced with irresponsible use of freedom of expression that undermines the dignity, or even the safety, of these population groups or sectors. Political speeches that stir up hatred based on religious, ethnic or cultural prejudices represent a threat to social peace and political stability in democratic States (see *Féret v. Belgium*, no. 15615/07, § 73, 16 July 2009).

47. In *Leroy v. France* (no. 36109/03, 2 October 2008) the Court found that the form of expression in issue did not fall within the category of publications which Article 17 of the Convention excluded from the protection of Article 10. Firstly, the underlying message the applicant had sought to convey through the humorous yet controversial medium of a cartoon – namely the destruction of American imperialism – was not aimed at destroying fundamental rights and could not be equated with remarks directed against the Convention's underlying values, for example remarks characterised by racism, anti-Semitism (see *Garaudy*, cited above, and *Pavel Ivanov*, cited above) or Islamophobia (see *Norwood*, cited above). Secondly, although the domestic courts had found the applicant guilty of condoning terrorism, the Court considered that the drawing in question and its accompanying caption did not constitute such an unequivocal attempt to justify an act of terrorism as to exclude them from the protection of freedom of the press enshrined in Article 10 (see *Leroy*, cited above, § 27). Lastly, the insult to the memory of the victims of the attacks of 11 September 2001 through the publication in issue had to be examined in the light of the right protected by Article 10, which was not an absolute right; the Court had already examined the content of similar statements from the standpoint of that Article (see *Kern v. Germany* (dec.), no. 26870/04, 29 May 2007).

48. Lastly, in *Molnar v. Romania* ((dec.), no. 16637/06, 23 October 2012) the Court had to determine the case of a person who had been

convicted of distributing visual propaganda material (posters) whose content stirred up inter-ethnic hatred, discrimination and anarchy.

The Court found that the posters discovered at the applicant's home contained various messages expressing his own opinions. While some of the messages were not shocking as far as their content was concerned, others could have contributed to tensions within the population, especially in the Romanian context. In that connection, the Court took particular note of the messages containing references to the Roma minority and the homosexual minority. Through their content, these messages sought to arouse hatred towards the minorities in question, constituted a serious threat to public order and ran counter to the fundamental values underpinning the Convention and a democratic society. Such acts were incompatible with democracy and human rights because they infringed the rights of others; on that account, in accordance with Article 17 of the Convention, the applicant could not rely on the provisions of Article 10.

**(b) Application of these principles in the instant case**

49. In the light of the case-law outlined above, the Court will determine whether the applicant's statements should be excluded from the scope of Article 10 on the basis of Article 17 of the Convention, notwithstanding the fact that the respondent Government did not submit any request to that effect. As is apparent from the judgments and decisions cited, this is a measure which the Court has applied only very rarely.

50. The Turkish Government submitted that the application in the present case could not be declared inadmissible on the basis of Article 17 of the Convention, a provision which the Swiss Government, moreover, had never asked to be applied.

51. The Court accepts that some of the applicant's comments were provocative. The applicant's motives for committing the offence were described as "nationalistic" and "racist" by the domestic courts (see point 5.2 of the Federal Court judgment cited in paragraph 13 above). In the speeches he gave about the events in question, the applicant referred, among other things, to the idea of an "international lie". However, the Court notes at the outset that ideas that offend, shock or disturb are also protected by Article 10. Furthermore, it considers it important that the applicant has never disputed that massacres and deportations took place during the years in question. Instead, all he denies is the legal characterisation of those events as "genocide".

52. The case-law cited above (see paragraphs 44-50) indicates that the threshold for determining whether statements may fall within the scope of Article 17 relates to whether their aim is to stir up hatred or violence. The Court considers that the rejection of the legal characterisation of the events of 1915 was not in itself sufficient to amount to incitement of hatred towards the Armenian people. In any event, the applicant has never been

prosecuted or punished for incitement to hatred, which is a separate offence under the first paragraph of Article 261 *bis* of the Criminal Code (see paragraph 14 above). Nor does it appear that the applicant has expressed contempt towards the victims of the events in question. Accordingly, the Court considers that the applicant has not abused his right to engage in open discussion of matters including those which are sensitive and likely to cause offence. The free exercise of this right is one of the fundamental aspects of freedom of expression and distinguishes a democratic, tolerant and pluralist society from a totalitarian or dictatorial regime.

53. Admittedly, the Criminal Court noted that the applicant claimed to be a follower of Talaat Pasha, whom it described as one of the initiators, instigators and driving forces of the Armenian genocide. The Court does not find it inconceivable that the applicant's identification to a certain extent with the perpetrators of such atrocities might be deemed to constitute an attempt to justify the acts committed by the Ottoman Empire (see, to similar effect, the Spanish Constitutional Court's judgment no. 235/2007, referred to in paragraphs 38-40 above). However, it does not consider itself obliged to answer this question, seeing that the applicant has neither been prosecuted nor convicted for seeking to "justify" a genocide within the meaning of the fourth paragraph of Article 261 *bis* of the Criminal Code.

54. In view of the foregoing, the applicant cannot be said to have used his right to freedom of expression for ends which are contrary to the text and spirit of the Convention, and thus to have deflected Article 10 from its real purpose. It is therefore unnecessary to apply Article 17 of the Convention.

*2. Conclusions as to admissibility*

55. The Court further notes that the complaint under Article 10 is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and that it is not inadmissible on any other grounds. It must therefore be declared admissible.

## B. Merits

*1. Whether there was interference*

56. The Court observes the parties did not dispute that there had been interference with the applicant's freedom of expression. It likewise takes the view that the applicant's conviction indisputably amounted to "interference" with his right to freedom of expression.

*2. Whether the interference was justified*

57. Such interference will breach Article 10 unless it satisfies the requirements of the second paragraph of that Article. It thus remains to be

determined whether the interference was "prescribed by law", pursued one or more legitimate aims under that paragraph and was "necessary in a democratic society" to achieve them.

**(a) "Prescribed by law"**

*(i) The parties' submissions*

– *The applicant*

58. The applicant submitted that Article 261 *bis* § 4 of the Criminal Code concerned denial of a "genocide" without specifying whether this referred to the "Jewish genocide" or the "Armenian genocide". He further pointed out that in the case tried at first instance by the Berne-Laupen District Court, the Federal Court had cleared him of the same charge (see paragraph 17 above). Accordingly, he submitted that he could not have foreseen that the same law might have different consequences in the later case forming the subject of the present application. Lastly, he added that the provision in issue had been criticised by a member of the Swiss Government, namely the former Minister of Justice C.B., during a visit to Turkey in early October 2006.

– *The Government*

59. The Government observed that the applicant's conviction had been based on Article 261 *bis* § 4 of the Swiss Criminal Code (see paragraph 14 above), which had been published in full in the Compendium of Federal Law (*Recueil systématique* (RS)) and the Official Collection of Federal Statutes (*Recueil officiel* (RO)). They pointed out that the Bill tabled by the Federal Council had proposed limiting protection under the criminal law to denial of the Holocaust, without making specific reference to denial of genocides. However, Parliament had not taken up that proposal, instead extending the scope of the provision in question to cover denial, trivialisation or attempted justification of genocide in general and/or crimes against humanity (in this connection, the Government referred to point 3.2 of the Federal Court's judgment of 12 December 2007). At the start of the National Council's deliberations, the rapporteur of the Legal Affairs Committee had specified that the massacres of Armenians were also to be regarded as a "genocide" within the meaning of the provision as amended.

60. The Government submitted that when ratifying the International Covenant on Civil and Political Rights, Switzerland had entered a reservation to the effect that it reserved the right, on the occasion of its planned accession to the Convention of 21 December 1965 on the Elimination of All Forms of Racial Discrimination, to enact a criminal-law provision taking into account the requirements of Article 20, paragraph 2, of the Covenant, namely that "[a]ny advocacy of national, racial or religious

hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law." When Article 261 *bis* of the Criminal Code came into force, the reservation had been withdrawn.

61. The Government submitted that Recommendation No. R (97) 20 on "hate speech", adopted by the Committee of Ministers of the Council of Europe on 30 October 1997 – which condemned all forms of expression that incited racial hatred, xenophobia, anti-Semitism and any other forms of intolerance – was to be seen in the same context.

62. In addition, the Government noted that more than twenty national parliaments had recognised that the deportations and massacres occurring between 1915 and 1917 constituted genocide within the meaning of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Furthermore, on 15 November 2000 the European Parliament had called on Turkey to publicly recognise the genocide of Armenians perpetrated during the First World War.

63. In view of these international developments and the very wording of Article 261 *bis* § 4 of the Criminal Code, the applicant could have foreseen that his statements would render him liable to a criminal penalty in Switzerland. The Government added that at a hearing on 20 September 2005 the applicant had stated that he had not denied any genocide since there had never been a genocide, but that he was fighting against an international lie.

64. The Government therefore submitted that Article 261 *bis* § 4 of the Criminal Code was formulated with sufficient precision, especially as the facts denied by the applicant constituted crimes against humanity in any event (citing the Federal Court's judgment of 12 December 2007, point 7 – see paragraph 13 above), which were likewise covered by the wording of Article 261 *bis* § 4.

*- The Turkish Government, third-party intervener*

65. Like the applicant, the Turkish Government submitted that the measure complained of had not been foreseeable to him. He could reasonably have expected to be convicted only on the basis of international or Swiss law, rather than on the basis of a consensus in public opinion in Switzerland. The interference with his freedom of expression had therefore lacked a sufficient legal basis.

*(ii) The Court's assessment*

*- The applicable principles*

66. The Court reiterates its case-law to the effect that the expression "prescribed by law" not only requires that the impugned measure should have a legal basis in domestic law, but also refers to the quality of the law in question, which should be accessible to the person concerned and foreseeable as to its effects (see, among other authorities, *VgT Verein gegen*

*Tierfabriken v. Switzerland*, no. 24699/94, § 52, ECHR 2001-VI; *Rotaru v. Romania* [GC], no. 28341/95, § 52, ECHR 2000-V; *Gawęda v. Poland*, no. 26229/95, § 39, ECHR 2002-II; and *Maestri v. Italy* [GC], no. 39748/98, § 30, ECHR 2004-I). However, it is for the national authorities, notably the courts, to interpret and apply domestic law (see *Kopp v. Switzerland*, 25 March 1998, § 59, *Reports* 1998-II, and *Kruslin v. France*, 24 April 1990, § 29, Series A no. 176-A).

67. One of the requirements flowing from the expression "prescribed by law" is foreseeability. Thus, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable citizens to regulate their conduct; they must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Such consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity, and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice (see *Rekvényi v. Hungary* [GC], no. 25390/94, § 34, ECHR 1999-III; Sunday Times *v. the United Kingdom (no. 1)*, 26 April 1979, § 49, Series A no. 30; and *Kokkinakis v. Greece*, 25 May 1993, § 40, Series A no. 260-A).

68. The level of precision required of domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the law in question, the field it is designed to cover and the number and status of those to whom it is addressed (see *Rekvényi*, cited above, § 34, and *Vogt v. Germany*, 26 September 1995, § 48, Series A no. 323). Because of the general nature of constitutional provisions, the level of precision required of them may be lower than for ordinary legislation (see *Rekvényi*, cited above, § 34).

- *Application of these principles in the present case*

69. Turning to the circumstances of the present case, it has not been disputed that the applicant was convicted on the basis of an instrument that was accessible, namely Article 261 *bis* § 4 of the Criminal Code (see paragraph 14 above). However, the applicant maintained that that provision did not satisfy the Court's requirements as to precision and foreseeability. The Court is therefore called upon to examine whether, in the specific circumstances of the case, the applicant could have foreseen that his statements at events in Switzerland might give rise to an investigation, or even a criminal conviction, on the basis of the provision in question.

70. The Federal Court found that a literal and grammatical interpretation of the provision in issue suggested that the law was not referring to any specific historical event, given that Article 261 *bis* § 4 of the Criminal Code

mentioned "a" genocide and "other crimes against humanity". Accordingly, in its view, the law did not preclude punishment of denial of genocides other than that perpetrated by the Nazi regime; nor did it explicitly classify denial of the Armenian genocide as an act of racial discrimination under criminal law (see point 3.1 of the Federal Court's judgment, cited in paragraph 13 above). The same conclusion appears to follow from a historical interpretation of the provision (see point 3.2 of the Federal Court's judgment).

71. The Court considers that the term "a genocide", as used in Article 261 *bis* § 4 of the Criminal Code, might give rise to doubts in terms of the precision required by Article 10 § 2 of the Convention. It nevertheless takes the view that in the particular circumstances of the case the criminal penalty was foreseeable for the applicant, who, as a doctor of laws and a well-informed political figure, might have suspected that he could face criminal penalties by making speeches of this kind in Switzerland, following the Swiss National Council's recognition in 2002 of the existence of the Armenian genocide (see paragraph 16 above). Furthermore, the applicant himself acknowledged that he had been aware of the provision of Swiss law punishing public denial of genocide, adding that "he would never change his position, even if a neutral panel should one day conclude that the Armenian genocide did indeed take place" (see point 6 of the Federal Court's judgment). The Court therefore agrees with the Federal Court that in such circumstances, the applicant could not have been unaware that by describing the Armenian genocide as an "international lie", he was liable to face a criminal penalty in Swiss territory (ibid.).

72. In conclusion, the Court finds that the interference complained of was "prescribed by law" within the meaning of the second paragraph of Article 10 of the Convention.

**(b) Legitimate aim**

73. The Government submitted that the applicant's conviction had pursued several legitimate aims, including protection of the reputation and rights of others, and specifically the honour of the victims, whom the applicant had publicly described as instruments of imperialist powers, against whose attacks the Turks had simply been defending their homeland. They added that the applicant's conviction for his public statements had also been justified by the prevention of disorder, in accordance with Article 10 § 2.

74. The Turkish Government submitted that the applicant's conviction had not pursued any of the legitimate aims listed in Article 10 § 2. The respondent Government had in any event not shown that the measure had been necessary to prevent a specific and genuine threat to public safety.

75. The Court considers that the impugned measure was designed to protect the rights of others, namely the honour of the relatives of victims of

the atrocities perpetrated by the Ottoman Empire against the Armenian people from 1915 onwards. However, it finds that the Government's argument that the applicant's comments posed a serious risk to public order is not sufficiently substantiated.

**(c) "Necessary in a democratic society"**

*(i) The parties' submissions*

*- The applicant*

76. The applicant submitted that the restriction of his freedom of expression was not proportionate to the aims pursued, namely prevention of racial discrimination and xenophobia. He also contended, referring to Article 6 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, that the existence of a "genocide", which was a legal term, was a matter that could be determined by a court alone.

77. The applicant argued that the measure complained of had not been necessary in a democratic society and that his conviction for statements he had made had not met any pressing social need. The restriction of his freedom of expression had not been necessary for the protection of the honour and the rights of others, and specifically the dignity of the Armenian community. Moreover, by convicting him Switzerland had undermined the honour of the Turkish community, which rejected the idea of an "Armenian genocide".

78. The applicant contested the opinion of the domestic authorities that his comments had been of a nationalistic and racist nature. He stressed the legal aspect of his arguments, which drew on international law, including the 1948 Convention.

79. The applicant, referring to several cases examined by the Court concerning Holocaust denial, maintained that the fundamental difference was that the Holocaust had been categorised by the Nuremberg Tribunal as a crime against humanity. In addition, the Court had noted that the cases in question concerned clearly established historical facts. In *Lehideux and Isorni* (cited above, § 55) the Court had held that every country had to make an effort to debate its own history openly and dispassionately. In finding a violation of Article 10 in that case, it had thus protected the publication produced by the applicants, who had portrayed Marshal Pétain in a more favourable light.

A similar approach had been pursued in *Giniewski v. France* (no. 64016/00, ECHR 2006-I), concerning a publication in which the applicant had sought to develop an argument about the scope of a particular doctrine and its possible links with the origins of the Holocaust. In that case, the Court had also stated that what was at issue was a view which the applicant had wished to express as a journalist and historian, and that it was

essential in a democratic society that a debate on the causes of acts of particular gravity amounting to crimes against humanity should be able to take place freely (ibid., § 51).

In the same case, the Court had observed that statements or written texts containing conclusions and phrases which might offend, shock or disturb some people did not in themselves preclude the enjoyment of freedom of expression (ibid., § 52; the applicant also cited *De Haes and Gijsels v. Belgium*, 24 February 1997, § 46, *Reports* 1997-I).

80. The applicant emphasised that the Federal Court's judgment had mainly been based on the finding that the Armenian genocide was regarded by public opinion in Switzerland and internationally as a clearly established fact. However, while being aware that there were diverging views on this issue, the judges of that court had sought to reassure themselves through the phrase "consensus does not mean unanimity" (point 4.4 of the judgment). The applicant submitted that by taking that approach, the Federal Court had disregarded or at the very least belittled the opinions and work of those who shared his view. Furthermore, the concept of "consensus" should be used with caution in the scientific sphere, where results were subject to constant changes, challenges and progress.

81. The applicant submitted that many other people besides him believed that the tragic events of 1915 could not be categorised as "genocide" (he mentioned some twenty names), and had substantiated their arguments. However, the Federal Court had ignored their views, instead simply stating that it was not its role to write history. Lastly, the applicant noted the Federal Court's argument that it could not be inferred from the Federal Council's repeated refusal to recognise the existence of an Armenian genocide in an official declaration that the characterisation "genocide" was arbitrary (point 4.5 of the judgment).

82. The applicant also referred to the "Protocol on the Development of Relations between the Republic of Armenia and the Republic of Turkey", signed in Zürich on 10 October 2009 (but not yet in force), by which the two States had agreed to set up an intergovernmental commission and sub-commissions in order to engage in dialogue of historic importance with the aim of restoring mutual trust between the two nations, including a specific impartial examination of the historical records and archives to define existing problems and formulate recommendations. He argued that the need to set up commissions to discuss historical matters amounted to an acknowledgment that these were not "clearly established facts".

83. The applicant submitted that "genocide" was a clearly defined international crime. Its current legal basis was Article II of the 1948 Convention, which required any one of the specified acts to have been "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group" (*dolus specialis*). In its judgment of 26 February 2007 in the case concerning *Application of the Convention on the*

*Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* the ICJ had clarified the notion of "genocide". It had also noted that deportation of a group or part of a group, for example, might constitute a war crime or a crime against humanity, but did not necessarily entail the constituent elements of a "genocide". The ICJ had also emphasised that the onus was on the applicant party to prove an allegation of genocide and that the requisite standard of proof was high.

84. The applicant also referred to the French National Assembly's Information Report on Questions of Memory, dated 18 November 2008 (no. 1262) and presented by the former Speaker of the National Assembly, Bernard Accoyer (rapporteur). The report had concluded that the legislature should not take over the role of the courts in apportioning responsibility for certain historical events through laws. In the rapporteur's view, passing judgment on historical matters was incompatible with the French Constitution and could undermine freedom of thought and expression and the foundations of historical science, create divisions among French citizens and cause diplomatic problems. The applicant added that Robert Badinter, the former President of the French Constitutional Council, had expressed similar views, having observed in particular that laws punishing anyone who denied the "Armenian genocide" were at variance with Article 34 of the French Constitution.

85. The applicant, citing Stefan Yerasimos, an Istanbul-born professor at the University of Paris, contended that it was essential to make a distinction between "law" and "history", the purpose of the former being to prove and judge things while the purpose of the latter was to explain things without making value judgments. He submitted that it was therefore the task of the appropriate courts to determine how a particular historical fact was to be characterised under international law and that events should be discussed in a comprehensive manner, taking into account differences of opinion on the basis of conflicting documents. After studying the relevant issues in detail, some people, according to their personal beliefs, might feel the need to apologise or take other initiatives, but others might react differently. The applicant was persuaded that "standardising" and "handcuffing" personal beliefs would not be of benefit to anyone and, moreover, would not change anyone's personal views.

86. On the basis of the foregoing considerations, the applicant submitted that there had been a violation of Article 10 of the Convention.

*- The Government*

87. As to whether the interference had been necessary, the Government submitted that the Swiss courts had been called upon to determine whether the applicant had denied or trivialised events which – assuming they were established as having taken place – would have been characterised as an international crime under public international law. To that end, the courts

had not only relied on political declarations of recognition, but had also found that the authorities issuing such declarations had formed their views on the basis of expert opinions or reports acknowledged as being cogently argued and substantiated. The courts had also examined whether there had been a broad consensus within the community and, if so, whether that consensus was itself based on a broad academic consensus as to whether the events of 1915 to 1917 were to be categorised as genocide. They had also observed that in the general literature on international criminal law, and more specifically on genocide research, the Armenian genocide was itself portrayed as one of the "classic" examples (see point 4.2 of the Federal Court judgment in paragraph 13 above). Accordingly, the cantonal courts could not be criticised for having described the deportations and massacres occurring between 1915 and 1917 as genocide and a clearly established historical fact, and nor could the Federal Court for having found that the conclusion that there was a general consensus to this effect was not arbitrary and that this finding was not at odds with the Federal Council's openness to dialogue in advocating the setting up of a panel of historians (Federal Court judgment, points 4.4 to 4.6).

88. With regard to the applicant's conduct, the Government observed that he had publicly described the Armenians as aggressors of the Turkish people, condemning a matter of broad consensus as an "international lie" and placing the United States and the European Union on the same footing as the "Führer". Furthermore, as the first-instance court had found, the applicant had himself claimed to be a follower of Talaat Pasha, who had placed a decisive role in the context of the events in question. As the Federal Court had noted, the Armenian community identified itself in particular through these events, with the result that the applicant's views constituted a threat to the identity of its members (Federal Court judgment, point 5.2).

89. The Government submitted that these considerations were a sufficient illustration of the racist and nationalistic motives espoused by the applicant, who was seeking to vindicate the acts committed and to accuse the victims of such acts of falsifying history. The present case was thus to be distinguished from the situation examined by the Court in *Jersild v. Denmark* (23 September 1994, Series A no. 298), in which the applicant had not made the objectionable statements himself (ibid., § 31) and his news report could not objectively have appeared to have as its purpose the propagation of racist views and ideas (ibid., § 33).

90. The Government further observed that the applicant himself had confirmed that he would not change his opinion, even if a neutral panel were one day to confirm that the events in question did constitute genocide. The views supported by the applicant could therefore not be said to stem from anything resembling a historical study. On the contrary, they undermined the values on which the fight against racism and intolerance

were based. Since they infringed the rights of the victims' relatives in particular, they were incompatible with the values proclaimed and guaranteed by the Convention, namely tolerance, social peace and non-discrimination.

91. In addition, the Government noted that the applicant had not been prevented from expressing his opinion publicly and that other events of a similar nature had taken place. Consideration should also be given, in the Government's view, to the penalty imposed on the applicant, amounting to ninety day-fines of CHF 100, which were suspended, and a fine of CHF 3,000, whereas Article 261 *bis* of the Criminal Code provided for penalties of up to three years' imprisonment or 360 day-fines of CHF 3,000 (Article 34 of the Criminal Code). The sanction had therefore not been disproportionate to the legitimate aims pursued.

92. In view of the foregoing, the domestic courts had not overstepped the margin of appreciation they had enjoyed in the present case and there had therefore been no violation of Article 10.

*- The Turkish Government, third-party intervener*

93. The Turkish Government, intervening in the proceedings as a third party, submitted that it was essential to bear in mind that the applicant had never denied that massacres and deportations had taken place within the territory of the former Ottoman Empire in 1915. What he disputed, however, was simply their legal characterisation as "genocide" for the purposes of international and Swiss law. In the Turkish Government's submission, there was a significant difference between ongoing debate about the legal aspects of the events of 1915 and denial of "clearly established historical facts". The Turkish Government observed that it was not the Court's task to settle matters forming the subject of ongoing debate about certain historical events and their interpretation (citing, among other authorities, *Lehideux and Isorni*, cited above, § 47). In their submission, the categorisation of the 1915 events was still the subject of debate among historians.

94. The third party was, moreover, persuaded that the measure had not been necessary in a democratic society. They noted that the applicant was far from being the only person holding the view that the events in question did not constitute genocide according to the legal definition. In that connection they quoted a paragraph from a reply dated 8 March 2008 by a United Kingdom Government representative to a question from that country's Parliament: "The position of the Government on this issue is long-standing. The Government acknowledge the strength of feeling about this terrible episode of history and recognise the massacres of 1915-16 as a tragedy. However, neither this Government nor previous Governments have judged that the evidence is sufficiently unequivocal to persuade us that these events should be categorised as genocide as defined by the 1948 UN

Convention on Genocide" (paragraph reproduced in the *British Yearbook of International Law*, vol. 79, 2008, pp. 706-07).

95. The Turkish Government further submitted that there had not been any criminal convictions in any other member State of the Council of Europe for denial of the "Armenian genocide" under the heading of racial discrimination or of any other offence. They added that no States had introduced legislation prescribing criminal penalties for denial of the "Armenian genocide" and that, besides Switzerland, only two European States, namely Luxembourg and Spain, had passed laws criminalising genocide denial in general. In the third party's submission, this clearly showed that there could be no question of a "pressing social need" within the meaning of the Court's case-law concerning Article 10 § 2. In addition, Switzerland had no specific historical experience, in relation to the events occurring within the territory of the former Ottoman Empire in 1915, that might have given rise to a "pressing social need" to punish a person for racial discrimination on the basis of statements disputing the legal characterisation of such events as "genocide". Lastly, the Turkish Government submitted that the fact that the applicant had been given a criminal penalty without having been prevented from publicly expressing his opinion and that other events of a similar nature had taken place constituted further proof that no such need had been present.

96. The Turkish Government doubted that the interference with the applicant's freedom of expression had been proportionate to the aim pursued. They did not in any way deny the vital importance of combating racial discrimination in all its forms and manifestations. However, they were persuaded that the applicant's comments had not been designed to encourage violence, hostility and racial hatred towards the Armenian community in Switzerland. There was no basis for inferring – as the Swiss courts had done – any racist or nationalistic motives, or any intention to discriminate on racial or ethnic grounds, from the applicant's rejection of the legal characterisation of the events of 1915 as "genocide". In that connection, the Turkish Government submitted that, while Holocaust denial was nowadays the main vehicle of anti-Semitism, rejection of the characterisation of the events of 1915 as "genocide" could not have the same effect. Disputing this legal characterisation would in no way amount to encouragement of or incitement to hatred towards the Armenian community. Lastly, unlike in cases involving the National Socialist regime that had been responsible for the Holocaust, there had been no intention to restore any particular government in the applicant's case.

97. Having regard to the foregoing, the Turkish Government concluded that there had been a violation of Article 10 of the Convention.

*(ii) The Court's assessment*

*- Applicable principles*

(α) In general

98. The general principles for assessing the necessity of interference with the exercise of freedom of expression were summarised in *Stoll v. Switzerland* ([GC], no. 69698/01, § 101, ECHR 2007-V) and have been reiterated more recently in *Mouvement raëlien suisse v. Switzerland* ([GC], no. 16354/06, § 48, ECHR 2012) and *Animal Defenders International v. the United Kingdom* ([GC], no. 48876/08, § 100, ECHR 2013):

> "(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it 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 are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'. As set forth in Article 10, this freedom is subject to exceptions, which ... must, however, be construed strictly, and the need for any restrictions must be established convincingly ...
>
> (ii) The adjective 'necessary', within the meaning of Article 10 § 2, implies the existence of a 'pressing social need'. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a 'restriction' is reconcilable with freedom of expression as protected by Article 10.
>
> (iii) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'.... In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts ...."

(β) Concerning historical debate and research

99. The Court further reiterates that while it is an integral part of freedom of expression to seek historical truth, it is not the Court's role to settle historical issues forming part of an ongoing debate among historians (see, *mutatis mutandis*, *Chauvy and Others*, cited above, § 69, and *Lehideux and Isorni*, cited above, § 47). Instead, its task is to consider whether in the instant case the measures taken were proportionate to the aim pursued (see *Monnat v. Switzerland*, no. 73604/01, § 57, ECHR 2006-X).

100. It would also point out that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate of questions of public interest (see *Wingrove v. the United Kingdom*, 25 November 1996, § 58, *Reports* 1996-V; *Lingens v. Austria*, 8 July 1986, § 42, Series A no. 103; *Castells v. Spain*, 23 April 1992, § 43, Series A no. 236; and *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, § 63, Series A no. 239).

101. The Court further reiterates that in exercising its supervisory jurisdiction, it must look at the impugned interference in the light of the case as a whole, including the content of the remarks held against the applicant and the context in which he made them (see *Lingens*, cited above, § 40, and *Chauvy and Others*, cited above, § 70).

102. The principle cited above to the effect that Article 10 also protects information or ideas that may offend, shock or disturb applies likewise, as in the present case, to historical debate, "in a sphere in which it is unlikely that any certainty exists" (see *Monnat*, cited above, § 63) and in which the dispute is still ongoing (see *Lehideux and Isorni*, cited above, § 55).

103. As regards debate on historical matters, the Court has had occasion to observe that the passing of time makes it inappropriate to deal with certain remarks about historical events, many years on, with the same severity as just a few years before. That forms part of the efforts that every country must make to debate its own history openly and dispassionately (see *Monnat*, cited above, § 64, and *Lehideux and Isorni*, cited above, § 55; see also, *mutatis mutandis*, *Editions Plon v. France*, no. 58148/00, § 53, ECHR 2004-IV, in which the Court reiterated the principle that the passage of time must be taken into account in assessing whether a measure such as banning a book was compatible with freedom of expression).

104. As regards the "proportionality" of an interference, the Court reiterates that the nature and severity of the penalties imposed are also factors to be taken into account (see, for example, *Chauvy and Others*, cited above, § 78).

(γ) Case-law in cases against Turkey concerning hate speech, the condoning of violence and the Armenian question

105. In a large number of cases, many of them brought against Turkey, the applicants have complained about their conviction for hate speech or incitement to violence. A select few examples of relevance to the present case are outlined below.

106. In *Erdoğdu and İnce v. Turkey* ([GC], nos. 25067/94 and 25068/94, ECHR 1999-IV) the applicants were convicted of disseminating separatist propaganda through the magazine of which they were the editor and a journalist (ibid., § 48). The Court observed that the magazine had published an interview with a Turkish sociologist in which the latter had explained his opinion on potential changes in the Turkish State's attitude to the Kurdish

question. It found that the interview had been analytical in nature and had not contained any passages which could be described as an incitement to violence. The domestic authorities did not appear to have had sufficient regard to the public's right to be informed of a different perspective on the situation in south-east Turkey, however unpalatable that perspective might have been for them.

In the Court's view, although the reasons given by the Istanbul National Security Court for convicting and sentencing the applicants had been relevant, they could not be considered sufficient to justify the interference with the applicants' right to freedom of expression (ibid., § 52).

107. In *Gündüz v. Turkey* (no 35071/97, ECHR 2003-XI) the applicant was punished for statements classified by the domestic courts as "hate speech". Having regard to the relevant international instruments and its own case-law, the Court emphasised, in particular, that tolerance and respect for the equal dignity of all human beings constituted the foundations of a democratic, pluralistic society. That being so, as a matter of principle it could be considered necessary in certain democratic societies to punish or even prevent all forms of expression which spread, incited, promoted or justified hatred based on intolerance (including religious intolerance), provided that any "formalities", "conditions", "restrictions" or "penalties" imposed were proportionate to the legitimate aim pursued (ibid., § 40).

The Court observed that the television programme at issue in the case before it was about a sect whose followers had attracted public attention. In the Court's view, the comments made by the applicant demonstrated an intransigent attitude towards and profound dissatisfaction with contemporary institutions in Turkey, such as the principle of secularism and democracy. Seen in their context, however, they could not be construed as a call to violence or as hate speech based on religious intolerance (ibid., § 48). The mere fact of defending sharia, without calling for violence to introduce it, could not be regarded as "hate speech" (ibid., § 51).

108. In *Erbakan v. Turkey* (no. 59405/00, 6 July 2006) the applicant was found guilty for comments made in a public speech which were held to have constituted incitement to hatred and religious intolerance (ibid., § 59). The Court found that such comments – assuming they had in fact been made – by a well-known politician at a public gathering were more indicative of a vision of society structured exclusively around religious values and thus appeared hard to reconcile with the pluralism typifying contemporary societies, where a wide range of different groups were confronted with one another (§ 62). Pointing out that combating all forms of intolerance was an integral part of human-rights protection, the Court held that it was crucially important that in their speeches politicians should avoid making comments liable to foster intolerance (§ 64).

However, having regard to the fundamental nature of free political debate in a democratic society, the Court concluded that the reasons given to justify

the applicant's prosecution were not sufficient to satisfy it that the interference with the exercise of his right to freedom of expression had been "necessary in a democratic society".

109. In *Dink v. Turkey* (nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, 14 September 2010) the applicant was found guilty of denigrating "Turkishness" (*Türklük*). The Court noted, firstly, that an examination of the series of articles in which the applicant had made the statements in issue showed clearly that his use of the term "poison" denoted the "perception of Turks" among Armenians and the "obsessive" nature of the Armenian diaspora's campaign to secure the Turkish people's recognition of the events of 1915 as genocide. It observed that Fırat Dink had asserted that this obsession, which meant that Armenians still viewed themselves as "victims", had poisoned the lives of members of the Armenian diaspora and prevented them from developing their own identity on a healthy basis. The Court concluded, contrary to the arguments put forward by the Turkish Government, that these assertions, which were in no way directed at "the Turks", could not be treated as amounting to hate speech (ibid., § 128).

The Court also took into account the fact that the applicant had been writing in his capacity as a journalist and editor-in-chief of a Turkish-Armenian bilingual newspaper, commenting on issues concerning the Armenian minority in the context of his role as a player on the Turkish political scene. When Fırat Dink had expressed his resentment at attitudes which in his view amounted to denial of the incidents of 1915, he had merely been conveying his ideas and opinions on an issue of indisputable public concern in a democratic society. The Court considered it essential in such societies that the debate surrounding historical events of a particularly serious nature should be able to take place freely. It further noted that "it is an integral part of freedom of expression to seek historical truth" and that "it is not the Court's role to arbitrate" on an underlying historical matter forming part of an ongoing public debate. Furthermore, the Court found that the articles by Fırat Dink had not been "gratuitously offensive" or insulting, and had not fostered disrespect or hatred (ibid., § 135, with references to the case-law).

Accordingly, there had been no "pressing social need" to find Fırat Dink guilty of denigrating "Turkishness".

110. Mention should also be made of the case of *Cox v. Turkey* (no. 2933/03, 20 May 2010), although it differs from the cases cited above. The case was brought by a United States national who had taught at two Turkish universities in the 1980s. In 1986 she was deported from Turkey and banned from re-entering the country for having stated in front of students and colleagues that "the Turks [had] assimilated Kurds" and "expelled and massacred Armenians". She was deported on two further occasions. In 1996 she brought proceedings seeking to have the ban lifted, but was unsuccessful.

The Court observed that the applicant had been precluded from re-entering the country because of her controversial statements concerning the Kurdish and Armenian questions, which continued to be the subject of heated debate, not only in Turkey but also internationally.

However, the Court concluded that it was impossible to determine from the domestic courts' reasoning how the applicant's views were harmful to Turkey's national security. Nor could it accept that "the situation complained of by the applicant did not fall within the ambit of any of her fundamental rights". Bearing in mind that there had never been any indication that the applicant had committed an offence or been engaged in activities which could clearly be seen as harmful to Turkey, the reasons adduced by the domestic courts could not be regarded as sufficient and relevant justification for the interference with her right to freedom of expression.

*- Application of these principles in the present case*

111. The Court considers it important to make clear at the outset that it is not required to determine the actual nature of the massacres and deportations suffered by the Armenian people at the hands of the Ottoman Empire from 1915 onwards, or the appropriateness of categorising such events in legal terms as "genocide", within the meaning of Article 261 *bis* § 4 of the Criminal Code. It is primarily for the national authorities, notably the courts, to interpret and apply domestic law (see, among many other authorities, *Lehideux and Isorni*, cited above, § 50). The Court's task is merely to review under Article 10 the decisions delivered by the appropriate national authorities pursuant to their power of appreciation.

To determine whether the applicant's conviction was guided by a "pressing social need", the Court must weigh the requirements of protecting others, namely the honour of the families and relatives of the victims of the atrocities, against the applicant's freedom of expression. It should examine in particular whether the interference complained of, in the light of the circumstances of the case as a whole, was proportionate to the legitimate aim pursued and whether the reasons adduced by the national authorities to justify it are relevant and sufficient.

(α) Nature of the applicant's statements and the domestic courts' margin of appreciation

112. The Court notes that it has not been disputed that the question whether the events that took place during 1915 and subsequent years may be characterised as "genocide" is of considerable interest to the public. The applicant's statements were made in the context of a controversial and heated debate. As regards the nature of his comments, the Court notes that he is a doctor of laws and chairman of the Turkish Workers' Party. He also

describes himself as a historian and writer. Although the domestic authorities found that his comments were more "nationalistic" and "racist" than historical in nature (see point 5.2 of the Federal Court's judgment in paragraph 13 above), the substance of his statements and arguments must nevertheless be viewed against a historical background, as is indicated in particular by the fact that one of his speeches took place at a conference commemorating the 1923 Treaty of Lausanne. In addition, the applicant was speaking as a politician about an issue pertaining to relations between two States, namely Turkey and Armenia, the people of the latter country having been the victims of massacres and deportations. Since this matter concerned the categorisation of a crime, it also had a legal connotation. The Court therefore considers that the applicant's comments were of a historical, legal and political nature.

113. Having regard to the foregoing, and especially to the public interest in the applicant's statements, the Court considers that the domestic authorities' margin of appreciation was reduced.

(β) Method adopted by the domestic authorities to justify the applicant's conviction: the notion of "consensus"

114. The principal ground relied on by the Swiss courts and the respondent Government relates to the apparent existence of a "general consensus" within the community, and especially the academic community, as to the legal characterisation of the events in question. The Court does not dispute that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law (see *Winterwerp v. the Netherlands*, 24 October 1979, § 46, Series A no. 33). It nevertheless considers it appropriate to add the following observations about the domestic authorities' use of the notion of "consensus".

115. The Federal Court has itself admitted that there is no unanimity in the community as a whole concerning the legal characterisation in issue. Both the applicant and the Turkish Government cited numerous sources – which have not been contested by the respondent Government – attesting to diverging views, and argued that it would be very difficult to speak of a "general consensus". The Court agrees, and would point out that there are differing views even among the various political bodies in Switzerland: whereas the National Council – the lower house of the Federal Parliament – has officially recognised the Armenian genocide, the Federal Council has repeatedly refused to do so (see points 4.2 and 4.5 of the Federal Court judgment in paragraph 13 above). In addition, it appears that to date, only about twenty States (out of more than 190 in the world) have officially recognised the Armenian genocide. In some countries, as in Switzerland, recognition has not come from the Government but only from Parliament or one of its chambers (see in this connection the declaration of 24 April 2013

by certain members of the Parliamentary Assembly of the Council of Europe, paragraph 29 above).

116. The Court also agrees with the applicant that "genocide" is a clearly defined legal concept. It denotes an aggravated internationally wrongful act for which responsibility may nowadays be attributed either to a State, in accordance with Article 2 of the 1948 Convention (see paragraph 18 above), or to an individual, notably on the basis of Article 5 of the Rome Statute (see paragraph 20 above). According to the case-law of the ICJ and the International Criminal Tribunal for Rwanda (see paragraphs 21-23 above), for the crime of genocide to be made out, it is not sufficient for the members of a particular group to be targeted because they belong to that group, but the acts in question must at the same time be perpetrated with intent to destroy the group as such in whole or in part (*dolus specialis*). Genocide is therefore a very narrow legal concept which, moreover, is difficult to prove. The Court is not satisfied that the "general consensus" to which the Swiss courts referred as a basis for the applicant's conviction can be relied on in relation to these very specific points of law.

117. In any event, it is even doubtful that there can be a "general consensus", particularly among academics, about events such as those in issue in the present case, given that historical research is by definition subject to controversy and dispute and does not really lend itself to definitive conclusions or the assertion of objective and absolute truths (see, to similar effect, the Spanish Constitutional Court's judgment no. 235/2007, referred to in paragraphs 38-40 above). In this connection, a clear distinction can be made between the present case and cases concerning denial of crimes relating to the Holocaust (see, for example, the case of *Robert Faurisson v. France*, determined by the UN Human Rights Committee on 8 November 1996, Communication no. 550/1993, doc. CCPR/C/58/D/550/1993 (1996)). Firstly, the applicants in those cases had not disputed the mere legal characterisation of a crime but had denied historical facts, sometimes very concrete ones, such as the existence of gas chambers. Secondly, their denial concerned crimes perpetrated by the Nazi regime that had resulted in convictions with a clear legal basis, namely Article 6, sub-paragraph (c), of the Charter of the (Nuremberg) International Military Tribunal, annexed to the London Agreement of 8 August 1945 (see paragraph 19 above). Thirdly, the historical facts challenged by the applicants in those cases had been found by an international court to be clearly established.

118. The Court therefore considers that the method used by the domestic courts to secure the applicant's conviction was questionable.

(γ) Whether there was a pressing social need

119. The Court considers that it has already shown, in determining the question of the application of Article 17 of the Convention, that the comments made by the applicant were not likely to stir up hatred or violence (see paragraphs 51-54 above). Furthermore, it shares the Turkish Government's opinion that Holocaust denial is nowadays the main vehicle of anti-Semitism. The Court considers that this is a phenomenon which is still prevalent and which calls for firmness and vigilance on the part of the international community. It cannot be maintained that the rejection of the legal characterisation of the tragic events of 1915 and subsequent years as "genocide" could have similar repercussions.

120. In addition, the study dated 19 December 2006 by the Swiss Institute of Comparative Law, which was produced to the Court by the respondent Government (see paragraph 30 above), shows that at that time, only two of the sixteen countries analysed – namely Luxembourg and Spain – had introduced a criminal offence of genocide denial, generically and without restricting themselves to the crimes perpetrated by the Nazi regime. All the other States had apparently not felt a "pressing social need" to introduce similar legislation. In this connection, the Court agrees with the Turkish Government that Switzerland has not demonstrated why there is a stronger social need there than in other countries to punish an individual for racial discrimination on the basis of statements merely challenging the legal characterisation as "genocide" of events that took place within the territory of the former Ottoman Empire in 1915 and subsequent years.

121. Furthermore, since the publication of the study in 2006, there have been two significant developments. Firstly, in a judgment of 7 November 2007 (no. 235/2007) the Spanish Constitutional Court declared unconstitutional the offence of "denial" of genocide laid down in the first sub-paragraph of Article 607.2 of the Criminal Code (see paragraphs 36-38 above). It held, in particular, that mere denial of a crime of genocide did not presuppose direct incitement to violence and that simply disseminating conclusions as to the existence or otherwise of specific acts, without making any value judgments about them or about their illegality, was protected by academic freedom (ibid.).

122. In addition, the French Constitutional Council has declared unconstitutional the Law on criminalising denial of the existence of genocides recognised by law (see paragraph 33 above). In particular, it held that the Law infringed freedom of expression and freedom of research, observing that "freedom of expression and communication is all the more precious since its exercise is a precondition for democracy and one of the guarantees of respect for other rights and freedoms. Any restrictions imposed on the exercise of this freedom must be necessary, appropriate and proportionate to the aim pursued" (point 5) and that "in thereby making it an

offence to dispute the existence and the legal characterisation of crimes which it has itself recognised and characterised as such, Parliament has interfered in an unconstitutional manner with the exercise of freedom of expression and communication" (point 6).

123. Although these two developments do not strictly constitute precedents that are binding on it, the Court cannot remain impervious to them. It would point out in this connection that France explicitly recognised the Armenian genocide in a law of 2001 (see paragraph 31 above). It considers that the decision of the Constitutional Council provides a clear illustration that there is in principle no contradiction between official recognition of certain events as genocide and the unconstitutionality of imposing criminal sanctions on anyone who questions the official view. Moreover, other States that have recognised the Armenian genocide – in the vast majority of cases, through their parliaments – have not deemed it necessary to pass laws introducing criminal sanctions, being mindful that one of the main aims of freedom of expression is to protect minority views which may contribute to debate on questions of general interest that are not entirely settled.

124. Furthermore, the Court observes that in General Comment no. 34 concerning freedom of opinion and expression under Article 19 of the International Covenant on Civil and Political Rights, the UN Human Rights Committee expressed its conviction that "[l]aws that penalize the expression of opinions about historical facts are incompatible with the obligations that the Covenant imposes on States parties ..." (see paragraph 49 of the General Comment, cited in paragraph 27 above). The Committee was also convinced that "[t]he Covenant does not permit general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events" (ibid.).

125. Lastly, it should also be noted that the present case involves the first conviction of an individual under Article 261 *bis* of the Criminal Code in the context of the Armenian events. Moreover, the applicant, together with eleven other Turkish nationals, was acquitted by the Berne-Laupen District Court on 14 September 2001 on charges of genocide denial within the meaning of that Article, no intent to discriminate being found on the part of the accused.

126. In view of the foregoing, the Court doubts that the applicant's conviction was required by a "pressing social need".

(δ) Proportionality of the measure to the aim pursued

127. The Court further reiterates that the nature and severity of the penalties imposed are factors to be taken into account when assessing the proportionality of the interference in issue (see, for example, *Chauvy and Others*, cited above, § 78). It must also satisfy itself that the penalty does not amount to a form of censorship intended to discourage criticism. In the

context of a debate on a topic of public interest, such a sanction is likely to deter contributions to public discussion of issues affecting the life of the community (see, to similar effect, *Stoll*, cited above, § 154). In that connection, the conviction itself may in some cases be more important than the minor nature of the penalty imposed (see, for example, *Jersild*, cited above, § 35, and *Lopes Gomes da Silva v. Portugal*, no. 37698/97, § 36, ECHR 2000-X).

128. In the present case, the applicant was ordered to pay ninety day-fines of CHF 100, suspended for two years, a fine of CHF 3,000, which could be replaced by thirty days' imprisonment, and compensation of CHF 1,000 to the Switzerland-Armenia Association for non-pecuniary damage. The Court considers that although the severity of these sanctions – one of which may be converted into a custodial sentence – is relative, they are nevertheless capable of having the deterrent effects described above.

(ε) Conclusions

129. In view of the foregoing, and especially in the light of the comparative-law material, the Court considers that the reasons given by the domestic authorities to justify the applicant's conviction were not all relevant and, taken as a whole, were insufficient. The domestic authorities did not show, in particular, that the applicant's conviction met a "pressing social need" or that it was necessary in a democratic society for the protection of the honour and feelings of the descendants of the victims of the atrocities dating back to 1915 and subsequent years. The domestic authorities thus overstepped the limited margin of appreciation afforded to them in the present case, which relates to a debate of undeniable public interest.

130. There has therefore been a violation of Article 10 of the Convention.

## II. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

131. Arguing that the wording of Article 261 *bis* § 4 of the Swiss Criminal Code was very vague, the applicant submitted that his criminal conviction breached the principle of "no punishment without law" enshrined in Article 7 of the Convention.

132. The complaint under Article 7 does not raise any separate issue from those examined by the Court in connection with the complaint under Article 10 of the Convention, particularly as regards the existence of a basis in law for the interference in issue (see paragraphs 66-72 above). The other parties to the proceedings were, moreover, not notified of this complaint.

133. Accordingly, there is no need to examine separately the admissibility or merits of the complaint under Article 7 of the Convention.

## III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

134. Relying on Article 6 of the Convention, the applicant complained that he had not been granted a visa by the Swiss Government and had therefore not been able to meet his lawyer during the judicial proceedings. The applicant also complained that the Lausanne District Court and the Federal Court had omitted to examine certain documents submitted by him. He further contended that those courts had committed a "major error in the assessment of the evidence" in failing to take into account, without providing any explanation, a judgment of the Berne-Laupen District Court (the judgment of 14 September 2001 – see paragraph 17 above).

135. Lastly, the applicant relied on Articles 14, 17 and 18 of the Convention. He submitted that the Swiss courts had used discriminatory language against him in their judgments.

136. The Court considers that these complaints – to the extent that they are sufficiently substantiated and comprehensible – are unfounded and/or have not been raised before the domestic authorities as required by Article 35 § 1 of the Convention.

137. It follows that these complaints are manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

## IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

138. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

### A. Damage

139. The applicant claimed 20,000 euros (EUR) in respect of pecuniary damage, without specifying the nature of the damage. He also sought EUR 100,000 in respect of the non-pecuniary damage he had suffered.

140. The respondent Government argued that the applicant had not proved that he had in fact sustained any pecuniary damage, particularly as he had not shown that he had actually paid the fine of 3,000 Swiss francs (CHF) or the sum of CHF 1,000 which he had been ordered to pay to the Switzerland-Armenia Association. As regards non-pecuniary damage, the Government submitted that the finding of a violation of Article 10 would in itself constitute just satisfaction.

141. The Court agrees with the respondent Government that the claim in respect of pecuniary damage has not been sufficiently substantiated.

142. With regard to non-pecuniary damage, the Court considers, in the light of all the circumstances of the case, that the finding of a violation is sufficient to remedy any harm that the applicant's conviction in breach of Article 10 may have caused him.

143. It follows that no award is to be made in respect of damage.

### B. Costs and expenses

144. The applicant also claimed EUR 20,000 to cover his travel expenses and those incurred by his lawyer and experts.

145. The Government contended, as their main submission, that no award should be made to the applicant under this head, since his claim was not sufficiently substantiated. In the alternative, a sum of CHF 9,000 would in their view cover all the costs and expenses for the proceedings before the domestic courts and the Court.

146. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum (see *Philis v. Grece (no. 1)*, 27 August 1991, § 74, Series A no. 209). In the present case, and having regard to the documents in its possession and its case-law, the Court considers that the applicant's claim is not sufficiently substantiated and therefore dismisses it.

147. It follows that no award is to be made in respect of costs and expenses.

## FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the complaint under Article 10 admissible and the complaints under 6, 14, 17 and 18 of the Convention inadmissible;

2. *Holds*, by five votes to two, that there has been a violation of Article 10 of the Convention;

3. *Holds*, unanimously, that there is no need to examine separately the admissibility or merits of the complaint under Article 7 of the Convention;

4. *Holds*, by five votes to two, that the finding of a violation of Article 10 constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant;

5. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in French, and notified in writing on 17 December 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

| Stanley Naismith | Guido Raimondi |
| --- | --- |
| Registrar | President |

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) joint concurring opinion of Judges Raimondi and Sajó;

(b) joint partly dissenting opinion of Judges Vučinić and Pinto de Albuquerque.

G.R.A.
S.H.N.

# JOINT CONCURRING OPINION OF JUDGES RAIMONDI AND SAJÓ

There are occasions when judges of human rights courts have a special moral obligation to account for their position to people affected by the judgment. This is such an occasion.

Why do we have a special obligation *vis-à-vis* the Armenians? Because government-led destruction of a people always commands particular attention and imposes special obligations on all of us. From 1915 to 1917, the Armenian people experienced an unimaginable degree of suffering. This tragedy has had lasting consequences even for the fifth generation that grew up after the *Meds Yeghern* (Great Crime), in part because that past injustice and suffering has never been fully acknowledged or remedied.

Many people in the Armenian community may feel abandoned, even betrayed, by the majority's position in this case. They may conclude that once again they have been treated with less understanding and respect than they deserve given the calamities that have destroyed Armenian communities in the past. It is in anticipation of this reaction that we provide this account.

Many Armenians believe that true recognition of the Great Crime requires an unconditional application of the term genocide. However, it is often rightly said that determining truth in historical matters is not the role of the law, and even less that of the courts. This does not prevent the courts from apportioning historical responsibilities. The determination of legal responsibility inevitably requires a reading of history covering more than facts alone. Examining the period in question in the light of earlier massacres (for example, the Hamidian massacres), we are convinced that there is sufficient evidence (a terribly legalistic word in the present context) to show that Armenian citizens of the Ottoman Empire were subjected to a State policy that resulted in the death and suffering of hundreds of thousands of people (estimates range from 600,000 to 1,500,000) and brought Armenians as a distinct community to the verge of extinction. It is true that the specific factors which triggered those events remain contested. Regardless of this, there can be no acceptable reason for State action – or even inaction, as the case may be – that resulted in such an abominable tragedy, in the death of children and all those other innocent people.

We are left with the symbolic and moral obligation to define and label these events, which is where we run into tensions between law, moral truth and history. We know that when Raphael Lemkin (*Axis Rule in Occupied Europe*, 1944) coined the term genocide, he had in mind the 1915 massacres and deportations. The use of the term to denote these events is appropriate in everyday discourse, and cannot give rise to punishment. This is how we read the *Dink v. Turkey* judgment (nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, 14 September 2010).

When it comes to punishment for genocide denial and official recognition of certain historical episodes as genocides, many countries refer to specific events and determinations made by international courts, while others make special provisions in domestic law to distinguish the genocides whose denial is punishable, based on the modern legal definition of genocide.

This narrow specification serves legal certainty, which is of the utmost importance in the context of free speech. But it is here that Armenians, and other communities who suffered extreme injustice prior to the crystallisation of the modern concept of genocide or who were simply left out after 1948 for political reasons, suffer an additional injustice – because the Great Crime occurred in 1915, prior to the development of the term "genocide" and subsequent genocide law. Some countries have therefore enacted special laws which expressly speak of the Armenian genocide and which make its denial a crime.

This is not the case in Switzerland. The Swiss Federal Court decided to overcome this difficulty in the present case by extending the definition of genocide to the Great Crime, stating that this was "generally accepted" as constituting genocide. Such an extension of a legal concept is problematic in criminal law and, in the circumstances of this case, incompatible with the standards of freedom of expression the Court is called upon to protect within the framework of the Convention.

In determining whether there has been a violation of the right to freedom of expression, the Court is obliged to assess whether the interference with speech was prescribed by law, where the law is defined, concrete and foreseeable. The definition of genocide is clear in international law, and does not include references to the same concepts that are accepted by the public at large. Of course, even criminal-law concepts have a certain openness to common-sense interpretations. But here we are dealing with the criminalisation of expression. The Federal Court's interpretation is overly broad in that a speaker will never know which statements fall into the punishable category, resulting in a chilling effect. Moreover, Swiss law does not provide for exceptions or defences in the fields of science and art.

The level of precision required of domestic legislation depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed (see *Hashman and Harrup v. the United Kingdom* [GC], no. 25594/94, § 31, ECHR 1999-VIII, and *Groppera Radio AG and Others v. Switzerland*, 28 March 1990, § 68, Series A no. 173).

In this case, the applicant could not have foreseen that his comments would be held to be criminal in nature. Previously there had been prosecutions for comparable statements resulting in acquittals, indicating that at the level of the lower courts the Federal Court's later assumption about the common understanding of genocide was not obvious. Similarly,

there is political division in Switzerland among the two legislative chambers regarding the characterisation of the Great Crime as genocide.

The Court will usually not pursue its examination of a complaint any further once an interference is found which was not prescribed by law. We consider that it should have gone further in this case.

The Court has construed the purpose of the limitation of freedom of expression in the present case as being a means to protect the honour of those who perished in the Great Crime. However, this purpose is secondary at best and it tips the proportionality exercise towards a violation: remembrance of the dead, while evidently important, may be outweighed by the need not to penalise a purportedly scholarly speech made by a living person today.

But the Swiss Government also argued that public order was served by the criminalisation of genocide denial. To our mind this is undeniable in view of the actual circumstances of the case. The Court should be especially alert in cases where the purposes of an interference are provided *ex post facto*, only in the course of the proceedings before the Court. This is not the case here: the genocide-related provision in the Criminal Code was introduced to comply with Switzerland's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (1965).

Moreover, the Federal Court, to justify its own position, stated: "The applicant's conviction is thus intended to protect the human dignity of members of the Armenian community, who identify themselves through the memory of the 1915 genocide." Criminalisation of statements held to constitute attacks on the identity of certain individuals is deeply troubling (see the Court's remarks on "Turkishness", for example in *Dink*) – although of course, we are not in a position to pass judgment on the formation of a nation's identity or a national community where it is based on national tragedy. This is a contested issue (see Hrant Dink's critical position in that regard in *Dink*).

The Federal Court did not elaborate on that point. Dignity as a ground for restriction of rights is ambiguous, even if dignity is often understood as a fundamental value for human rights protection. Of course, the dignity of an individual may be violated when the humanity of the group is denied or diminished. This is the case when their belonging to humanity on equal grounds is denied on the grounds of their belonging to a group that is alleged not to be part of humanity. However, we do not see how the dignity of members of the Armenian community is affected in the above sense by the denial of the existence of a master plan of extermination by Talaat Pasha and his cronies, unless such a statement can be understood as calling the genocide-related component of the Armenian identity a falsification. This is not, however, the plain meaning of the denial of the legal assertion made by

the applicant; and it is certainly not the meaning attributed to it by the Swiss authorities.

Although the applicant's remark was disrespectful, even outrageously so, it does not necessarily diminish the humanity of the affected group. Of course, negationist statements may constitute a crime to the extent that they incite hatred and violence and represent an actual danger given the history and social conditions in the society in question. However, none of these elements were present in Switzerland.

Rather, the primary purpose of the law and of the specific interference with the applicant's freedom of expression revolves around racial discrimination. ("Racial" includes national discrimination, just as genocide can be carried out not only against an ethnic group but also against a religious or national community.) The approach taken by the law as interpreted in this specific case is that all speech that denies the legal characterisation of the destruction of a people is racist or racially discriminatory, or amounts to an act of discrimination. Such unconditional criminalisation at the level of the law makes it practically impossible to take the freedom-of-expression aspects of the utterances into consideration. Speech, including disrespectful scholarly speech, is automatically turned into a racially discriminatory act.[1]

The Court rightly found it necessary to undertake *sponte sua* an analysis under Article 17. The unconditional criminalisation of the denial of genocide (extended to the 1915 events or applied to them by implication) means that such negation amounts to an abuse of rights (see the French courts' position in the *Faurisson* case (cited below), in which revisionist statements were treated as aggression and not speech). Given the Court's case-law in the context of Articles 10 and 17, a speech act of this kind must be actually destructive and not just offensive in theory. Where the Court has found an abuse for the purposes of Article 17, it has done so because Article 10 had been relied on by groups with totalitarian motives (see *Vajnai v. Hungary*, no. 33629/06, § 24, ECHR 2008) and because the speech act itself had destructive potential.

The construction of speech in criminal law as an unconditional crime reflects Article 17 considerations and remains inherently problematic, among other reasons because there is little opportunity to consider the

[1] For a possible consequence of this approach, consider the case of Bernard Lewis. In an interview with *Le Monde* Professor Lewis stated, among other things: "There is no serious proof of a decision and a plan by the Ottoman Government to exterminate the Armenian nation." Professor Lewis was found liable on 21 June 1995 (civil judgment, Paris *tribunal de grande instance*, on the basis of Article 1382 of the Civil Code) and ordered to pay one franc in damages to the claimant associations, which had accused him of "negationism". In its judgment the court held: "In concealing the aspects contradicting his thesis ... he ... failed in his duties of objectivity and caution by expressing himself unequivocally ... [accordingly,] his statements, which are capable of unjustly reviving the pain of the Armenian community, are wrongful and warrant an award of compensation."

freedom of expression aspects within the unconditional setting of criminal law, where the utterance of certain words is a crime *per se*, without any further possibility of a proportionality analysis.

In its Views in the case of *Robert Faurisson v. France* (Communication no. 550/1993, UN Doc. CCPR/C/58/D/550/1993(1996)), the United Nations Human Rights Committee expressly admitted that the application of the terms of the Gayssot Act, which, in their effect, made it a criminal offence to challenge the conclusions and the verdict of the International Military Tribunal at Nuremberg, could lead to decisions or measures that were incompatible with the International Covenant on Civil and Political Rights.

According to the present judgment, the applicant expressed his views as a scholar on a matter of historical debate. The Federal Court seems to have had a slightly different interpretation: "With regard to intent, the Criminal Court found that [the applicant], a doctor of laws, politician and self-styled writer and historian, had acted in full knowledge of the consequences, stating that he would never change his position, even if a neutral panel should one day conclude that the Armenian genocide did indeed take place" (see paragraph 13 of the judgment). In our view, the applicant tried to use historical arguments in the courtroom to prove his point; however, his original remarks were not made in the context of a scholarly debate, nor was his attitude truly scholarly, as he *ab ovo* excluded scholarly evidence that would be contrary to his views. The impugned statements formed part of a political debate on a matter of public interest, intended to influence Swiss parliamentary (legislative) policy. We agree, however, that the freedom of research is at stake in the evaluation of the case.

The Federal Court seems to accept that the applicant did not contest the occurrence of the massacres, and his "negationism" consisted in the fact that he tried to put forward an alternative cause of those events: "It should be noted, moreover, that the appellant has not denied the existence either of massacres or of deportations ..., which cannot be categorised, even if one exercises restraint, as anything other than crimes against humanity ... Justification of such crimes, even with reference to the law of war or alleged security considerations, will in itself fall foul of Article 261 *bis* § 4 of the Criminal Code." We find the applicant's arguments, namely that an "Armenian aggression" served as the origin of the tragic events, more than troubling. Under particular circumstances (see, conversely, *Fáber v. Hungary*, no. 40721/08, 24 July 2012) such remarks, combined with negationist discourse, might have resulted in a clear and present danger of incitement to hatred, the standard applied by the Court in similar cases for finding that the interference of the criminal law was proportionate (see *Gül and Others v. Turkey*, no. 4870/02, § 42, 8 June 2010).

In the present case, however, there is no evidence that the speech in question constituted direct incitement to hatred amounting to discrimination. Was it necessary in the democratic society of Switzerland to punish the

applicant for the statements he made? We share the Court's position that the rejection of the legal characterisation of the events of 1915 was not in itself sufficient to amount to incitement of hatred towards the Armenian people.

In *Faurisson* it was argued that the author's revisionist discourse incited his readers to anti-Semitic behaviour. Conversely, in the present case the applicant can be said to have expressed anti-imperialist sentiments in line with his political views, rather than anti-Armenian sentiment; he attributes what he calls the "genocide lie" to international imperialism rather than to Armenians themselves.

As a rule, incitement to hatred has to be directed against identifiable individuals and is not understood as a form of criminal group libel. The concurring opinion in *Faurisson* by Elizabeth Evatt and David Kretzmer, co-signed by Eckart Klein, refers to the possibility of an exception[2]: "However, there may be circumstances in which the right of a person to be free from incitement to discrimination on grounds of race, religion or national origins cannot be fully protected by a narrow, explicit law on incitement ... This is the case where, in a particular social and historical context, statements that do not meet the strict legal criteria of incitement can be shown to constitute part of a pattern of incitement against a given racial, religious or national group, or where those interested in spreading hostility and hatred adopt sophisticated forms of speech that are not punishable under the law against racial incitement, even though their effect may be as pernicious as explicit incitement, if not more so."

We consider that these circumstances should have been clearly demonstrated in the case at hand. In their absence, the criminalisation of the applicant's speech, even if it were held to border on negationism, does not satisfy the necessity requirement; thus, the criminal punishment in the present case is disproportionate. The legitimate objective of the law could have been achieved by a less drastic provision rather than legislative dogma that could not be challenged, no matter what the object behind that challenge or its likely consequences.

[2] We do not intend to endorse their conclusions regarding the facts of that case.

# JOINT PARTLY DISSENTING OPINION OF JUDGES VUČINIĆ AND PINTO DE ALBUQUERQUE

1. The *Perinçek* case raises two fundamental legal questions which the European Court of Human Rights ("the Court") has never dealt with, namely the international recognition of the Armenian genocide and the criminalisation of the denial of this genocide. Our purpose is to discuss these issues as thoroughly as possible in the limited confines of this opinion, while believing that issues of this magnitude require and deserve a judgment of the Grand Chamber. Despite having many doubts as to the admissibility of the applicant's complaint in the light of Article 17 of the European Convention on Human Rights ("the Convention"), we eventually agreed to examine it on the merits in order to address all the legal arguments raised by the applicant under Article 10 of the Convention. We do not want to avoid thorny legal questions, under the pretext that the impugned declarations are *per se* contrary to the values underlying the Convention, as they clearly seem to be prima facie. In any case, after much reflection, we reached the conclusion that there was no violation of Article 10 in the present case. We agree, however, that there is no need to examine separately the Article 7 complaint.

## The international recognition of the Armenian genocide

2. By a formal declaration of the National Council of 16 December 2003, the respondent State recognised that the events affecting the Armenian people under the Ottoman Empire during 1915 amounted to "genocide"[1]. In accordance with that official State position, the Police Court, the Criminal Cassation Division of the Cantonal Court and the Federal Court considered that the Armenian genocide was an historical fact recognised by the Swiss State and society, for the purposes of Article 261 *bis* § 4 of the Swiss Criminal Code. Consequently, the national courts found that there was a legal basis in Swiss society for punishing the denial of the Armenian genocide. This conclusion is not arbitrary.

3. Switzerland is not alone in recognising the Armenian genocide, since this genocide has been recognised by the Turkish State itself, by personalities, institutions and governments which were contemporaneous to the massacres, and afterwards by international organisations, national and regional governments and national courts from the four corners of the world.

[1] Prior to that date, the legislature had already affirmed that the Armenian genocide was one of the examples to which the new criminal offence provided for in paragraph 4 of Article 261 *bis* of the Criminal Code should be applied (see Official Gazette of the Federal Assembly (*Bulletin Officiel de l'assemblée fédérale – Conseil national*), 1993, p. 1076).

4. In fact, soon after the tragic events, the Turkish State itself recognised the Armenian "massacres" and brought to justice some of those responsible for them. This laudable act of contrition on the part of the Turkish State occurred in two sets of proceedings. The central criminal procedure was the court-martial trial of the former Ottoman Empire Grand Vizier Talaat Pasha, the former Minister of War Enver Pasha, the former Minister of the Navy Cemal Pasha, the former Minister of Education Nazım Bey and other former ministers and high-ranking members of the Union and Progress Party (*İttihat ve Terakki Cemiyeti*), some of the defendants being tried *in absentia*. The court martial delivered its verdict on 5 July 1919, imposing the death penalty on several defendants for various crimes, including the "massacres" of Armenians, and therefore confirming the indictment of the defendants, according to which "The massacre and destruction of the Armenians were the result of decisions by the Central Committee of *İttihat*" [2]. The legal basis for the convictions and sentences was formed by Articles 45 and 55 of the Turkish Criminal Code.

5. The second set of criminal proceedings included various criminal proceedings with dozens of defendants, such as the proceedings against the regional party leaders (judgment delivered on 8 January 1920), the proceedings concerning the massacres and deportations in the *sanjak* of Yozgat (judgement delivered on 8 April 1919, with a death sentence imposed on the former governor Mehmet Kemal Bey), the proceedings concerning the massacres and deportations in the *vilayet* of Trebizond (judgment delivered on 22 May 1919, with death sentences imposed on Cemal Azmi Bey and Nail Bey), the proceedings concerning the massacres and deportations in Büyükdere (judgment delivered on 24 May 1919), the proceedings concerning the massacres and deportations in the *vilayet* of Kharput (judgment delivered on 13 January 1920, with a death sentence imposed on the former president of the Special Organisation and member of the central committee of the Unionist Party, Bahattin Şakir), the proceedings concerning the massacres and deportations in Urfa (judgment delivered on 20 July 1920, with a death sentence imposed on the former governor Behramzade Nusret Bey), and the proceedings concerning the massacres and deportations in Erzincan (judgment delivered on 27 July 1920, with a death sentence imposed on the former chief of the gendarmerie Abdullah Avni). The death sentences imposed on Mehmet Kemal Bey, Behramzade Nusret Bey and Abdullah Avni were carried out.

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[2] See the essential work by Vahakn Dadrian on the evidence gathered by the Turkish Military Tribunal of planned mass murder, systematic torture and organised deportation of the Armenian people, "The documentation of the World War I Armenian Massacres in the proceedings of the Turkish Military Tribunal", in *Int.J. Middle East Stud.* 23 (1991), pp. 549-576, as well as the special issue of *Journal of Political and Military Sociology*, vol. 22 no. 1 (1994); and the special issue of *Revue d'Histoire de la Shoah*, no. 177-178 (2003).

6. The subsequent rehabilitation of some of the defendants by the Turkish State does not call into question the international validity of the judgments referred to, which were delivered in accordance with the standards of international law at the relevant time[3]. In fact, as soon as the international community acquired knowledge of the facts, an immediate official reaction occurred in the form of the Joint Declaration by France, Great Britain and Russia of 24 May 1915, which denounced "crimes of Turkey against humanity and civilization" committed against Armenians, for which "all members of the Ottoman Government and those of their agents who are implicated in such massacres" would be made responsible. That reaction was followed by political and diplomatic acknowledgment of the atrocities, such as by the US Senate Concurrent Resolution (with the House of Representatives concurring) of 9 February 1916, which referred to the "untold suffering" and "terrible plight" of thousands of Armenians, and the 1919 Report of the Commission on Responsibility of the Authors of the War and on Enforcement of Penalties, which concluded that the Ottoman Empire's treatment of Armenians in its territory breached "the established laws and customs of war and the elementary laws of humanity", and declared that Ottoman officials responsible for such acts were liable to prosecution. Subsequently, Articles 226, 227 and 230 of the Treaty of Sèvres signed between Great Britain, France, Italy, Japan, Armenia, Belgium, Greece, the Hejaz, Poland, Portugal, Romania, the Serb-Croat-Slovene State, Czechoslovakia and Turkey on 10 August 1920, enshrined the right of the Allied Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war, "notwithstanding any proceedings or prosecution before a tribunal in Turkey", as well as the obligation of the Turkish State to deliver those responsible for "massacres committed during the continuance of the state of

[3] In a firm statement, Mustafa Kemal himself, in an interview published on 1 August 1926 in the *Los Angeles Examiner*, acknowledged that "These left-overs from the former Young Turk Party, who should have been made to account for the millions of our Christian subjects who were ruthlessly driven en masse from their homes and massacred, have been restive under the Republican rule." Many righteous Turks repudiated these acts, and even saved Armenians (see "Turks Who Saved Armenians: An Introduction", at zoryaninstitute.org). For example, Mehmet Celal Bey, Governor of Aleppo and Konya, who saved many Armenians, once said: "The purpose was to annihilate and they were annihilated. It is impossible to hide and conceal this policy conducted by the *İttihat ve Terakki* which was drafted by its leaders and was ultimately accepted by the general public"; Mustafa Arif, Interior Minister of the Ottoman Empire in 1917 and 1918, stated: "Unfortunately, our wartime leaders, imbued with a spirit of brigandage, carried out the law of deportation in a manner that could surpass the proclivities of the most bloodthirsty bandits. They decided to exterminate the Armenians, and they did exterminate them"; and Ahmed Rıza, president of the Turkish Senate, admitted on 21 October 1918 that the mass murder of Armenians had been an "officially" sanctioned crime. More recently, the bold and straightforward Declaration of the Human Rights Association of Turkey, of 24 April 2006, is to be highlighted.

war on territory which formed part of the Turkish Empire on August 1, 1914" to stand trial. The fact that the Treaty of Sèvres did not enter into force does not invalidate the conclusion that the above-mentioned provisions corresponded to the standard of customary international law at the relevant time, in so far as they acknowledged an international crime entailing individual responsibility. Even if the principle of criminal liability did not prevail in the subsequent negotiations that led to the Lausanne Treaty, the historical fact itself of the occurrence of the "massacres" as the result of the Ottoman Empire's policy in breach of the "laws of humanity" was acknowledged by the signatory parties to the Treaty of Sèvres in compliance with the Joint Declaration of 24 May 1915[4]. Indeed, Article 230 of the Treaty of Sèvres constitutes the irrefutable precedent of Article 6 (c) of the Nuremberg Charter and Article 5 (c) of the Tokyo Charter, referring to "crimes against humanity" as they were understood since at least the beginning of the twentieth century[5].

[4] The Ottoman genocidal policy was revealed to the world by direct witnesses to the events, such as Henry Morgenthau, US Ambassador to the Ottoman Empire in 1913-1916, who stated: "The great massacres and persecutions of the past seem almost insignificant when compared with the suffering of the Armenian race in 1915 … When the Turkish authorities gave the orders for these deportations, they were merely giving the death warrant for a whole race; they understood this well, and in their conversations with me, they made no particular attempt to conceal the fact … the one motive was cold-blooded, calculating state policy"; Count Wolff-Metternich, German Ambassador to the Ottoman Empire, who cabled to the German Chancellor, on 10 July 1916: "In its attempt to carry out its purpose to resolve the Armenian question by the destruction of the Armenian race, the Turkish government has refused to be deterred neither by our representations, nor by those of the American Embassy, nor by the delegate of the Pope, nor by the threats of the Allied Powers, nor in deference to the public opinion of the West representing one-half of the world."; Giacomo Gorrini, Italian Consul General at Trebizond, who in an interview on 25 August 1915 said: "As for the Armenians, they were treated differently in the different vilayets. They were suspect and spied upon everywhere, but they suffered real extermination, worse than massacre, in the so-called 'Armenian Vilayets'"; and Carl Ellis Wandel, the Danish diplomat in Constantinople, who produced a long and detailed report on 4 September 1915 on "the cruel intent of the Turks, to exterminate the Armenian people". These testimonies were confirmed by Fridtjof Nansen, High Commissioner for Refugees under the League of Nations, who stated: "The whole plan of extermination was nothing less than a cold-blooded, calculated political measure, having for its object the annihilation of a superior element in the population, which might prove troublesome, and to this must be added the motive of greed." Sir Winston Churchill agreed: "The Turkish Government began and ruthlessly carried out the infamous massacre and deportation of Armenians in Asia Minor. The clearance of the race from Asia Minor was about as complete as such an act, on a scale so great, could well be" (see the documents available at armenocide.de and genocide-museum.am).

[5] In the same way, Articles 226 and 227 of the Treaty of Sèvres, Articles 228 and 229 of the Treaty of Versailles, Articles 176 and 177 of the Treaty of Saint-Germain-en-Laye, Articles 157 and 158 of the Treaty of Trianon and Articles 118 and 119 of the Treaty of Neuilly-sur-Seine are the precedents of Article 6 (b) of the Nuremberg Charter, and Article 227 of the Treaty of Versailles is the precedent of Article 6 (a) of the Nuremberg Charter.

7. The subsequent Treaty of Lausanne of 24 July 1923 contained no war crimes clauses or punishment clauses, nor any reference to the "massacres" committed during the state of war, but was accompanied by a "Declaration of Amnesty", according to which "Full and complete amnesty shall be respectively granted by the Turkish Government and by the Greek Government for all crimes or offences committed during the same period [1 August 1914 to 20 November 1922] which were evidently connected with the political events which have taken place during that period". The personal and material scope of provision III of the Declaration of Amnesty, and of the Declaration itself, does not evidently encompass the "massacres" of the Armenian population of the Turkish Empire. In any case, the "crimes against humanity and civilization", as they were described in the Joint Declaration of 24 May 1915, cannot be amnestied, and are not subject to the statute of limitations, in view of the peremptory and non-derogable nature of the criminalisation of genocide and of crimes against humanity, according to an established principle of customary and treaty international law[6].

[6] On the inadmissibility of statutory limitations to prosecution of genocide and crimes against humanity, see Article 29 of the Rome Statute of the International Criminal Court (1998), with 122 States Parties, including Switzerland; the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (1968), with 54 States Parties; the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes (1974), with 7 States Parties; and paragraph 6 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by UN General Assembly Resolution 60/147 of 16 December 2005. In his report "The rule of law and transitional justice in conflict and post-conflict societies" of 23 August 2004, UN Secretary-General Kofi Annan recommended that peace agreements and Security Council resolutions and mandates "reject any endorsement of amnesty for genocide, war crimes, or crimes against humanity" (§ 64 (c)). These views were repeated in his follow-up report on the subject, dated 12 October 2011 (§§ 12 and 67). On the inadmissibility of amnesty for genocide or crimes against humanity, see also Office of the United Nations High Commissioner for Human Rights, *Rule of Law Tools for Post-Conflict States: Amnesties*, 2009, HR/PUB/09/1; UNHRC General Comment no. 31 on the nature of the general legal obligation imposed on States Parties to the Covenant (2004), § 18; and the consistent practice of international courts, such as: Special Court for Sierra Leone, *Prosecutor v. Morris Kallon*, case no. SCSL-2004-15-AR72(E), and *Prosecutor v. Brima Bazzy Kamara*, case no. SCSL-2004-16-AR72(E), Appeals Chamber Decision on challenge to jurisdiction: Lomé Accord Amnesty (13 March 2004), §§ 67-73; International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Anto Furundžija*, case no. IT-95-17/1-T, Judgment of 10 December 1998, § 155; Inter-American Court of Human Rights, *Almonacid Arellano et al. v. Chile*, Judgment of 26 September 2006, § 114, and *Velásquez Rodríguez Case*, Judgment of 29 July 1988, § 172; and Inter-American Commission on Human Rights, *Alicia Consuelo Herrera et al. v. Argentina*, Report No. 28/92, 2 October 1992; *Santos Mendoza et al. v. Uruguay*, Report No. 29/92, 2 October 1992, *Garay Hermosilla et al. v. Chile*, Report No. 36/96, 15 October 1996; *Las Hojas Massacre Case v. El Salvador*, Report No. 26/92, 24 September 1992; and *Ignacio Ellacuría et al. v. El Salvador*, Report No. 136/99, 22 December 1999; see also the Court's principled position against amnesty for Article 3 violations in *Okkalı v. Turkey*, no. 52067/99, § 76, ECHR 2006-XII.

8. The fact of the Armenian genocide was later acknowledged by many international organisations, such as the Parliamentary Assembly of the Council of Europe in its Declaration of 24 April 1998 signed by 51 members of parliament, the Declaration of 24 April 2001 signed by 63 members of parliament, and the Declaration of 24 April 2013 signed by 26 members of parliament; the European Parliament in its Resolutions of 18 June 1987, 15 November 2000, 28 February 2002 and 28 September 2005; the MERCOSUR (South America Common Market Organization) Parliament in its Resolution of 19 November 2007; the International Center for Transitional Justice in its Independent Memorandum of 10 February 2003, drawn up at the request of the Turkish-Armenian Reconciliation Commission; the European Alliance of YMCAs in its Declaration of 20 July 2002; the Ligue des droits de l'homme in its Resolution of 16 May 1998; the Association of Genocide Scholars in its Resolution of 13 June 1997; the Kurdistan Parliament in Exile in its Resolution of 24 April 1986; the Union of American Hebrew Congregations in its Declaration of 7 November 1989; the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities in its Report of 2 July 1985; the World Council of Churches in its Declaration of 10 August 1983; and the United Nations War Crimes Commission in its Report of 28 May 1948.

9. In addition, the Armenian genocide has been recognised by the national courts of several countries. Thus, in the United States the Ninth Circuit, in the *Movsesian v. Victoria Versicherung AG* judgment of 10 December 2010, affirmed that "there is no express federal policy forbidding states to use the term 'Armenian Genocide'"; the First Circuit, in the *Griswold, et al. v. David P. Driscoll* judgment of 11 August 2010, affirmed the right of a school human rights curriculum and teachers' guide to refer to the "Armenian genocide", endorsing the conclusion of the District Court of Massachusetts in the same case; and the District of Columbia Circuit, in the *van Krikorian v. Department of State* judgment of 29 January 1993, affirmed that the long-standing policy of the United States was to recognise the Armenian genocide. In Europe, the Paris *tribunal de grande instance*, in a judgment of 1 June 1995, found Bernard Lewis liable for denial of the Armenian genocide; and, most notably, a court of first instance in Berlin, in a judgment of 3 June 1921, acquitted Soghomon Tehlirian, the murderer of the former Ottoman Grand Vizier Talaat Pasha, on account of temporary insanity due to his traumatic experience as a survivor of the massacres.

10. Finally, States and regional governments that have recognised the Armenian genocide include Argentina (Laws of 18 March of 2004 and 15 January 2007); Belgium (Senate Resolution of 26 March 1998); Canada (Senate Resolution of 13 June 2002 and House of Commons Resolutions of 23 April 1996 and 21 April 2004); Chile (Senate Resolution of 5 June 2007); Cyprus (House of Representatives Resolutions of 24 April 1975,

29 April 1982 and 19 April 1990); France (Law of 29 January 2001)[7]; Germany (Parliament Resolution of 15 June 2005); Greece (Parliament Resolution of 25 April 1996); Italy (Chamber of Deputies Resolution of 16 November 2000); Lebanon (Parliament Resolution of 11 May 2000 and Chamber of Deputies Resolution of 3 April 1997); Lithuania (Assembly Resolution of 15 December 2005); Netherlands (Parliament Resolution of 21 December 2004); Poland (Parliament Resolution of 19 April 2005); Russia (Duma Resolution of 14 April 1995); Slovakia (Resolution of 30 November 2004); Sweden (Parliament Resolution of 11 March 2010); United States of America (House of Representatives Resolutions of 9 April 1975, 12 September 1984 and 11 June 1996)[8]; Uruguay (Senate and House of Representatives Resolution of 20 April 1965 and Law of 26 March 2004); Vatican City (Joint Declaration of His Holiness Pope John Paul II and His Holiness Catholicos Karekin II of 10 January 2000); Venezuela (National Assembly Resolution of 14 July 2005); as well as 43 States of the United States, the Basque Country, Catalonia and the Balearic Islands (Spain), Wales, Scotland and Northern Ireland (United Kingdom), and New South Wales (Australia).

## The lawfulness of the criminalisation of genocide denial

11. Taking into account the recognition both by the international community and by the respondent State of the Armenian genocide, the interference with the applicant's freedom of speech was lawful, since the criminalisation of denial of the Armenian genocide was sufficiently

[7] President François Mitterrand stated: "It is not possible to erase the traces of the genocide which struck you." President Charles de Gaulle declared: "I bow down before the victims of the massacres perpetrated against your peaceful people by the Turkish governments of that time with a view to its extermination."

[8] President Barack Obama stated on 24 April 2012: "Today, we commemorate the *Meds Yeghern*, one of the worst atrocities of the 20th century. In doing so, we honor the memory of the 1.5 million Armenians who were brutally massacred or marched to their deaths in the waning days of the Ottoman Empire. … I have consistently stated my own view of what occurred in 1915. My view of that history has not changed", and previously, on 28 April 2008: "it is imperative that we recognize the horrific acts carried out against the Armenian people as genocide". President George Bush declared on 20 April 1990: "[We join] Armenians around the world [as we remember] the terrible massacres suffered in 1915–1923 at the hands of the rulers of the Ottoman Empire. The United States responded to this crime against humanity by leading diplomatic and private relief efforts." President Ronald Reagan affirmed on 22 April 1981: "Like the genocide of the Armenians before it, and the genocide of the Cambodians which followed it and like too many other such persecutions of too many other peoples – the lessons of the Holocaust must never be forgotten". President Jimmy Carter declared on 16 May 1978: "It is generally not known in the world that, in the years preceding 1916, there was a concerted effort made to eliminate all the Armenian people, probably one of the greatest tragedies that ever befell any group. And there weren't any Nuremberg trials."

established in Swiss law and the definitional limits of the relevant legal provision were not overly broad or vague.

12. Article 261 *bis* § 4 of the Swiss Criminal Code complies with the principle of legality, because the expression "genocide or crimes against humanity" refers to those crimes as established by the Swiss Criminal Code and international law, and the crime of genocide and crimes against humanity are sufficiently defined in both Swiss and international law, namely in the Genocide Convention and the Statute of the International Criminal Court[9]. In fact, such criminalisation corresponds to a common European standard[10]. Moreover, the legal technique used by the Swiss legislature in the provision on denial of genocide and crimes against humanity is not unknown, and can be compared to the technique used in Article 259 of the Swiss Criminal Code ("public incitement to crime or violence"), which refers generally to "crime" in paragraph 1 and specifically to the crime of genocide in paragraph 1 *bis*. More importantly, Article 261 *bis* § 4 of the Swiss Criminal Code includes a very important definitional limit (*aus einem dieser Gründen*/*pour la même raison*), which restricts punishment to discriminatorily motivated conduct, that is, to conduct which is motivated by discrimination on grounds of race, ethnic origin or religion[11].

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[9] The point is settled in the literature on Swiss criminal law (Niggli, *Rassendiskriminerung, Ein Kommentar zu Art. 261bis StG und Art. 171c MStG*, 2nd edition, 2007, no. 1363; Vest, "Zur Leugnung des Völkermordes an den Armeniern 1915", in *AJP* 2000, pp. 66-72, Aubert, "L'article sur la discrimination raciale et la Constitution fédérale", in *AJK*, 9/1994, and Dorrit Mettler, annotation 63 on Article 261 *bis*, in Niggli/Wiprächtiger, *Strafrecht II*, 3rd edition, 2013).

[10] Criminal provisions on genocide denial can be found in Article 458 of the Andorran Criminal Code, Article 397 (1) of the Armenian Criminal Code, Article 1 § 3h of the Austrian Law on National Socialism Prohibition (1947, amended 1992), Article 1 of the Belgian Law of 23 May 1995 (amended 1999), Article 405 of the Czech Criminal Code, Article 24 *bis* of the French Law of 29 July 1881 as amended by Law of 13 July 1990, Article 130 (3) of the German Criminal Code, Article 269 (c) of the Hungarian Criminal Code, Article 325 (4) of the Croatian Criminal Code, section 283 of the Liechtenstein Criminal Code, Article 170(2) of the Lithuanian Criminal Code, Article 82 B of the Maltese Criminal Code, Article 457 (3) of the Luxembourg Criminal Code, Article 407-a of the Macedonian Criminal Code, Article 370 (2) of the Montenegrin Criminal Code, Article 55 of the Polish Act on the Institute of National Remembrance of 18 December 1998, Article 422d of the Slovakian Criminal Code, Article 297 § 2 of the Slovenian Criminal Code, Article 242, no. 2 (b) of the Portuguese Criminal Code, and Articles 5 and 6 of the Romanian Emergency Ordinance No. 31 of 13 March 2002. Article 8 of the Italian Law no. 962 of 9 October 1967 punishes the condoning of genocide. The current version of Article 607 (1) of the Spanish Criminal Code refers exclusively to the justification of genocide. Finally, in some European countries, there is no specific criminal provision, but courts apply the more general provision of incitement to hatred or discrimination, for example in the Netherlands, where Articles 137c and 137d of the Criminal Code are applied to denial of genocide (Supreme Court, judgment of 27 October 1987).

[11] Swiss scholars have argued that genocide denial not only offends the memory of the victims, but constitutes implicit incitement to discrimination against the survivors (Aubert,

13. The aforementioned conclusion is even more forceful in the case of the denial of the Armenian genocide, inasmuch as Article 261 *bis* § 4 of the Swiss Criminal Code is interpreted in accordance with the National Council's declaration of 16 December 2003, which leaves no doubt about the official position of the Swiss State and the national law with regard to the legal characterisation of the massacres and deportations of Armenians in Turkey at the beginning of the twentieth century[12]. And both the criminal-law provision and the National Council's declaration were public and were known to the applicant, as he himself admitted.

**The proportionality of the criminalisation of genocide denial**

14. In addition to being lawful, interference with an applicant's freedom of expression is only justified if it complies with a two-tier test: the test of necessity and the test of proportionality. When performing the two tests in the present case, the Court has to consider whether the reasons on which the impugned conviction was based were relevant and sufficient and whether the interference corresponded to a pressing social need.

15. The domestic courts' decisions are to be assessed in terms of the negative obligations arising from Article 10 of the Convention, which narrows the breadth of the margin of appreciation afforded to the respondent State. In addition, States have, in principle, a narrow margin of appreciation with regard to the expression in a public space of comments of a political nature. Nonetheless, tragic events in the history of mankind may be viewed as a relevant factor when the State regulates freedom of expression, which broadens the margin of appreciation of the respondent State[13]. Assuming for the sake of argument that the applicant's statements still fall under the protection of Article 10, this form of expression may lose such protection when it entails a clear and imminent danger of public disorder, crime or other infringements of the rights of others, such as when it is carried out in a

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cited above, no. 36, and Niggli, "Es gibt kein Menschenrecht auf Menschenrechtsverletzung", in *Völkermord und Verdrängung*, 1998, p. 87, and Niggli/Exquis, "Recht, Geschichte und Politik", in *AJP* 4/2005, 436).

[12] In fact, the Federal Court has consistent case-law on denial of genocide (see judgments of 5 December 1997 (BGE 123 IV 202), 30 April 1998 (BGE 124 IV 121), 3 November 1999 (BGE 126 IV 20), of 7 November 2002 (BGE 129 IV 95), 16 September 2010 (no. 6B.297/2010) and 24 February 2011 (no. 6B 1024/2010)). In the Federal Court's view, the criminal provision in question applies to genocides other than the *Shoah*, since it includes all facts that are considered, according to a "very general consensus", to constitute genocide, and the legal values protected (*geschützte Rechtsgüter*) by the criminal provision are twofold: directly, human dignity and public safety (*öffentliche Sicherheit*) and public peace or order (*öffentliche Friede*), and indirectly, the safety and honour of individual members of the victimised people. Bearing in mind the clarifications added below in this opinion, this interpretation is not arbitrary.

[13] See Judge Pinto de Albuquerque's separate opinion in *Fáber v. Hungary*, no. 40721/08, 24 July 2012.

manner likely to incite violence or hatred[14]. Overall, a broad margin of appreciation prevails in the case.

16. The criminalisation of genocide denial is compatible with the freedom of expression, and is even required in the framework of the European human rights protection system. In fact, States Parties to the Convention have the duty to criminalise speech or any other form of dissemination of racism, xenophobia or ethnic intolerance, prohibit every assembly and dissolve every group, organisation, association or party that promotes them. This international obligation must be acknowledged as a principle of customary international law, binding on all States, and a peremptory norm with the effect that no other rule of international or national law may derogate from it[15]. Within the Council of Europe, genocide denial is regarded as a grave form of disseminating racism, xenophobia or ethnic intolerance, or as hate speech. Article 6 of the Additional Protocol to the Convention on Cybercrime requires criminalisation of denial of genocide, for example of the Holocaust[16]: the denial of a genocide acknowledged by final and binding decisions of the International Military Tribunal, established by the London Agreement of 8 August 1945, or of any other international court established by relevant international instruments and whose jurisdiction is recognised by the State Party, must be made a criminal offence[17]. This obligation is even more forceful in the case of genocide established both by the courts of the State where the genocide was committed and by a constitutional organ of the State where the expression of denial took place, as in the present case.

17. Furthermore, the European Union Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and

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[14] For an introductory explanation of the standard of clear and imminent danger, see Judge Pinto de Albuquerque's separate opinion in *Mouvement raëlien suisse v. Switzerland* [GC], no. 16354/06, ECHR 2012.

[15] See Judge Pinto de Albuquerque's separate opinion in *Vona v. Hungary*, no. 35943/10, ECHR 2013.

[16] ETS no. 189. It is true that the respondent State has signed, but not ratified, the Additional Protocol, but this fact alone does not justify ignoring the standard of the Council of Europe, since the Additional Protocol has already entered into force and has been ratified by twenty States. It is also true that States may reserve the right not to apply Article 6 § 1 of the Additional Protocol, but this right in itself only serves to show that this provision does not yet reflect a norm of customary international law. In other words, the prohibition of denial of genocide has not yet been incorporated as a constituent part of the customary and peremptory norm of criminalisation of racist, xenophobic and intolerant expression. Nevertheless, it can be affirmed that there is, at least in Europe, an evolving international obligation to criminalise the denial of genocide.

[17] To be precise, no defendant was convicted of the crime of genocide in Nuremberg. Thus, the reference to the crime of genocide as established in "final and binding decisions of the International Military Tribunal" is, in fact, a reference to the crime of genocide as it was then understood, namely as a part of crimes against the laws of humanity, and as it was later codified in the Genocide Convention.

xenophobia by means of criminal law requires the criminalisation of 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 and crimes defined in Article 6 of the Charter of the International Military Tribunal, when the conduct is carried out in a manner likely to incite violence or hatred against a group defined by reference to race, colour, religion, descent or national or ethnic origin or a member of such a group. A 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 above only if these crimes have been established by a final decision of a national court of that Member State and/or an international court, or by a final decision of an international court only.

18. Thus, within the European human rights protection system, denial of genocide encompasses all acts of genocide that have been acknowledged (1) by the International Military Tribunal established by the London Agreement of 8 August 1945, (2) by any other international court, (3) by any court of the State where the genocide was committed or of the State where the expression of denial occurred, or (4) by any other constitutional organ, such as the State President, the national assembly or the government, of the State where the genocide was committed or of the State where the expression of denial occurred. In addition, States may also, in the use of their broad margin of appreciation in this field, criminalise denial of genocide (5) where there is a social consensus regarding acts of genocide committed in that State or in another State[18], even in the absence of any prior statement or decision of any constitutional organ of that State or of the other State, or of any international or national court. In all of the aforementioned five cases, criminalisation of the act of denial when it is carried out in a manner likely to incite violence, hatred or discrimination corresponds to a pressing social need.

19. The Spanish Constitutional Court distinguishes between the denial of genocide, this being constitutionally acceptable, and the justification, trivialisation or relativisation of genocide, this being constitutionally unacceptable. This *distinguo* is inadmissible both under the Additional Protocol to the Convention on Cybercrime and under Framework Decision 2008/913/JHA[19]. As a matter of fact, the distinction between mere denial

[18] Corresponding to an "established historical fact", to use the Court's expression (see *Lehideux and Isorni v. France*, 23 September 1998, § 47, *Reports of Judgments and Decisions* 1998-VII, and *Garaudy v. France* (dec.), no. 65831/01, ECHR 2003-IX).

[19] See the Spanish Constitutional Court's judgment of 7 November 2007, no. 235/2007, with four strong dissenting opinions. It is important to stress, first, that Spain has not yet ratified the above-mentioned Additional Protocol, which was thus not taken into account in the judgment, and, second, that the Spanish justices were expressing their view prior to Framework Decision 2008/913/JHA, which invalidates their *distinguo*. Both the *Abogado del Estado* (State Advocate General) and the *Fiscal General del Estado* (General Public

and trivialising or justifying is artificial in linguistic terms and can be easily circumvented by a sophisticated speaker, through euphemistic and elaborate speech, as in the present case, where the denial of genocide was associated with justification of the Turkish "reaction" to alleged Armenian "attacks". Furthermore, and this is the essential point, the *distinguo* is ethically unsustainable, because the denial as much as the justification of genocide humiliates the victims and their families, offends the memory of the massacred people, exculpates those responsible for the massacres, and thus constitutes a serious incitement to hatred and discrimination and, to that extent, paves the way to discriminatory and violent acts against those who belong to the victimised people[20]. The freedom of scientific research and information may not be invoked to legitimise the disputed *distinguo*, contrary to the assumption of the majority of the justices of the Spanish Constitutional Court. Otherwise, racist, xenophobic and intolerant views could easily be promoted by a *male fide* speaker alleging that they had a historical or scientific connotation[21]. To put it in plain words, tolerating negationism is "akin to killing [the victims] a second time", to use Elie Wiesel's expression. Or as the Turkish Human Rights Association Declaration of 24 April 2006 stated: "Denial is a constituent part of genocide itself and results in the continuation of the genocide. Denial of genocide is a human rights violation in itself."

**The necessity of the criminalisation of genocide denial**

20. The French Constitutional Council has argued that "[a] legislative provision with the purpose of 'recognising' a crime of genocide cannot in itself have the normative scope attaching to the law"[22]. In other words, the

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Prosecutor) expressed the opposite view to the majority. The mere denial of genocide can be "the most direct incitement" (*impulso directísimo*) to grave crimes, and "this presumption is not unreasonable or excessive, but it is the product of painful historical experiences", as the *Abogado del Estado* affirmed. Or as the *Fiscal General* argued, the denial of genocide leads to the creation of "an environment of acceptance and oblivion" (*un clima de aceptación y olvido*) of grave historical facts which can give rise to violence.

[20] To this effect, see the German Federal Constitutional Court's judgments of 13 April 1994 (1 BvR 23/94, § 34), 25 March 2008 (1 BvR 1753/03, § 43), and 9 November 2011 (1 BvR 461/08, § 22), on the lack of protection of the "Auschwitz lie" (*Auschwitzlüge*) under the freedom of expression; the Canadian Supreme Court in *R. v. Keegstra* (1996), 3 SCR 667, on the applicability of the offence of promoting racist hate propaganda, set out in section 319 (2) of the Canadian Criminal Code, to the defendant's anti-Semitic statements, including his Holocaust denial; and the Committee on the Elimination of Racial Discrimination (CERD), General Recommendation no. 35, 26 September 2013, § 14. It should be stressed that the CERD does not require that genocide or crimes against humanity be established by a final decision of an international or national court.

[21] The dissemination of scientific information, based on appropriate evidence, by a *bona fide* speaker, may evidently serve as a defence regarding scientific speech on genocide.

[22] French Constitutional Council, decision of 28 February 2012.

principle of necessity would be breached if genocide were to be acknowledged by a formal act of the legislature. This argument is incorrect when it implies that the subject matter of "memorial laws" (*lois mémorielles*) belongs to historians and that such laws are therefore deprived of any legal (that is, normative) effects. And it is incorrect for the obvious reason that the legal characterisation of an act as a crime of genocide has legal consequences both in criminal and in civil law. The argument is also misplaced if it implies that memorial laws encroach on the competence of judges and are therefore an *ultra vires* act of the legislative power, in breach of the principle of the separation of powers. And here again it is misplaced for the clear reason that the legal characterisation of an act as genocide does not presuppose the imputation of that act to a specific person or group of persons, which is the task of the judiciary. This conclusion is *a fortiori* valid for any official statement made by other branches of the State, such as the State President or the government, in the exercise of their constitutional powers. The legislature, the State President or the government may well pronounce official statements, or even approve laws, on the legal nature of a fact, but that does not imply any assessment of the wrongfulness of the conduct and the personal guilt of any particular person[23].

21. That being said, the criminalisation of genocide denial corresponds to a State policy which is necessary to fully implement the spirit and the letter of Article I of the Genocide Convention, which places an obligation on States to prevent genocide, and the United Nations General Assembly Resolution of 26 January 2007, which calls on all UN Member States "unreservedly to reject any denial of the Holocaust as a historical event, either in full or in part, or any activities to this end". At least in Europe, the soil upon which so much blood was shed during the twentieth century in order to execute terrible plans involving the extermination of entire peoples, genocide denial is to be viewed as a seriously threatening and offensive form of speech, and thus the type of "fighting words" undeserving of protection[24]. Furthermore, in the particular case of the denial of the

[23] In its decision of 28 February 2012 the French Constitutional Council added: "Parliament has interfered in an unconstitutional manner with the exercise of freedom of expression and communication". This laconic statement is insufficient to prove a breach of the freedom of expression. Not even a single word is provided as to the necessity and proportionality of the interference with the freedom of expression, in relation to the criminal-policy aims pursued by the criminalisation of genocide denial.

[24] Since *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), the US Supreme Court has dealt with the issue of "fighting words" and "expressive conduct" with the same insulting or threatening meaning, such as flag desecration and cross-burning. In *Cohen v. California*, 403 U.S. 15 (1971), the Supreme Court admitted the expression "Fuck the Draft" as constitutionally protected, because no individual actually or likely to be present could reasonably have regarded the words on the appellant's jacket as a direct personal insult, and there was no evidence that its use was inherently likely to cause or incite to violence. These were not unconstitutional "fighting words". In *Street v. New York*, 394 U.S. 576 (1969), the Supreme Court considered that the mere offensiveness of utterances against the flag did not

Armenian genocide, there is an additional imperative need to prevent hatred and discrimination against Armenians, who are a vulnerable minority in some countries, and thus should deserve, like any other vulnerable minority, special care and protection, if need be through the means of criminal law[25].

22. As the Court stated in *Garaudy*, to accuse the victims themselves of falsifying history is "one of the most serious forms of racial defamation of Jews and of incitement to hatred of them", and therefore "constitutes a serious threat to public order" and "infringes the rights of others"[26]. The

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qualify as "fighting words" either. The same was valid for the expressive conduct of flag-burning itself, since it did not always pose an imminent threat of lawless action, according to the Brandenburg test (*Texas v. Johnson*, 491 U.S. 397 (1989)). In *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), the Supreme Court considered unconstitutional the criminalisation of burning a cross or placing a Nazi swastika or any other symbol in a public or private property, which one knew or had reasonable grounds to know aroused anger, alarm or resentment in others on the basis of race, colour, creed, religion or gender, because the definition of this offence was overly broad, proscribing both "fighting words" and protected speech, and because the regulation was "content-based", proscribing only activities which conveyed messages concerning particular topics. But in *Virginia v. Black*, 538 U.S. 343 (2003), the Supreme Court practically overturned the *R.A.V. v. City of St. Paul* precedent, by holding that cross-burning could be punished as a criminal offence if and when the defendant's conduct was a signal of impending intimidation and the intent to intimidate was proven by the State. In any case, the burden of proof should not be placed on the defendant to demonstrate that he or she did not intend the cross-burning as intimidation. In his dissent, Justice Thomas went even further and explained that cross-burning was always a threat of some kind, and therefore an exception to the First Amendment. It can thus be argued that, from a substantive perspective, the opinion of the Swiss Federal Court on denial of genocide is in line with both the US Supreme Court's majority in *Virginia v. Black* and the Canadian Supreme Court's majority in *R. v. Keegstra*.

[25] See the worrying reports on the situation of Armenians in the fourth report of ECRI on Turkey (2011, §§ 90-91 and 142), the third report of ECRI on Azerbaijan (2011, § 101), the third report of ECRI on Georgia (2010, § 74), and the third report of ECRI on Turkey (2005, § 35 and 89-93). Hence, we do not agree with the majority's underlying assumption that the need for criminal protection diminished with the passage of time. This aspect of the necessity of making genocide denial a criminal offence was ignored by both the French Constitutional Council and the majority of the Spanish Constitutional Court, but not by the dissenters or the *Fiscal General*, who referred to the persistent racist and xenophobic movement in Europe as sufficient justification for the criminalisation of genocide denial.

[26] See *Garaudy*, cited above, and at the level of the UNHRC, *Robert Faurisson v. France*, communication no. 550/1993, 8 November 1996. Thus, paragraph 49 of the UNHRC's General Comment no. 34 neither reflects the UNHRC's previous case-law nor the settled case-law of the Court. Furthermore, it does not touch on the issue of justification or glorification of a crime committed in the past, which indisputably warrants criminal punishment. Finally, it only refers to "the expression of an erroneous opinion" and "an incorrect interpretation of past events". These expressions are ambiguous and misleading. The Committee certainly did not intend to refer to "deliberate false statements on the existence of a crime", let alone to deliberate false statements on the existence of the worst of crimes, genocide. Otherwise, the Committee would be accepting the condoning and justification of a murderer and his or her infamous deeds, or even the deliberate denial of the *Shoah*, as being covered by freedom of expression. Thus, until it is reviewed, the unfortunate paragraph 49 warrants a restrictive interpretation which is in line with

same must apply to Armenians. The suffering of an Armenian under the genocidal Ottoman State policy is not worth less than the suffering of a Jewish person under the genocidal Nazi State policy. And the denial of the *Hayots Tseghaspanutyun* (Հայոց Ցեղասպանութիւն) or *Meds Yeghern* (Մեծ Եղեռն) is no less dangerous than the denial of the *Shoah*.

**The application of the European standard to the facts of the case**

23. The constituent elements of the crime of denial of genocide in the present case are proven, regarding both *actus reus* and *mens rea*. Regarding *actus reus*, the applicant publicly denied the Armenian genocide, calling it an "international lie", accused the Armenian people of being aggressors of the Turkish State and identified himself as a follower of Grand Vizier Talaat Pasha, who was found guilty of "massacres" of the Armenian people by a Turkish court martial in 1919. The applicant's statements did not objectively contribute to any public and democratic debate concerning the issue at stake; on the contrary, they were a serious incitement to intolerance and hatred towards a vulnerable minority. In fact, the applicant did not present or discuss any evidence relating to the scope and purpose of the atrocities, and even acknowledged that he would never recognise genocide even if a neutral scientific commission were to establish its existence.

24. Regarding *mens rea*, the competent domestic courts established that the applicant had acted with "racist" and "nationalist" motives (see paragraph 52 of the judgment). They were unable to find any scientific, historical or political purpose for his speech. By acting as he did, the applicant repeatedly and consciously scorned the existing legal framework of a foreign country to which he had travelled with the predetermined purpose of pronouncing the aforementioned statement and thus defying the national law. In seeking to whitewash the Ottoman regime by denying and justifying its genocidal policy, the applicant's statements laid the foundations for more intolerance, discrimination and violence.

25. The factual motivation of the applicant can only be established by the domestic court which assembled the evidence and heard his submissions. The Court is bound by the established fact that the applicant acted with a "racist" motive, and cannot change that fact. And this fact is crucial. It shows that the applicant intended not only to deny the existence of the Armenian genocide, but also to accuse the victims and the world of falsifying history, to depict Armenians as aggressors and to justify the Ottoman genocidal policy as an act of self-defence, to diminish the magnitude of the atrocities and sufferings caused to the Armenian people by

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paragraph 3 of Article 19 and Article 20 of the International Covenant on Civil and Political Rights. That was exactly what the CERD did in its General Recommendation no. 35, referred to above.

the Turkish State and to defame and insult the Armenian people in Switzerland and throughout the world through comments that were deliberately hateful and "racist"[27]. The expressions "*mensonge international*", "*historische Lüge*" and "*imperialistische Lüge*" (international/historical/imperialistic lie) used by the applicant clearly overstep the permissible limits of freedom of expression, since they equate the victims to liars[28]. To that extent, the applicant acted with the same unacceptable *dolus* as Mr Garaudy. Indeed, he acted with an even more repugnant *dolus*, since he identified himself with Talaat Pasha, the mastermind of the Armenian genocide according to the competent Turkish military court[29].

26. Since the facts were clearly established by the domestic courts and the lawfulness, proportionality and necessity of the provisions criminalising genocide denial are compatible with the principles set out by the Council of Europe, the European Union, the Committee on the Elimination of Racial Discrimination, the German Federal Constitutional Court and the United States and Canadian Supreme Courts, the remaining question to be discussed is that of the proportionality of the applicant's punishment in relation to his freedom of expression, in view of the alleged public interest in the speeches he gave in the context of public, political meetings, the aim being to determine whether the penalty imposed on him was excessive as he maintained.

27. In a civilised world, there is no public interest in protecting statements which denigrate and humiliate victims of crimes, exculpate or simply identify with criminals and incite to hatred and discrimination, even if these statements refer to horrendous crimes that occurred seventy years

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[27] We cannot therefore accept the majority's statement in paragraph 52 of the judgment: "Nor does it appear that the applicant has expressed contempt towards the victims of the events in question". This statement not only lacks any evidential basis, but contradicts the facts established by the domestic courts. The majority are acting here as a court of first instance, reassessing the intention of the applicant without even having had the benefit of hearing and questioning him personally.

[28] See the applicant's statements before the public prosecutor (23 July 2005), the investigating judge (20 September 2005) and the Police Court (8 March 2007), included in the case file. In *Witzsch v. Germany* ((dec.), no. 41448/98, 20 April 1999), the Court found that the expression "historical lies" about the mass murder of Nazi victims was not protected by Article 10. The same reasoning was confirmed in *Schimanek v. Austria* ((dec.), no. 32307/96, 1 February 2000) and *Witzsch v. Germany* ((dec.), no. 7485/03, 13 December 2005).

[29] This important fact was also pointed out by the Federal Court (point 5.2 of the judgment of 12 December 2007) and by the respondent Government in their observations to the Court (§ 25). Thus, we cannot accept that the object of the applicant's statements was the legal classification of the events and not the events *per se*. This argument contradicts common sense. The applicant did not only dispute the legal classification, but also portrayed the massacre of Armenians as equivalent to war casualties suffered on the Turkish side and justified Talaat Pasha's genocidal policy as an act of self-defence against an Armenian aggression.

ago (Jewish genocide) or even ninety years ago (Armenian genocide). Moreover, the criminal-policy aims pursued by the courts of the respondent State through the punishment of denial of the Armenian genocide – such as the prevention of public disorder in the face of the applicant's "provocation", to use the expression of the Federal Court, and the protection of the dignity and honour of the victims and the Armenian people in general – are relevant factors for restricting freedom of expression under Article 10 § 2 of the Convention. Assessing the weight of all the relevant factors for the test of proportionality, the balancing act clearly favours considering the purpose of the State interference to the detriment of the circumstantial element of space[30]. Thus, the reasons on which the impugned conviction was based were both relevant and sufficient and the State interference did correspond to a pressing social need.

28. Finally, the punishment was certainly not disproportionate to the gravity of the facts. The applicant was sentenced to two fines: ninety day-fines, which were suspended, and a fine of 2,500 euros, which could be replaced by thirty days' imprisonment. He was not sentenced to a prison term, although the crime was punishable by three years' imprisonment. He was neither detained nor imprisoned in Switzerland. The Swiss courts showed considerable restraint in a grave case that could have called for a heavier penalty, for the purposes of both general deterrence and special prevention.

## Conclusion

29. In a 1949 CBS interview, available on the Internet, Raphael Lemkin, the man who coined the word "genocide" and the driving force behind the Genocide Convention, said: "I became interested in genocide because it happened to the Armenians; and after[wards] the Armenians got a very rough deal at the Versailles Conference because their criminals were guilty of genocide and were not punished." Over the decades, the planned mass murder, systematic torture and organised deportation of the Armenian people and the premeditated erasure of Christianity in Turkey at the beginning of the twentieth century have long been viewed as the "forgotten genocide". However, they are not forgotten by the authors of this dissent. Thus, we are of the view that the criminalisation of genocide denial and the punishment of the applicant for denial of the Armenian genocide, in strict accordance with the law in force in the respondent State, did not breach Article 10 of the Convention.

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[30] The context of a political debate or meeting is clearly irrelevant to the racist or discriminatory nature of speech. See Judge Pinto de Albuquerque's separate opinion in *Vona*, cited above; and also *Féret v. Belgium*, no. 15615/07, §§ 75-76, 16 July 2009, and CERD Communication no. 34/2004, § 7.5, Communication no. 43/2008, § 7.6, and Communication no. 48/2010, § 8.4.