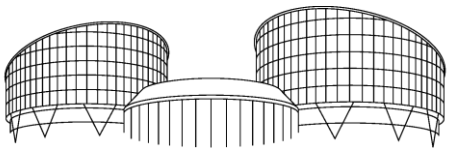

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

MATTER OF PERİNÇEK v. SWITZERLAND

(Application no.˙ 27510/08)

MATTER

STRASBURG

17 December 2013

This judgement will become definitive under the conditions defined in Article 44 § 2 of the Convention. It may undergo slight modifications for form's sake.

In the matter of Perinçek v. Switzerland,

The European Court of Human Rights (second section), sitting in a chamber consisting of:

Guido Raimondi, *president,*
Peer Lorenzen,
Dragoljub Popović,
András Sajó,
Nebojša Vučinić,
Paulo Pinto de Albuquerque,
Helen Keller, *judges,*

and Stanley Naismith, *court clerk of the section,*

After having deliberated in council chambers on 12 November 2013,

Renders the following judgement, adopted on this date:

PROCEDURE

1. The case originated in an application (No. 27510/08) against the Swiss Confederation, which a Turkish citizen, Mr Doğu Perinçek ("the applicant"), brought before the Court on 10 June 2008 pursuant to Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedom ("the Convention").

2. The applicant was represented by Maître M. Cengiz, attorney in Ankara. The Swiss Government ("the Government") was represented by its deputy agent, Adrian Scheidegger, of the European Law and International Human Rights Protection Division of the Federal Office of Justice.

3. The applicant maintained in particular that he had been wrongly convicted by the Swiss courts for having publicly claimed that the Armenian genocide was an "international lie" during various events.

4. On 10 September 2010, the application was sent to the Government. As Article 29 § 1 of the Convention allows, it was also decided that the chamber would decide at the same time on the admissibility and the merits.

5. Claiming the right of intervention granted to it by Article 36 § 1 of the Convention, the Turkish government sent comments on 15 September 2011.

IN FACT

I. THE CIRCUMSTANCES OF THE CASE

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

7. The applicant is a doctor of law and chairman of the Turkish Workers' Party. On 7 May, 22 July and 18 September 2005, in Lausanne (Canton of Vaud), Opfikon (Canton of Zurich) and Köniz (Canton of Bern), respectively, he attended various conferences during which he publicly denied the existence of any genocide perpetrated by the Ottoman Empire against the Armenian people in 1915 and in the following years. He described the idea of an Armenian genocide in particular as an "international lie". His statements had been made in various contexts: he had expressed himself in Lausanne during a press conference (in Turkish), in Opfikon during a conference held in connection with the commemoration of the Treaty of Lausanne of 1923 and in Köniz on the occasion of a meeting of his party.

8. On 15 July 2005, the Switzerland-Armenia Association brought a complaint against the applicant for the content of the above-mentioned statements.

9. By a judgment dated 9 March 2007, the Lausanne Police Court found the applicant guilty of racial discrimination in the meaning of Art. 261bis, para. 4, of the Swiss Penal Code (paragraph 14 below) and sentenced him to a punishment of 90 days and a fine of 100 Swiss francs (CHF) (approximately 85 euros (EUR)), suspended for two years, with payment of a fine of 3,000 CHF (approximately 2,500 EUR) replaceable by 30 days incarceration, and payment of moral damages of 1,000 CHF (approximately 850 EUR) for the benefit of the Switzerland-Armenia Association. It noted that the Armenian genocide was a proven fact according to Swiss public opinion and in a more general manner. For that, it referred to various parliamentary acts (in particular to the postulate of Buman; see paragraph 16 below), to legal publications as well as various statements from the Swiss federal and cantonal political authorities. In addition, it also cited the recognition of the said genocide by various international authorities, such as the Council of Europe[1] and the European Parliament. In addition, it found that the motives pursued by the applicant were similar to racist motives and did not fall within a historic debate.

10. The applicant lodged an appeal against that judgment. He requested primarily the invalidation of the judgment and an additional investigation concerning in particular the status of the research and the position of historians on the Armenian question.

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

11. On 13 June 2007, the Criminal Court of Cassation of the Cantonal Court of the Canton of Vaud dismissed the appeal brought by the applicant against the said judgment. According to it, following the example of the Jewish genocide, the Armenian genocide was, on the date of ratification of Article 261bis, para. 4, of the Swiss Criminal Code, a historic fact recognised as proven by the Swiss legislator. Consequently, the courts did not have to resort to historians' works to admit its existence. The cantonal court moreover emphasised that the applicant contented himself with denying the discussion of genocide, without even calling into question the existence of the massacres and deportations of Armenians.

12. The applicant lodged an appeal in criminal matters before the Federal Tribunal against the said decision. He requested primarily the reversal of the judgment rendered in the sense of his acquittal and release from any conviction, both civil and criminal. In substance, he reproached the two cantonal authorities, from the perspective of the application of Art. 261bis, para. 4, of the Swiss Criminal Code and of the violation of the fundamental rights which he alleged, for not having conducted a sufficient investigation with regard to the materiality of the circumstances of fact making it possible to describe the events of 1915 as genocide.

13. By a judgement dated 12 December 2007 (ATF 6B_398/2007), the relevant excerpts of which are below, the Federal Tribunal dismissed the applicant's appeal:

> "3.1 Art. 261bis para. 4 CP [Criminal Code] punishes the behaviour of whoever publicly, by word, writing, image, gesture, acts of violence or any other manner, demeans or discriminates against an individual or a group of individuals because of their race, their ethnicity or their religion in a way which undermines human dignity, or for the same reason, denies, grossly minimizes or seeks to justify a genocide or other crimes against humanity. In an initial, literal and grammatical approach, it can be noted that the wording of the law (by using the indefinite article "a genocide"), does not explicitly refer to any precise historic event. The law thus does not rule out punishing the negation of genocides other than the one committed by the Nazi regime; nor does it explicitly describe the negation of the Armenian genocide in the criminal respect as an act of racial discrimination.
>
> 3.2 Art. 261-bis para. 4 CP was adopted when Switzerland joined the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965 (RS 0.104). In its initial wording, the text of the draft law of the Swiss Federal Council made no specific mention of the negation of genocides (see FF 1992 III 326). The criminalisation of revisionism, and/or of Holocaust denial, had to be included in the act constituting dishonouring the memory of a deceased person appearing in paragraph 4 of the draft of Article 261bis CP [Criminal Code] (Message from the Swiss Federal Council dated 2 March 1992 concerning Switzerland's adhesion to the International Convention of 1965 on the Elimination of All Forms of Racial Discrimination and the related revision of criminal law; FF 1992 III 265 et seq., spec. 308 s.). That message contains no specific reference to the events of 1915.
>
> During the parliamentary proceedings, the Committee for Legal Affairs of the National Council proposed to add to Art. 261-bis para. 4 CP the text "[...] or whoever, for the same reason, grossly minimizes or seeks to excuse genocide or other crimes

against humanity" [...]. The French-speaking rapporteur of the committee, National Councillor Comby, specified that there was confusion between the German text and the French text, stating that the subject was obviously any genocide and not only the Holocaust (BO/CN 1992 II 2675 et seq.). The draft of the committee was nevertheless adopted by the National Council in the form proposed (BO/CN 1992 II 2676). Before the Council of States, the proposal of the Committee for Legal Affairs of the said Council to adhere to the wording of Art. 261bis para. 4 CP adopted by the National Council was opposed to a proposal from Küchler, who did not, however, call into question the phrase "or whoever, for the same reason, denies or grossly plays down or seeks to justify genocide or other crimes against humanity" (BO/EC 1993 96; concerning the importance of this proposal, see ATF [Swiss Federal Tribunal judgement] 123 IV 202 consid. 3c p. 208 and Poncet, ibidem). This proposal was adopted with no further reference being made to the denial of the Armenian genocide during the proceedings. During the elimination of the divergences, the Committee for Legal Affairs of the National Council proposed, through Mr Comby, to adopt the amendments presented by the Council of States, with the exception of the 4th paragraph, where it proposed to speak of "a genocide", alluding to all genocides that may occur. The French-speaking rapporteur noted that several persons had spoken in particular of the Kurdish massacres or massacres of other peoples, for example of Armenians, with all of those to be taken into account (BO/CN 1993 I 1075 et seq.). The definition of genocide was also briefly alluded to and the manner in which a Turkish citizen would express himself concerning the Armenian drama and to the fact that the provision was not supposed to refer, in the mind of the committee, to a single genocide, but to all genocides especially in Bosnia-Herzegovina (BO/CN 1993 I 1077; Grendelmeier intervention). Ultimately, the National Council adopted the text of paragraph 4 in the following wording: "[...] any other manner, undermines the human dignity of an individual or a group of individuals because of their race, their ethnicity or their religion, or for the same reason, denies, grossly minimizes or seeks to justify a genocide" (BO/CN 1993 I 1080). In the continuation of the parliamentary works, the Council of States maintained its position, adopting as a simple editorial modification of the French text the expression "a genocide", and the National Council ultimately joined the decision of the Council of States, without again mentioning the denial of the Armenian genocide (BO/CN 1993 I 1300, 1451; BO/EC 1993 452, 579).

The said preparatory works thus clearly show that Art. 261bis para. 4 CP does not refer exclusively to the denial of Nazi crimes but also other genocides.

[...]

3.4 On the other hand, one cannot interpret the said preparatory work in the sense that the criminal standard allegedly refers to certain specific genocides that the legislator had in sight when promulgating it, as the judgment rendered suggests.

3.4.1 The will to combat negationist and revisionist opinions in connection with the Holocaust indeed constituted a central element in the drafting of Art. 261bis para. 4 CP. In its case-law, however, the Federal Tribunal has judged that Holocaust denial objectively achieves the situation criminalised by Art. 261bis para. 4 CP because it is a matter of a historic fact generally recognised as established (ATF 129 IV 95 consid. 3.4.4, p. 104 et seq.), without the legislator's historic intention having been referred to in the said judgment. In the same sense, numerous authors see therein a well-known fact for the penal authority (Vest, Delikte gegen den öffentlichen Frieden, n. 93, p. 157), an indisputable historic fact (Rom, op. cit., p. 140), a description ("genocide") which leaves no doubt (Niggli, Discrimination raciale, n. 972, p. 259, which notes simply that the said genocide was at the origin of the creation of the standard; in the same sense: Guyaz, op. cit. p. 305). Only a few rare voices refer only to the legislator's

intention to recognising the fact as historic (see for example: Ulrich Weder, Schweizerisches Strafgesetzbuch, Kommentar [Andreas Donatsch Hrsg.], Zurich 2006, Art. 261bis para. 4, p. 327; Chaix/Bertossa, op. cit., p. 184).

3.4.2 The approach consisting of seeking which genocides the legislator had in mind when the standard was promulgated furthermore already clashes with the literal interpretation (see above consid. 3.1), which clearly demonstrates the legislator's intention to give priority on this point to an open formulation of the law, as opposed to the technique of laws called "memory" laws adopted in particular in France (Law no. 90-615 of 13 July 1990, called the Gayssot Law; Law no. 2001-434 of 21 May 2001 tending to recognise the slave trade and slavery as a crime against humanity, called the Taubira Law; Law no. 2001-70 of 29 January 2001 concerning recognition of the Armenian genocide of 1915). The criminalisation of Holocaust denial in light of Art. 261bis para. 4 CP is thus based less on the legislator's intention, at the time when he promulgated the penal standard, to specifically target negationism and revisionism than on the finding that on this point, there is a very broad consensus, of which the legislator doubtlessly partook. There is thus also no reason to research whether such an intention motivated the legislator as regards the Armenian genocide (contra: Niggli, Rassendiskriminierung, 2nd edition, Zurich 2007, n. 1445 et seq., p. 447 et seq.). Moreover, on this point one must note that although certain elements of the text were fiercely debated by the members of Parliament, the description of the events of 1915 was not the subject of any debate in this context and was ultimately invoked only by two speakers to justify adopting a French version of Art. 261bis para. 4 CP not allowing an exaggeratedly restrictive interpretation of the text, which the German version did not impose.

3.4.3 Doctrine and case-law also deduced from the notorious, incontestable or indisputable nature of the Holocaust that it no longer needs to be proven in criminal trial (Vest, ibidem; Schleiminger, op. cit., Art. 261bis CP, no. 60). The courts thus do not have to resort to the works of historians on this point (Chaix/Bertossa, ibidem; unpublished judgment 6S.698/2001 consid. 2.1). The thereby determined basis for criminalising Holocaust denial consequently also dictates the method that is imposed on the judge when it is a matter of denial of other genocides. The first question that consequently arises is whether there is a comparable consensus regarding the facts denied by the appellant.

4. The question thus asked is based on fact. It less directly concerns the genocide description of the massacres and deportations attributed to the Ottoman Empire than the assessment generally made of the said description, by the public and within the community of historians. That is how one must understand the approach adopted by the tribunal de police [police court], which emphasised that it was not its duty to make history, but rather to research whether the said genocide is "known and recognised", or even "proven" (judgment, consid. II, p. 14) before becoming convinced on this last point of fact (judgment, consid. II, p. 17), which is an integral part of the cantonal judgment (cantonal judgment, consid. B p. 2).

4.1 Such a finding of fact is binding on the Federal Court [...].

4.2 As regards the decisive point of fact, the tribunal de police [police court] based its conviction not only on the existence of political declarations of acknowledgement, but it also emphasised that the conviction of the authorities that the declarations came from was forged based on the opinion of experts (in particular a body of some one hundred historians as regards the French National Assembly when the Law of 29 January 2001 was adopted) or reports described as extremely well-argued and documented (European Parliament). Thus, in addition to relying on the existence of political acknowledgement,

the said argumentation confirms, in the facts, the existence of a broad consensus of the community, reflected by the political statements, and itself based on a broad scientific consensus regarding the description of the facts of 1915 as genocide. In addition, in the same sense, during the debate that led the National Council to officially recognise the Armenian genocide, reference was made to the international research works published under the title "Der Völkermord an den Armeniern und die Shoah" (BO/CN 2003 2017; Language intervention). Lastly, the Armenian genocide is one of the examples presented as "classic" in the general literature devoted to international criminal law and, respectively, to research on genocides (see Marcel Alexander Niggli, Rassendiskriminierung, n. 1418 et seq., p. 440 and the very many references cited; see also n. 1441 p. 446 and references).

4.3 Insofar as the appellant's argumentation tends to dispute the existence of a genocide or the legal description of the events of 1915 as genocide – in particular in emphasizing the absence of judgment coming from an international court or from specialised committees and, respectively, the absence of irrefutable evidence establishing that the facts corresponding to the objective and subjective conditions set by Art. 264 CP or those of the UN Convention of 1948, in maintaining that as things stand, there were allegedly only three genocides internationally recognised –, it is irrelevant for resolving the legal dispute, consequently, that it is a matter of determining first of all whether there is a general consensus, a historic consensus in particular, sufficient to exclude from the criminal debate on the application of Art. 261bis para. 4 CP the underlying historic debate on the description of the events of 1915 as genocide. The same is true in that the appellant accuses the cantonal court of arbitrariness by not examining the grounds for invalidation raised in the cantonal appeal, in connection with the same facts and the measures of examination that he had requested. There is thus reason to examine his argumentation only in that it concerns specifically the ascertainment of the said consensus.

4.4 The appellant notes that he requested to have the examination completed concerning the current state of the research and the current position of historians worldwide on the Armenian question. His briefs also show here and there that he believes that there is no unanimity or consensus of the States, on the one hand, and the historians on the other hand, regarding the description of the facts of 1915 as genocide. However, his argumentation wears itself out opposing his own conviction against that of the cantonal authority. In particular, he does not cite any precise fact that would demonstrate an absence of the consensus ascertained by the tribunal de police [police court], even less that would demonstrate the arbitrariness of that finding.

The appellant indeed states that numerous States have refused to acknowledge the existence of an Armenian genocide. However, on this point it should be recalled that even UN Resolution 61/L.53 voted on in January 2007 and condemning Holocaust denial gathered only 103 votes among the 192 Member States. Only the finding that certain States refuse to declare on the international stage that they condemn Holocaust denial, apparently does not suffice to challenge the existence of a very broad consensus on the genocidal nature of the said acts. Consensus does not signify unanimity. The choice of certain States not to publicly condemn the existence of a genocide or not to join a resolution condemning the denial of a genocide may be dictated by political considerations with no direct connection to the genuine assessment provided by the said States on how historic facts must be described and does not make it possible in particular to call into question the existence of a consensus on this point, especially within the scientific community.

4.5 The appellant also notes that in his opinion, it would be contradictory for Switzerland to acknowledge the existence of the Armenian genocide and to support, in its relationship with Turkey, the creation of a committee of historians. That would demonstrate, according to him, that the existence of a genocide is not established.

However, it cannot be deduced from the repeated refusal of the Swiss Federal Council to acknowledge the existence of an Armenian genocide by an official statement, nor from the chosen approach consisting of supporting, with the Turkish authorities, the creation of an international committee of experts, that the finding according to which there is allegedly a broad consensus on the description of genocide is allegedly arbitrary. According to the clearly expressed will of the Swiss Federal Council, its approach is guided by concern to lead Turkey to carry out a work of collective memory regarding its past (BO/CN 2001 168: response from Federal Councillor Deiss on the Zisyadis assumption; BO/CN 2003 2021 et seq.: response from the Federal Councillor Calmy-Rey on the Vaudroz assumption – Acknowledgement of the 1915 genocide of the Armenians). This attitude of opening up to the dialogue cannot be interpreted as denying the existence of a genocide and nothing indicates that the support expressed in 2001 by the Federal Council for the creation of an international inquiry committee did not proceed from the same approach. It cannot be deduced from this, in a general manner, that there is allegedly sufficient doubt in the scientific community in particular, about the veracity of the genocidal nature of the facts of 1915 to make the finding of the said consensus arbitrary.

4.6 That being so, the appellant does not demonstrate how the tribunal de police became arbitrary in finding that there is a broad consensus, scientific in particular, about the description of the facts of 1915 as genocide. It follows from this that the cantonal authorities rightly refused to support the appellant’s approach seeking to open a historic-legal debate on this point.

5. Subjectively, the offence punished by Art. 261bis para. 1 and 4 CP presumes intentional behaviour. In/To ATF 123 IV 202 consid. 4c p. 210 and 124 IV 121 consid. 2b p. 125, the Federal Court judged that the said intentional behaviour had to be dictated by motives of racial discrimination. This question debated in doctrine was subsequently left open in/to ATF 126 IV 20 consid. 1d, spec. p. 26 and 127 IV 203 consid. 3, p. 206. It may remain open in this particular case as well, as will be seen.

5.1 As regards the intention, the correctional court upheld that the applicant, a doctor of law, politician, so-called writer and historian, had acted with full knowledge of the facts, stating that he would never change position, even if a neutral committee one day stated that the genocide of the Armenians indeed existed. These findings of the appellant’s inner will to deny a genocide are based on fact (ATF 110 IV 22, consid. 2, 77, consid. 1c, 109 IV 47 consid. 1, 104 IV 36 consid. 1 and cit.), so much so that the Federal Court is bound on this point (Art. 105 para. 1 LTF [Federal Court Act]). The appellant also does not formulate any complaint on this subject. He does not try to demonstrate that these findings of fact are allegedly arbitrary or result from a violation of his constitutional or convention-based rights, so much so that there is no need to examine this question (Art. 106 para. 2 LTF). For the rest, we do not see that the cantonal authorities, who deduced from this the appellant’s intention from extraneous elements (cf. ATF 130 IV 58 consid. 8.4 p. 62) disregarded on this point the very notion of intention under federal law.

5.2 As regards the appellant's motives, the Correctional Court upheld that they were similar to racist, nationalist motives and did not pertain to the historic debate, emphasising in particular that he described the Armenians as being aggressors of the Turkish people and that he claimed to be a follower of [Talaat] Pasha, who was historically, with his two brothers, the initiator, the instigator and the driving force of the genocide of the Armenians (judgment, consid. II, p. 17 et seq.).

It is not disputed in this particular case that the Armenian community constitutes a people, or at the very least an ethnicity (regarding the notion, see : Niggli, Rassendiskriminierung, 2nd edition, n. 653 p. 208), which is recognised in particular in its history marked by the events of 1915. It follows from this that the denial of the Armenian genocide – and, respectively, the representation lauded by the appellant of the Armenian people as aggressor – is already an assault on the identity of the members of this community (Schleiminger, op. cit., Art. 261bis CP, no. 65 and the reference to Niggli). The Correctional Court, which upheld the existence of motives similar to racism, also ruled out that the appellant's approach comes under the historic debate. These factual findings, concerning which the appellant does not raise any complaint (Art. 106 para. 2 LTF) are binding on the Federal Court (Art. 105 para. 1 LTF). They sufficiently demonstrate the existence of motives which, in addition to nationalism, can only be due to racial and/or ethnic discrimination. Consequently, it is not necessary to decide in this particular case the doctrinal debate cited in consid. 6 above. For the rest, the appellant also does not raise any complaint concerning the application of federal law on this point.

6. The appellant also invokes the freedom of expression guaranteed by Art. 10 ECHR, in connection with the interpretation given by the cantonal authorities under Art. 261bis para. 4 CP.

However, the records of the hearing of the appellant by the Public Prosecutor's Office of Winterthur/Unterland (23 July 2005), show that in speaking in public, in Glattbrugg in particular, the appellant intended to "to help the Swiss people and the National Council correct the error" (editorial note: acknowledgement of the Armenian genocide). In addition, he knew about the existence of the standard punishing the denial of a genocide and stated that he would never change positions, even if a neutral committee stated one day that the Armenian genocide indeed existed (judgment, consid. II, p. 17). One can deduce from these facts that the appellant was aware that by describing the Armenian genocide as an "international lie" and explicitly refusing the description of genocide for the facts of 1915, he was laying himself open to a criminal punishment in Switzerland. The appellant consequently cannot infer anything in his favour from the absence of predictability of the law that he invokes. These facts also allow one to uphold that the appellant is essentially attempting, by a provocative approach, to obtain a confirmation of his theory from the Swiss judicial authorities, to the detriment of the members of the Armenian community, for whom this question plays a central identity role. The sentencing of the appellant thus tends to protect the human dignity of the members of the Armenian community who recognise themselves in the memory of the genocide of 1915. The punishment of genocide denial is ultimately a measure of prevention of genocides in the meaning of Art. I of the Convention on the Prevention and Punishment of the Crime of Genocide concluded in New York on 9 December 1948, approved by the Swiss Federal Assembly on 9 March 2000 (RS 0.311.11).

7. Moreover, it should be noted that the appellant does not dispute the existence of the massacres or the deportations (see above consid. A), which can only be described, even in demonstrating restraint, as crimes against humanity (Niggli, Racial Discrimination, n. 976, p. 262). However, the justification of such crimes, whether it was in the name of

the right of war or alleged security reasons, already falls within the scope of Art. 261bis para. 4 CP, so much so that even considered under this perspective and independently of the description of these same facts as genocide, the sentencing of the appellant pursuant to Art. 261bis para. 4 CP does not appear arbitrary in its result, any more than it violates federal law."

II. THE RELEVANT INTERNATIONAL AND DOMESTIC LAW AND PRACTICE

A. The relevant domestic law and practice

14. Article 261bis of the Criminal Code, which curbs racial discrimination, is worded as follows:

"Whoever publicly incites hatred or discrimination toward an individual or group of individuals due to their race, ethnicity or religion;

whoever publicly propagates an ideology aiming to systematically demean or denigrate the members of a race, an ethnicity or a religion;

whoever, with the same intent, organised or encouraged propaganda actions or participates in the same;

Whoever publicly whoever publicly, by word, writing, image, gesture, acts of violence or any other manner, demeans or discriminates against an individual or a group of individuals because of their race, their ethnicity or their religion in a way which undermines human dignity, or for the same reason, denies, grossly minimizes or seeks to justify a genocide or other crimes against humanity; whoever refuses an individual or group of individuals, because of their race, their ethnicity or their religion, a service intended for public use, will be punished by a maximum of three years' imprisonment or a fine."

15. In its Article 264, titled "Genocide", the Criminal Code defines this offence as follows:

"Will be punished by life imprisonment or at least ten years imprisonment: whoever does the following with the intention of destroying in full or in part, a national, racial, religious or ethnic group:

a. kills members of the group or caused them to suffer a serious undermining of their physical or mental integrity;

b. subjected the members of the group to conditions of existence intended to cause its total or partial physical destruction;

c. ordered or took measures aiming to hinder births within the group;

d. forcefully transferred or had children from the group transferred to another group.

Whoever acted abroad, will also be punishable, if he is in Switzerland and cannot be extradited. Art. 6bis, pt. 2, is applicable.

The provisions relating to the authorisation to prosecute which appear in Art. 366, para. 2, let. b, in Articles 14 and 15 of the Law of 14 March 1958 on liability and in Articles 1 and 4 of the Law of 26 March 1934 on political guarantees are not applicable to genocide."

16. Postulate no. 02.3069, submitted to the National Council by Mr Dominique de Buman on 18 March 2002 and accepted by the National Council on 16 December 2003 by 107 votes to 67 votes, is worded as follows:

"The National Council acknowledges the 1915 genocide of the Armenians. It requests the Federal Council to acknowledge this and to forward its position by the usual diplomatic channels."

17. By a judgment dated 14 September 2001, the applicant and 11 other Turkish citizens were acquitted by the District Court of Bern-Laupen of the charges of genocide denial in the meaning of Article 261bis of the Criminal Code. That court deemed that the intention to discriminate was lacking in the defendants. The Court of Appeal of the Canton of Bern, and then the Federal Court on 7 November 2002, declared inadmissible the appeal and the appeal for review brought against that judgment.

B. International law and practice

18. The relevant articles of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 are worded as follows:

Article One

"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 2

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, 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 from 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 this 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 Statute of the International Military Tribunal, annexed to the Treaty of London of 8 August 1945, punished crimes against peace (sub-section a), war crimes (sub-section b) and crimes against humanity (sub-section c). It is worded as follows in its relevant part:

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 provisions of the Statute of Rome of the International Criminal Court, ratified on 17 July 1998 with entry into force with regard to 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, ethnic, racial or religious group, such as:

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 from 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, forced prostitution, forced pregnancy, forced sterilisation, or any other form of sexual violence of comparable gravity;

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

i) forced 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 the matter of *The Public Prosecutor v. Akayesu*, no. ICTR-96-4-T, 2 September 1998, the Trial Chamber of the International Criminal Tribunal for Rwanda accentuated the distinctive criterion 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, ethnic, racial or religious group, as such."

22. In addition, in the same matter, the said tribunal articulated the crime of genocide compared to the other crimes punishable by the Statute of the Tribunal (combination of offences):

> "469. Having regard to its Statute, the Chamber believes that the offences under the Statute - genocide, crimes against humanity, and violations of Article 3 shared by the Geneva Conventions and Additional Protocol II - have different constituent elements and, moreover, their repression is intended to protect different interests. It is consequently justified to consider them based on the same facts. In addition, depending on the case it could be necessary to obtain a conviction for more than one of these offences in order to show the extent of the crimes committed by a defendant. For example, a general who gives the order to kill all prisoners of war belonging to a given ethnic group, with the intention of thereby eliminating the said group, would be guilty at the same time of genocide and of shared violations under Article 3, although not necessarily of crimes against humanity. A conviction for genocide and violations of Article 3 together would then demonstrate fully the extent of the accused general's conduct.
>
> 470. On the other hand, the Chamber does not consider that any act of genocide, the crimes against humanity and/or violations of Article 3 shared by the Geneva Conventions and Additional Protocol II are minor forms of each other. The Statute of the Tribunal does not establish a hierarchy of standards; it handles all offences on equal footing. If genocide can be considered the most serious crime, nothing in the Statute allows one to say that crimes against humanity or shared violations under Article 3 and of Additional Protocol II are, in any case, accessory to the crime of genocide and are consequently offences subsidiary to it. As is stated, and that is a related argument, these offences contain different constituent elements. Once again, this consideration allows multiple conviction for these offences due to the same facts."

23. In its judgement of 26 February 2007 rendered in the case concerning *the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Serbia-and-Montenegro)* (*ICJ Collection 2007*), the International Court of Justice ("the ICJ") stated 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 following 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 from the group to another group" —

which include basic moral principles. "Killing" must be intentional, as must "causing serious bodily or mental harm to members of the group". In letters c) and d) of Art. II, these basic moral principles result expressly from the words "deliberately" and "intended", and implicitly as well, from the terms of "subjection" and "measures". In the same way, forcible transfer 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 2, p. 47, para. 5).

187. In addition to those basic moral principles, Article II adds one more. 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 para. 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 generally be referred to as "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. 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 "ICTY" or "the Tribunal") did in the Kupreškić et al. case: "[The] basic moral principle required 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 of 14 January 2000, para. 636.)"

24. The United Nations International Convention on the Elimination of All Forms of Racial Discrimination was ratified in New York on 21 December 1965. Switzerland ratified this instrument on 29 November 1994, which went into force in Switzerland on 29 December 1994. Its Articles 2 and 3 are worded as follows:

Article 2

"1. The 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 not engage in any act or practice of racial discrimination against persons, groups of persons or institutions and to ensure 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 organisations;

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 organisation;

e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organisations 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 United Nations International Covenant on Civil and Political Rights was adopted in New York on 16 December 1966. Switzerland ratified this instrument on 18 June 1992, which went into force in Switzerland on 18 September 1992. Its 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, public order, 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. During its 102nd session (2011), the UN Human Rights Committee adopted General Comment no. 34 on Article 19 of the Covenant. The paragraphs relevant to the present case are worded as follows:

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 subjected to any form of discrimination or 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, but not limited to, opinions of a political, scientific, historic, moral or religious nature. It is incompatible with paragraph 1 of Article 19[2] to criminalise the holding of an opinion. The harassment, intimidation or stigmatisation 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].

[2] See communications no. 550/1993, *Faurisson* v. *France*, Views adopted on 8 November 1996.

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

10. Any form of coerced effort to shape someone's opinion is prohibited.[4]. Freedom to express one's opinion necessarily includes freedom not to express one's opinions.

Freedom of expression

11. Paragraph 2 requires the States Parties to guarantee the right to seek, receive and impart information and ideas of all kinds regardless of frontiers. This right extends to the guarantee of the expression and receipt of every form of subjective idea and opinion capable of transmission to others, subject to the provisions in Article 19, paragraph 3, and Article 20[5]. It includes political views[6], commentary on one's own[7] and on public affairs[8], canvassing[9], discussion of human rights[10], journalism[11], cultural and artistic expression[12], teaching[13] and religious views[14]. It may also concern commercial advertising. The scope of paragraph 2 even embraces views 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.

(...).

Application of Article 19, paragraph 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 recognised 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 right to vote established under Article 25, as well as under Article 17 (see para. 37) 16.

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[4] See communications 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 communications no. 414/1990, *Mika Miha* v. *Equatorial Guinea*.
[7] See communications no. 1189/2003, *Fernando* v. *Sri Lanka*, Views adopted on 31 March 2005.
[8] See communications no. 1157/2003, *Coleman* v. *Australia*, Views adopted on 17 July 2006.
[9] Concluding Observations concerning the report from Japan (CCPR/C/JPN/CO/5).
[10] See communications no. 1022/2001, *Velichkin* v. *Belarus*, views adopted on 20 October 2005.
[11] See communications no. 1334/2004, *Mavlonov and Sa'di* v. *Uzbekistan*, views adopted on 19 March 2009.
[12] See communications no. 926/2000, *Shin* v. *Republic of Korea*, views adopted on 16 March 2004.
[13] See communications no. 736/1997, *Ross* v. *Canada*, views adopted on 18 October 2000.
[14] *Ibid.*
[15] *Ibid.*
[16] See communications no. 927/2000, *Svetik* v. *Belarus*, views adopted on 8 July 2004.

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' may relate to other persons individually or as members of a community[18]. Thus, it may, for instance, refer to 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 sanctions for expressing opinions on historic facts:

"49. Laws that penalise the promulgation of specific views about past events, so called "memory-laws", must be reviewed to ensure they violate neither freedom of opinion nor expression[21]. The Covenant does not permit general prohibitions on expression of historical views, nor does it prohibit a person's entitlement to be wrong or to incorrectly interpret past events. Restrictions must never be imposed on the right of freedom of opinion and, with regard to freedom of expression they may 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, titled "Hate Speech":

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

Whereas 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 anti-Semitism 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;

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[17] *Ibid*.

[18] See communications no. 736/1997, *Ross* v. *Canada*, views adopted on 18 October 2000.

[19] See communications no. 550/1993, *Faurisson* v. *France*, Concluding Observations concerning the report from Austria (CCPR/C/AUT/CO/4).

[20] Concluding Observations concerning the report from Slovakia (CCPR/CO/78/SVK) and the report from Israel (CCPR/CO/78/ISR).

[21] So-called "memory laws"; see Communication no. 550/1993, *Faurisson* v. *France*. See also Concluding Observations on the report from Hungary (CCPR/C/HUN/CO/5), para. 19.

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 and 8 December 1994), all forms of expression which incite racial hatred, xenophobia, anti-Semitism 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;

Considering 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 fully respect 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 already 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 the subject of discussions many times. In a declaration dated 24 April 2013 (no. 542, Doc. 13192), for example, some twenty members of the Parliamentary Assembly of the Council of Europe expressed themselves as follows:

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 (notice 06-184) of 19 December 2006, presented to the Court by the defendant government, the Institut Suisse de droit comparé (ISDC, *Swiss Institute of Comparative Law*) analysed the laws of 14 European countries (Germany, Austria, Belgium, Denmark, Spain, Finland, France, Ireland, Italy, Luxembourg, Norway, the Netherlands, the United Kingdom and Sweden) as well as those of the United States and Canada, concerning the offence of denial of crimes against humanity, in particular of genocide. Here is the summary thereof:

"The study of denial of crimes against humanity and genocide in the various countries subject to our examination reveals a contrasting situation.

Spain, France and Luxembourg all adopted an extensive approach to prohibiting the denial of such crimes. Spanish legislation refers generically to the denial of acts whose proven purpose was to eliminate in whole or in part an ethnic, racial or religious group. The perpetrator incurs a punishment of one to two years' imprisonment. In France and in Luxembourg, legislation targets the denial of crimes against humanity, as they are defined by Article 6 of the statute of the Nuremberg military tribunal annexed to the London Agreement of 8 August 1945 (...). This

limitation of the substantive scope of the criminalisation of denial of crimes against humanity is attenuated in Luxembourg by the fact that a special provision concerns the denial of crimes of genocide. Denial of such crimes is punishable by the same punishments [imprisonment of eight days to six months and/or a fine of 251 to 25,000 euros] as denial of crimes against humanity but the definition of genocide used is, in this instance, that of the Luxembourg Law of 8 August 1985, which is general and abstract, not limiting itself to acts committed during World War II. The limited scope of application of the French provisions was criticised and it should be emphasised in this regard that a proposed law to punish disputing the existence of the Armenian genocide was adopted at first reading by the National Assembly on 12 October 2006. Consequently, it appears that only Luxembourg and Spain criminalise the denial of crimes of genocide in their legislation, generically and without limiting themselves to specific historic episodes. In addition, to this day no country criminalises denial of crimes against humanity considered in their entirety.

In this regard, a group of countries to which, from analysing the laws, France can be added, criminalises only the denial of acts committed during World War II. Thus, **Germany** punishes by up to five years' imprisonment or a fine, whoever denies or minimises publicly or during a gathering, the acts committed with the objective of eliminating totally or partially a national, religious or ethnic group during the Nazi regime. **Austria** punishes by up to ten years' imprisonment whoever, acting in such a way that his position can be known to a large number of people, denies or seriously minimises genocide or the other crimes against humanity committed by the Nazi regime. Following the same approach, **Belgian law** punishes by imprisonment of eight days to one year whoever denies or grossly minimises, seeks to justify or approves the genocide committed by the German Nazi regime.

In other countries, in the absence of specific criminalisation in the law, the judge has intervened to ensure that negationism is punished. In particular, the Dutch Supreme Court stated that the provisions of the Criminal Code prohibiting discriminatory acts had to be applied to punish the denial of crimes against humanity. In addition, a draft law aiming to criminalise negationism is being examined in that country. In Canada, the Canadian Human Rights Tribunal based itself on the criminalisation of exposing others to hatred or contempt used in the Canadian Human Rights Act to condemn the content of a negationist website. The position of the judges in the United States is less decided, since that country protects freedom of expression very strictly for historic and cultural reasons. However, it can be noted that in a general manner, victims of offensive speech have thus far successfully obtained damages for their injury when they had legitimately felt a threat to their physical integrity.

In addition, there is a whole series of countries in which the denial of crimes against humanity is not directly envisaged by the law. For some of those countries, one can ponder the description, in this case, of more general criminal offences. Thus, **Italian law punishes apology for crimes of genocide, however the boundary between apology, minimisation and the denial of crimes is extremely thin. Norwegian law punishes whoever makes a discriminatory or hateful official statement.**

The applicability of such criminalisation to negationism is conceivable. The Supreme Court has thus far not had the opportunity to rule on this question. **In other countries, Denmark and Sweden for example, the trial judges have taken a position and accepted to verify the applicability of criminal charges concerning discriminatory or hateful statements to cases of negationism, although without upholding them in the cases that were submitted to them. In Finland, the political power has ruled in favour of the inapplicability of such provisions on negationism. Lastly, United Kingdom law and Irish law do not handle negationism."**

31. Since the publication of this study in 2006, significant developments have occurred in France and in Spain. Firstly concerning France, it should be recalled that it had adopted, on 29 January 2001, a law recognising, in a single article, the Armenian genocide perpetrated in 1915 (Law no. 2001-70):

Article 1:

"France publicly recognises the Armenian genocide of 1915."

32. On 23 January 2012, a law was adopted aiming to punish disputing the existence of genocides recognised by the law:

Article 1

"The first paragraph of Article 24bis of the Law of 29 July 1881 on freedom of the press is replaced by five paragraphs worded thusly:

"The following will be punished by the punishments stipulated by paragraph six of Article 24: persons publicly promoting, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes, as they are defined non-exclusively:

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

2.) by Articles 211-1 and 212-1 of the Criminal Code;

3.) by Article 6 of the Statute of the International Military Tribunal annexed to the London Agreement of 8 August 1945;

and which have been recognised by the law, an international convention signed and ratified by France or adhered to by France, by a decision taken by an EC or international institution, or characterised as such by a French court, rendered enforceable in France.""

Article 2:

"Article 48-2 of the Law of 29 July 1881 on freedom of the press is amended as follows:

1. After the word: "deported", the following words are inserted: ", or of any other victim of crimes of genocide, war crimes, crimes against humanity or crimes or offences of collaborating with the enemy."

2. After the word: "apologism", the following words are inserted: "for genocides,"."

33. On 28 February 2012, the French Constitutional Council declared this law to be contrary to the Constitution, in the following words:

"1. Whereas the applicant deputies and senators are referring to the Constitutional Council the law aiming to punish contesting the existence of the genocides recognised by the law;

2. Whereas Article 1 of the referred law inserts an Article 24 ter in the Law of 29 July 1881 on freedom of the press; and whereas the said article firstly punishes by one year of imprisonment and a fine of 45,000 euros those "having disputed or minimised in an outrageous manner", regardless of the public means of expression or communication used, "the existence of one or more crimes of genocide defined in Article 211-1 of the Criminal Code and recognised as such by French law"; and whereas Article 2 of the referred law amends Article 48-2 of the same Law of 29 July 1881; and whereas it extends the right recognised for certain associations to bring civil suit, in particular to draw the consequences of the creation of this new criminalisation;

3. Whereas , according to the authors of the court referrals, the referred law disregards the freedom of expression and communication proclaimed by Article 11 of the Declaration of the Rights of Man and the Citizen of 1789, as well as the principle of legality of the offences and punishments resulting from Article 8 of the said Declaration; and whereas in punishing only, on the one hand, genocides recognised by French law and, on the other hand, genocides to the exclusion of other crimes against humanity, these provisions allegedly also disregard the principle of equality; and whereas the applicant deputies also claim that the legislator misjudged his own competence and the principle of separation of powers proclaimed by Article 16 of the Declaration of 1789; and whereas the principle of necessity of punishments, proclaimed in Article 8 of the Declaration of 1789, freedom of research as well as the principle resulting from Article 4 of the Constitution according to which the parties carry out their professional activity freely, were allegedly also disregarded;

4. Whereas, on the one hand, under the terms of Article 6 of the Declaration of 1789: "The law is the expression of the public's will..."; and whereas the said article, like all of the other rules of constitutional value concerning the subject of the law, shows that, subject to the specific provisions stipulated by the Constitution, the law's purpose is to cite rules and it must consequently have a normative impact;

5. Whereas, on the other hand, under the terms of Article 11 of the Declaration of 1789: "The unrestricted communication of thoughts and opinions is one of the most precious rights of man: any citizen can thus speak, write and publish freely, unless he is responsible for abusing this freedom in cases determined by the law"; and whereas Article 34 of the Constitution provisions: "The law determines the rules concerning... the civic rights and fundamental guarantees given to citizens to exercise public freedoms"; and whereas, on this basis, the legislator is free to promulgate rules concerning the exercise of the right of free communication and the freedom to speak, write and publish; and whereas he is also free, on this basis, to institute criminalisation punishing abuses of the exercise of freedom of expression and communication which undermine public order and the rights of third parties; and whereas, however, freedom of expression and communication is all the more precious since the exercise thereof is a condition for democracy and one of the guarantees of respect of the other rights and freedoms; and whereas any undermining of the exercise of this freedom must be necessary, adapted and proportionate to the objective pursued;

6. Whereas a legal provision with the objective of "recognising" a crime of genocide cannot in and of itself have the normative impact attached to the law; and whereas,

however, Article 1 of the referred law punishes the disputing or minimising of the existence of one or more crimes of genocide "recognised as such by French law"; and whereas by thusly punishing the disputing of the existence and of the legal characterisation of crimes that he himself recognised and characterised as such, the legislator unconstitutionally undermined the exercise of freedom of expression and communication; and whereas, consequently, and with no need to examine the other complaints, Article 1 of the referred law must be declared to be contrary to the Constitution; and whereas its Article 2, which is not separable from it, must also be declared contrary to the Constitution,

D E C I D E S:

Article 1.- The law aiming to punish the contesting of the existence of the genocides recognised by the law violates the Constitution.

Article 2.- The present decision will be published in the Official Journal of the Republic of France.

(...)"

34. Significant developments have also been noted in Spain. Indeed, by a judgement dated 7 November 2007 (no. 235/2007), the Constitutional Court declared unconstitutional the offence of genocide "denial" referred to in the first subparagraph of Article 607.2 of the Criminal Code.

35. The offence of genocide is provided for by Article 607 of the Criminal Code. In its version prior to Constitutional Court judgement no. 235/2007, the said provision was worded as follows:

"1. Pursuing a goal of total or partial destruction of a national, ethnic, racial or religious group makes punishable:

- by imprisonment of fifteen to twenty years, the act of killing one of its members;

(...)

- by imprisonment of fifteen to twenty years, sexual assault on one of its members or inflicting injuries as described in Article 149;

(...)

2. The dissemination, by any means, of ideas or doctrines denying or justifying the crimes provided for by the preceding paragraph of this provision or seeking to rehabilitate regimes or institutions advocating practices constituting such offences, is punishable by one to two years' imprisonment."

36. Since judgement no. 235/2007 of the Constitutional Court, simple "denial" of a genocide is therefore no longer punishable and Article 607.2, in its amended version, reads as follows:

"The dissemination, by any means, of ideas or doctrines denying or justifying the crimes provided for by the preceding paragraph of this provision or seeking to rehabilitate regimes or institutions having advocated practices constituting such offences, will be punishable by one to two years' imprisonment."

37. In its judgement no. 235/2007, the Constitutional Court made a distinction between "denial" of genocide, on the one hand, which can be understood as simply expressing a point of view about certain facts, by stating that they did not take place or that they were not carried out in such a way that they can be described as genocide and, on the other hand, "justification", which does not imply an absolute denial of the existence of a precise crime of genocide but rather a relativising of it or denying its illegality, by a certain identification with the perpetrators of the crimes. In the case where the punishable conduct necessarily involves direct incitement to violence against certain groups or contempt toward the victims of crimes of genocide, the legislator specifically provided for punishments in connection with the concept of apologism for genocide, namely Article 615 of the Criminal Code, which punishes provoking, conspiring to commit and proposing genocide *(la provocación, la conspiración y la proposición*). The fact that the punishment stipulated in Article 607.2 is less severe than the one stipulated for apologism rules out the possibility that the legislator intended to institute a qualified punishment.

38. The Constitutional Court also questioned whether the types of conduct punished by Article 607.2 come under "hate speech". It deemed that simple denial of a genocide does not suppose direct incitement to violence against citizens or against precise races or beliefs. It stated that simple disseminating conclusions regarding the existence of or inexistence of specific facts, without making any value judgment about them nor about the illegality, falls within the scope of application of scientific freedom, recognised in para. b) of Article 20.1 of the Constitution. It stated that the said freedom enjoyed greater protection in the Constitution compared to freedom of expression or freedom of information. Lastly, it stated that this position was justified by the need for historic research, which is by definition controversial and disputable since it is built around value judgments and statements from which it is impossible to gain the objective truth with absolute certainty [summary of the judgement provided by the Court].

39. One should also mention the case of Luxembourg, which is the only country among those taken into account in the analysis by the Swiss Institute of Comparative Law which generally provides for a criminal punishment for genocide denial. Here are the relevant articles of the Criminal Code:

Article 457-3

"1. The following person is punishable by eight days to two years' imprisonment and a fine of 251 euros to 25,000 euros or only one of these punishments: whoever (...)

2. The following person is punishable by the same punishments or only one of these punishments: whoever, by one of the means cited in the preceding paragraph, has disputed, minimised, justified or denied the existence of one or more genocides as they are defined by Article 136bis of the Criminal Code, and of crimes against humanity and war crimes, as they are defined in Articles 136ter to 136quinquies of the Criminal Code and recognised by a Luxembourg court or an international court."

Article 136bis

"The following is characterised as a crime of genocide: one of the following acts committed with the intention of destroying in whole or in part, a national, ethnic, racial or religious group, as such:

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. measures intended to prevent births within the group;

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

The crime of genocide is punishable by a sentence of life imprisonment."

IN LAW

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

40. Invoking Article 10 of the Convention, the applicant maintains that by giving him a criminal conviction for having maintained in public that there had never been an Armenian genocide, the Swiss courts violated his freedom of expression. In particular he claims that Article 261bis, paragraph 4, of the Swiss Criminal Code does not present a sufficient degree of predictability, that his conviction is not motivated by the pursuit of a legitimate objective and that the violation of freedom of expression that he claims to have suffered is not "necessary in a democratic society". Article 10 provides the following:

"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 radio 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 objects to this theory.

A. Regarding admissibility

1. Regarding the application of Article 17 of the Convention

a. The applicable principles

42. The Court recalls that Article 17 allows it to declare an application inadmissible if it deems that one of the parties to the proceedings is invoking the provisions of the Convention to carry out an abuse of process. The said article is worded as follows:

"Nothing in this (...) Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein (...) or at their limitation to a greater extent than is provided for in [the] Convention."

43. The Court notes that the defendant government is not pleading that the application falls within the scope of application of Article 17. It nevertheless deems it advisable to examine whether the statements of the applicant should be removed from the protection of freedom of expression by virtue of this provision.

44. The Court firstly recalls that "Article 17, insofar as it refers to groups or to individuals, has the purpose of making 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; whereas, 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 (...)" (*Lawless v. Ireland*, 1 July 1961, § 7, series A no. 3).

45. The Court ruled in particular that "speech directed against the values supporting the Convention" is removed by Article 17 from the protection of Article 10 (see *Lehideux and Isorni v. France*, 23 September 1998, § 53 and 47, *Collection of judgments and decisions* 1998-VII, or *Orban et al. v. France*, no. 20985/05, § 34, 15 January 2009). Thus, in the matter of *Garaudy v. France* ((Dec.), No. 65831/01, ECHR 2003-IX (excerpts)), concerning in particular the conviction, for disputing crimes against humanity, of the author of a work systematically calling into question crimes against humanity committed by the Nazis against the Jewish community, the Court found incompatible *rationae materiae* with the provisions of the Convention the complaint that the interested party drew from this in the sphere of Article 10. It based its 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; it then deduced from this that the applicant was attempting to deflect Article 10 from its real purpose by using his right to freedom of expression for ends which are contrary to the text and spirit of the Convention. It arrived at the same conclusion in the judgments *Norwood v. United Kingdom* (no. 23131/03, 16 November 2004) and *Ivanov v. Russia* ((Dec.), no. 35222/04, 20 February 2007)), concerning the use of freedom of expression for Islamophobic and anti-Semitic purposes, respectively.

46. The Court reiterates that it is the highest priority to combat racial discrimination in all of its forms and manifestations (*Jersild v. Denmark*, 23 September 1994, § 30, series A no. 298). In this regard, it considers that incitement to hatred does not necessarily require a call to a particular act of violence or other criminal act. Attacks committed against persons by insulting, ridiculing or slandering certain parts of the population and specific groups or incitement to discrimination are sufficient for the authorities to give priority to the fight against racist speech over irresponsible freedom of expression that undermines the dignity, or even the security, of such parties or groups of the population. Political speeches that incite hatred based on religious, ethnic or cultural prejudice pose a threat to social peace and political stability in democratic States (*Féret v. Belgium*, no. 15615/07, § 73, 16 July 2009).

47. In the matter of *Leroy v. France* (no. 36109/03, 2 October 2008), the Court stated that the litigious expression did not fall within the scope of application of publications that would be removed by Article 17 of the Convention from the protection of Article 10. On the one hand, published in the humoristic and indeed controversial form of a caricature, the underlying message of the applicant – the destruction of American imperialism – did not concern denial of fundamental rights nor can it be equalled to speech directed against the underlying values of the Convention such as racism and anti-Semitism (*Garaudy*, aforementioned, and *Ivanov*, aforementioned) or Islamophobia (*Norwood*, aforementioned). On the other hand, notwithstanding the characterisation of apologism for terrorism upheld by the national courts, the Court considered that the litigious drawing and the commentary accompanying it were not such an unequivocal justification of terrorism that would have removed them from the protection, guaranteed by Article 10 of freedom of the press (§ 27). Lastly, the insult to the memory of victims of the 9/11 attacks through the litigious publication had to be examined in light of the non-absolute right protected by Article 10 of the Convention; the Court had already examined the content of similar statements under the perspective of the said provision (*Kern v. Germany* (Dec.), no. 26870/04, 29 May 2007).

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

convicted for distributing visual propaganda materials (posters) with content inciting to inter-ethnic hatred, discrimination and anarchy.

The Court considered that in this particular case, the posters found at the applicant's home contained various messages expressing the interested party's opinions. Although some of these messages were not shocking by their content, other ones could contribute, especially in the Romanian context, to maintaining tension within the population. In this regard, the Court noted more specifically the messages referring to the Roma minority and the homosexual minority. By their content, these messages sought to instigate hatred against these minorities, could seriously disturb public order and ran counter to the fundamental values of the Convention and a democratic society. Violating the rights of others, such acts were incompatible with democratic and human rights in such a way that pursuant to the provisions of Article 17 of the Convention, the applicant could not avail himself of the provisions of Article 10 of the Convention.

b. Application of the principles to this particular case

49. In the light of the said case-law, the Court will research whether the applicant's statements should be excluded from the scope of application of Article 10 pursuant to Article 17 of the Convention, even though the defendant government has not requested this. The judgments and decisions cited show that this is a measure that the Court has only very rarely applied.

50. The Turkish government firstly considers that this application cannot be declared inadmissible pursuant to Article 17 of the Convention, which the Swiss government never requested to apply, moreover.

51. The Court admits that some of the applicant's statements were likely to be provocative. The motives of the applicant to commit the offence were described as "nationalistic" and "racist" by the domestic courts (judgment of the Federal Court, consid. 5.2, paragraph 13 above). Addressing the litigious events, in his conferences the applicant specifically referred to the notion of "international lie". However, the Court first of all recalls that ideas which are upsetting, shocking or disturbing are also protected by Article 10. Then, it considers it important that the applicant has never disputed that there were massacres and deportations during the years in question. What he denies, on the other hand, is only the legal description of "genocide" given to the said events.

52. The above-mentioned case-law (paragraphs 44-50) shows that the tolerable limit for statements to fall within Article 17 lies in the question whether a discourse has the purpose of inciting to hatred or violence. The Court considers that the dismissal of the legal characterisation of the events of 1915 was not likely to in and of itself to incite hatred against the Armenian people. In any case, the interested party has not been prosecuted or punished for incitement to hatred, which is a separate offence by virtue of the first paragraph of Article 261bis of the Criminal Code (paragraph 14 above). Nor

does it appear that the applicant expressed contempt toward the victims of the events in question. Consequently, the Court considers that the applicant did not usurp his right to openly debate issues, even sensitive, potentially disagreeable issues. The unrestricted exercise of this right is one of the fundamental aspects of freedom of expression and distinguishes a democratic, tolerant and pluralistic society from a totalitarian or dictatorial regime.

53. Indeed, the Correctional Court considered that the applicant claimed to be a follower of Talaat Pasha, who was, according to the said court, one of the initiators, instigators and prime movers of the genocide of the Armenians. The Court does not rule out that the said identification, to a certain extent, with the perpetrators of the atrocities can be placed on equal footing with an attempt to justify the acts committed by the Ottoman Empire (see, in this sense, Spanish Constitutional Court judgment no. 235/2007, paragraphs 38-40 above). However, it does not consider itself obligated to respond to this question, given that the applicant has not been prosecuted nor punished for having tried to "justify" a genocide in the meaning of paragraph 4 of Article 261bis of the Criminal Code.

54. Considering the preceding, one cannot claim that the applicant used the right to freedom of expression for ends contrary to the word and the spirit of the Convention and consequently deflected Article 10 from its purpose. There is therefore no reason to apply Article 17 of the Convention.

2. Conclusions concerning admissibility

55. The Court also notes that the complaint drawn from Article 10 is not clearly unfounded in the meaning of Article 35 § 3 a) of the Convention. In addition, it notes that the complaint does not come up against any other grounds for inadmissibility. It should therefore be declared admissible.

B. On the merits

1. Existence of interference

56. The Court notes that the existence of interference with the applicant's freedom of expression is not contested by the parties. It too considers that the litigious conviction incontestably constitutes an "interference" in the applicant's exercise of his right to freedom of expression.

2. Justification of the interference

57. Such interference violates Article 10, unless it fulfils the requirements of paragraph 2 of the said provision. It remains to be seen whether the interference was "stipulated by the law", whether it pursued one or more of the legitimate objectives cited in the said paragraph and whether it was "necessary in a democratic society" to achieve them.

a. "Stipulated by the law"

i. The theories of the parties

- *The applicant*

58. The applicant maintains that Article 261[bis], paragraph 4, of the Criminal Code refers to denial of a "genocide", without specifying whether it is a matter of the "Jewish genocide" or the "Armenian genocide". In addition, he reiterates that the Federal Tribunal, in the case judged in the first instance by the court of Bern-Laupen, acquitted him of the same charge (paragraph 17 above). Consequently, he believes that he could not foresee that the same law could have different consequences in the subsequent case, which is the subject of this application. Lastly, he adds that the litigious provision was criticised by a member of the Swiss government, namely the former Minister of Justice, C.B., during a visit in Turkey in early October 2006.

- *The Government*

59. The Government notes that the conviction of the applicant is based on Article 261[bis], paragraph 4, of the Swiss Criminal Code (paragraph 14 above), which is published in full in the Systematic Collection (RS) and the Official Collection (RO) of federal laws. He specifies that the Federal Council had proposed, in its draft law, to limit the penal protection to Holocaust denial without explicitly mentioning genocide denial, but that the legislator had not followed it. Parliament allegedly extended the scope of application of the provision concerning denying, minimising or attempting to justify a genocide in general and/or crimes against humanity (see, in this regard, Federal Court judgment of 12 December 2007, consid. 3.2). At the beginning the deliberations of the National Council, the rapporteur of the Committee allegedly specified that the massacres of Armenians are also considered a "genocide" in the meaning of the amended provision.

60. The Government explains that when it had ratified the International Covenant on Civil and Political Rights, Switzerland had expressed a reservation in which it stated that it allegedly had the right to adopt, on the occasion of its planned joining of the Convention of 21 December 1965 on the Elimination of All Forms of Racial Discrimination, a criminal provision which takes into account the requirements of Article 20 § 2, of the Covenant, which provides that "any advocacy of national, racial or religious hatred that

constitutes incitement to discrimination, hostility or violence is prohibited by the law." With the entry into force of Article 261[bis] of the Criminal Code, the said reservation was able to be withdrawn.

61. The Government considers that this context includes Recommendation (97)20, adopted on 30 October 1997 by the Committee of Ministers of the Council of Europe, concerning hate speech, condemning any type of expression that incites racial hatred, xenophobia, anti-Semitism and all forms of intolerance.

62. In addition, the Government notes that more than 20 national parliaments have recognised that the deportations and massacres having occurred between 1915 and 1917 constitute a genocide in the meaning of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. In addition, the European Parliament invited Turkey, on 15 November 2000, to publicly recognise the genocide of the Armenians perpetrated during World War I.

63.In light of this international development and of the wording of Article 261[bis], paragraph 4, of the criminal code, the applicant would have been able to anticipate that his statements would expose him to penal sanctions in Switzerland. The Government adds that, in the hearing on 20 September 2005, the applicant stated he had not denied any genocide because there had never been genocide, but that he was fighting against an international lie.

64. The Government therefore considers that Article 261[bis], paragraph 4 of the penal code is written with sufficient precision, the more so since the facts denied by the applicant constitute, in any manner, crimes against humanity (judgment by the Federal Court dated 12 December 2007, consid. 7, paragraph 13 above), also aimed at by the wording of Article 261[bis], paragraph 4.

- The Turkish government, third party intervener

65. Following the example of the applicant, the Turkish government judges that the legal measure was not foreseeable by the interested party. The latter could not reasonably have expected to be condemned on the basis of international law or of Swiss law, nor the consensus of public opinion in Switzerland. From that time, the interference in his freedom of expression would not have had a sufficient legal basis.

ii. The Court's assessment

- The applicable principles

66. The Court recalls its precedent, according to which the words "anticipated by the law" not only require that the incriminated measure have a basis in domestic law, but also aim at the quality of the law involved: thus, the latter should be accessible to the persons subject to trial, and foreseeable in its effects, (see, among several others, *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 incumbent on the national authorities, in particular on the courts, to interpret and to apply domestic law (*Kopp v. Switzerland*, 25 March 1998, § 59, *Recueil* 1998-II, and *Kruslin v. France*, 24 April 1990, § 29, A series no. 176-A).

67. One of the requirements deriving from the expression "foreseen by the law" is foreseeability. Therefore, "a law" must be a standard that is stated with sufficient clarity to enable the citizen to govern his own conduct; by seeking the advice as necessary of informed counsellors, he should be able to anticipate, to a reasonable degree in the circumstances of the case, the consequences that may result from a particular action. They do not need to be foreseeable with absolute certainty - experience shows that such certainty is unattainable. Certainty, moreover, although highly desirable, is sometimes accompanied by excessive rigidity; and yet, the law must be able to adapt to changing circumstances. Also, many laws employ, in the nature of things, more or less vague formulations, the interpretation and application of which depend on practice (*Rekvényi v. Hungary* [GC], no. 25390/94, § 34, ECHR 1999-III ; Sunday Times *v. UK (no. 1)*, 26 April 1979, § 49, A series no. 30 ; and *Kokkinakis v. Greece*, 25 May 1993, § 40, A series no. 260-A).

68. The degree of precision of domestic legislation – which cannot in any event foresee every possible situation – depends to a great extent on the contents of the law in question, on the domain that it is intended to cover and on the number and status of persons to whom it is addressed (*Rekvényi,* above-mentioned, § 34, and *Vogt v Germany*, 26 September 1995, § 48, A series no. 323). Taking into account the general nature of constitutional provisions, the degree of precision required by these provisions may be less than that required of ordinary legislation (*Rekvényi*, above-mentioned, § 34).

- The application of the above-mentioned principles in the case in point

69. Concerning the circumstances in the case in point, it is not contested that the conviction of the applicant is based on an accessible text, i.e. Article 261bis, paragraph 4, of the criminal code (paragraph 14 above). On the other hand, the applicant maintains that this clause does not present the degree of precision and foreseeability required by the Court. The latter is from that time led to examine whether, in the concrete circumstances in the case in point, the applicant could anticipate that words spoken during meetings held in Switzerland could give rise to an investigation, which is to say a criminal conviction, on the basis of the provision mentioned.

70. According to the Federal Court, a literal and grammatical interpretation of the clause in question shows that the law does not refer to any specific historic event. In fact, Article 261bis, paragraph 4, of the criminal code mentions "a" genocide and "other crimes against humanity". The law

would therefore not exclude the curbing of the denial of genocides other than that committed by the Nazi regime; nor would it expressly describe the denial of the Armenian genocide as an act of racial discrimination under criminal law (see consideration 3.1 of the judgment by the Federal Court, paragraph 13 above). It would seem that the same conclusion could be drawn from the historic interpretation of the standard (see consideration 3.2 of the judgment by the Federal Court.

71. The Court estimates that the term "a genocide" used in Article 261bis, paragraph 4 of the criminal code may cause doubt with regard to the precision required by Article 10 § 2 of the Convention. It is nevertheless of the opinion that, in the particular circumstances of the case in point, the penal sanction was foreseeable by the applicant. In fact, the latter person, a doctor of law and an informed political figure, could have suspected that he was exposing himself to possible future penal sanctions by having this type of discussion in Switzerland, since the Swiss National Council had recognised the existence of the Armenian genocide in 2002 (see paragraph 16 above). Moreover, the applicant himself acknowledges awareness of the Swiss standard sanctioning the denial in public of a genocide, adding that "he would never change positions, even if a neutral commission should affirm one day that the genocide of Armenians had indeed existed", (see consid. 6 of the judgment by the Federal Court). Consequently, the Court shares the opinion of the Federal Court according to which, in these circumstances, the applicant was not unaware that by describing the Armenian genocide as an "international lie", he was exposing himself, in the Swiss territory, to a penal sanction *(ibid*.)

72. In conclusion, the Court concludes that the disputed interference was "foreseen by the law" in the sense of the second paragraph of Article 10 of the Convention.

b. Legitimate objective

73. The Government maintains that the conviction of the applicant aimed at several legitimate goals, in particular the protection of the reputation and the rights of others, in the particular case the honour of the victims whom the applicant publicly described as instruments of imperialist powers, against the attacks by whom the Turks were only defending their country. It adds that the conviction of the applicant's public statements was also justified by the protection of order, in conformity with Article 10 § 2.

74. The Turkish government considers that the conviction of the applicant does not serve any of the legitimate aims listed in Article 10 § 2. That the defendant government had not in any event proven that the measure was necessary to prevent a specific and concrete danger to public safety.

75. The Court judges that the disputed measure was able to aim at the protection of the rights of others, i.e. the honour of the families and friends of the victims of the atrocities committed by the Ottoman Empire against the

Armenian people beginning in 1915. On the other hand, it considers that the Government's argument, according to which the applicant's words could pose a grave threat to public "order", was not sufficiently substantiated.

c. "Necessary in a democratic society"

i. The theories of the parties

- *The applicant*

76. The applicant considers that the restriction of his freedom of expression is not proportional to the aims pursued, i.e. the prevention of racial discrimination and xenophobia. He maintains, moreover, on the basis of Article 6 of the 1948 Convention for the prevention and curbing of the crime of genocide, that the question as to whether a "genocide", which is a legal term, has been committed can only be resolved by a court.

77. The applicant considers that the disputed measure is not necessary in a democratic society and that convicting him for his statements did not serve any urgent social need. He does not consider necessary the restriction of his freedom of expression for the purpose of the protection of the honour and the rights of others, in the current case the dignity of the Armenian community. Furthermore, that in condemning him, Switzerland was attacking the honour of the Turkish community, which rejects the theory of an "Armenian genocide".

78. The applicant objects to the opinion of the domestic authorities, seeing in their statements nationalist and racist words. He insists on the legal character of his theory, inspired by international law and in particular by the 1948 Convention.

79. The applicant, referring to several of the Court's cases concerning denial of the Holocaust, maintains that the essential difference has to do with the fact that the Holocaust was described by the Nuremberg Court as a crime against humanity. Moreover, that the Court had declared, in the context of these cases, that they were a matter of clearly established historic facts. In the case *Lehideux and Isorni v. France* (23 September 1998, § 55, *Collection* 1998-VII), that the Court had stated that all countries should make efforts to debate publicly and calmly about their own history. That in pronouncing a violation of Article 10 in this case, it had therefore protected the publication by the applicants that presented Marshal Pétain in a more favourable light.

That the same would apply in the case *Giniewski v. France* (no. 64016/00, ECHR 2006-I), which originated in a publication in which the applicant wanted to present a theory on the significance of a dogma and on its possible links to the origins of the Holocaust. In this case, the Court had moreover declared that it concerned a thought that the applicant had wanted to express in the capacity of a journalist and historian and that it was of fundamental

importance, in a democratic society, that the debate engaged, relative to the origin of actions of a particular seriousness constituting crimes against humanity, could be conducted freely (§ 51).

That in this same case, the Court declared that statements or texts that contained conclusions and phrases that could offend, shock or even disturb certain persons did not lose, as such, the benefit of freedom of expression (§ 52 ; see also *De Haes and Gijsels v. Belgium*, 24 February 1997, § 46, *Collection* 1997-I).

80. The applicant recalls that the judgment by the Federal Court was based mainly on the fact that the Armenian genocide was considered in Swiss public opinion and in the international sphere as a clearly established fact. On the other hand, conscious that there are divergent opinions on this question, that the judges of this court had sought to reassure themselves by using the formula "consensus does not mean unanimity", (consid. 4.4 of the judgment). The applicant considers that by proceeding in this manner, the Federal Court ignored or at the very least minimised the opinion and the works of the adherents of this theory. Moreover, the concept of "consensus" should be used with care in the field of science, whose results are subject to constant change, challenge and progress.

81. The applicant states that at his side stand numerous persons who consider, as he does, that the tragic events of 1915 cannot be described as "genocide" (he cites the names of about twenty persons). That these persons have substantiated their theory. And yet, that the Federal Court had ignored their points of view, contenting itself to state that it was not up to them to write history. Finally, the applicant stresses the grounds advanced by the Federal Court, according to which it was not possible to deduce from the repeated refusal by the Federal Council to acknowledge, by an official declaration, the existence of an Armenian genocide, that the description as "genocide" is arbitrary (consid. 4.5 of the judgment).

82. The applicant also refers to the "Protocol for the development of relations between the Republic of Armenia and the Republic of Turkey", signed in Zurich on 10 October 2009 (which has not yet entered into effect), by which the two Governments agreed to create an intergovernmental commission and sub-commissions in order to implement a dialogue of historical significance with the aim of re-establishing mutual trust between these two nations, with a specific impartial investigation of the historic files and archives, with the aim of defining the existing problems and making recommendations. According to him, the necessity of creating commissions with the aim of discussing points of history amounts to acknowledging that one cannot speak of "clearly established facts".

83. The applicant maintains that "genocide" is a well-defined international crime. Its legal basis today would be Article 2 of the Convention of 1948, under the terms of which it is necessary to be confronted with one of the enumerated actions, and which, moreover, must have been "committed with the intention of destroying, in whole or in part, a national, ethnic, racial or religious group" (*dolus specialis*). In its judgment rendered on 26 February 2007, in the case relating to the *application of the convention for the prevention and curbing of the crime of genocide* (Bosnia-Herzegovina v. Serbia and Montenegro), the ICJ clarified the concept of "genocide". In this judgment, the ICJ also stressed that the expulsion of a group or of part of a group, for example, could constitute a war crime or a crime against humanity, but that it did not necessarily bring together the elements that constitute a "genocide". The ICJ also recalled that it was incumbent on the applicant party to prove an allegation of genocide, and that the level of proof required was high.

84. The applicant also refers to the Information Report on the questions commemorated by the French National Assembly, dated 18 November 2008 (no. 1262) and presented by the former president of the National Assembly, Bernard Accoyer (rapporteur). According to this document, the legislature, by the adoption of laws, may not substitute the courts in matters concerning the imputation of certain historic events. The rapporteur considers it incompatible with the French constitution to judge on historic facts, and that this can infringe on the freedom of expression and thought and on the foundations of science and history, divide the citizens of France and cause diplomatic problems. He adds that the opinion of Robert Badinter, the former president of the French Constitutional Council, has the same tendency, which considers in particular that laws that punish persons denying the "Armenian genocide" are contrary to Article 34 of the French Constitution.

85. The applicant, referring to Stefan Yerasimos, born in Istanbul and a professor at the University of Paris, considers it essential to make the distinction between "law" and "history", in that the purpose of the first is to prove and judge something, while the second seeks to explain things without providing value judgments. He maintains that it is up to the competent courts to describe a particular historic action with regard to international law, and that it is appropriate to discuss events in a global manner, taking into account differences of opinion on the basis of contradictory documents. According to their personal convictions and after an in-depth exploration of the pertinent questions, certain persons may feel the need to excuse themselves or to take other initiatives, but others may react differently. The applicant is convinced that the action of "standardising" and "handcuffing" personal convictions would not help anybody and, moreover, would not make the personal convictions of individuals evolve.

86. On the basis of these items, the applicant maintains that there has been a violation of Article 10 of the Convention.

- The Government

87. As concerns the need for interference, the Government states that the Swiss courts had to judge whether the applicant had denied or minimised the events that, on the supposition that they were established, would have been described as international crimes pursuant to international public law. To this end, these courts would be founded not only on declarations of political acknowledgement alone - they would also have considered that the authorities' conviction from which they emanate was formed by the opinions of experts or from reports considered to be solidly argued and substantiated. They would also have investigated whether there was a broad consensus within the community and, in the affirmative, whether this consensus was itself based on a broad scientific consensus with regard to the description of genocide for the events that occurred from 1915 to 1917. They would also have discovered that, in the general literature devoted to international criminal law, more particularly the study of genocides, one of the examples presented as "classic" is the very same Armenian genocide (judgment by the Federal Court, consid. 4.2, paragraph 13 above). Consequently, one cannot reproach the cantonal courts for having described the deportations and massacres that occurred between 1915 and 1917 as genocide and as a clearly established historical fact, nor reproach the Federal Court for having judged that the conclusion with regard to the existence of a general consensus in this regard was not arbitrary, and that there was no contradiction between this statement of fact and the attitude of openness to dialogue on the part of the Federal Council recommending the creation of a commission of historians (judgment by the Federal Court, consid. 4.4 to 4.6).

88. With regard to the behaviour of the applicant, the latter publicly described the Armenians as aggressors against the Turkish people, describing it as an "international lie" which is the object of a broad public consensus, and putting the USA and the European Union at the same level as the "Führer". Moreover, according to the judge in the magistrate's court, the applicant claimed to be a follower of Talaat Pasha, who played an important role in the context of the events in question. As the Federal Court found, the Armenian community would recognise itself in particular in these events, such that the applicant's theories would be damaging to the identity of its members (judgment by the Federal Court, consid. 5.2).

89. The Government considers that these items are sufficient to demonstrate the racist and nationalist character of the applicant's motives, who tries to rehabilitate the acts committed and to accuse the victims of these acts of falsifying history. The case in point would thus be different from the situation with which the Court was concerned in its judgment *Jersild v. Denmark* (23 September 1994, A Series no. 298). In this case, the applicant

did not himself make the contested statements (§ 31) and his reporting could not objectively appear to have the purpose of propagating racist ideas and racial opinions (§ 33).

90. Moreover, the Government observes that the applicant himself confirms that he would not change his opinion, even if a neutral commission should one day confirm that the events in question constitute a genocide. The arguments defended by the applicant thus did not result from work as part of an historic inquiry. Quite the contrary, they call into question the values that are the basis of the fight against racism and intolerance. Being an attack on rights, in particular of persons close to the victims, they would be contrary to the values proclaimed and guaranteed by the Convention, i.e. tolerance, social peace and non-discrimination.

91. The Government finds, moreover, that the applicant was not prevented from expressing his opinion publicly, and that other demonstrations of the same type have occurred. To this is to be added, in the eyes of the Government, the penalty imposed on the applicant, which amounts to 90 days – a fine of 100 CHF and a fine of 3,000 CHF, the former having been a suspended sentence, although Article 261bis of the criminal code provides for sanctions up to three years' imprisonment or 360 days – fines of 3,000 CHF (Article 34 of the criminal code). The sanction was therefore not disproportionate to the legitimate aims pursued.

92. In light of the preceding, the national courts did not exceed the margin of assessment that is granted to them in the case in point, and thus there has not been a violation of Article 10.

- *The Turkish government, third party intervener*

93.The Turkish government, a third-party intervener in the proceedings, considers it important to recall that the applicant never denied that massacres and deportations had occurred in the territory of the former Ottoman Empire in 1915. What the interested party would contest, on the other hand, would be simply their legal description of "genocide", in the sense of international law and Swiss law. According to the Turkish government, there is an important difference between an ongoing debate on the legal aspects of the events of 1915 and the denial of "clearly established historic facts". The Turkish government recalls that it is not up to the Court to arbitrate questions that are the object of an ongoing debate on certain historic events, nor their interpretation (see, among others, *Lehideux and Isorni v. France*, 23 September 1998, § 47, *Collection* 1998-VII). And yet, according to it, the definition of the events in 1915 is still the object of a debate among historians.

94. The third party intervener is, moreover, convinced that the measure was not necessary in a democratic society. It maintains that the applicant is far from being the only person who considers that no genocide in the legal sense is involved. The third party intervener cites, in this regard, a paragraph

by a representative of the British government in reply to a question in the British Parliament, dated 8 March 2008: "[T]he government's position on this question was settled long ago. The government is aware of the great emotion awakened by this tragic episode of history and acknowledges that the massacres of 1915 -1916 are a tragedy. On the other hand, neither it nor its predecessors have judged that the evidence is sufficiently unequivocal to convince us that the events should be described as genocide, as defined by the 1948 UN Convention on genocide" (translation by the court registry of the paragraph reproduced in the *British Year Book of International Law*, Vol. 79, 2008, p. 706-707).

95. The Turkish government also maintains that there has been no criminal conviction in any other nation that is a member of the European Council for denial of the "Armenian genocide" under the heading of racial discrimination or other heading. It adds that no nation has a law that would provide penal sanctions for denial of the "Armenian genocide" and that, apart from Switzerland, only two European nations, i.e. Luxembourg and Spain, have put in place laws curbing the denial of a genocide in general. According to the third party intervenor, this shows clearly that one cannot speak of an "urgent social need" in the sense of the Court's precedent relating to article 10 § 2. Moreover, Switzerland does not have, in relation to the events that occurred in the territory of the former Ottoman Empire in 1915, any specific historic antecedent that would give rise to an "urgent social need" to punish a person for racial discrimination on the basis of his statements contesting the legal characterization of "genocide" given to these actions. Finally, the Turkish government maintains that the fact that the applicant was sanctioned without having been prevented from publicly expressing his opinion and that other demonstrations of the same type have occurred is also evidence refuting the existence of such a need.

96. The Turkish government doubts that the interference in the applicant's freedom of expression was proportional to the goal pursued. It does not in any way deny the vital importance of the fight against racial discrimination in all its forms and manifestations. On the other hand, it is convinced that the applicant's remarks did not aim at inciting violence, hostility and racial hatred against the Armenian community in Switzerland. One cannot deduce, as the Swiss courts have done, from the rejection by the applicant of the legal characterization as "genocide" given to the events of 1915, any racist or nationalist motives or any intention of discrimination based on racial or ethnic considerations. In this regard, the Turkish government considers that, if the denial of the Holocaust is today the principal driving force of anti-Semitism, the rejection of the characterization as "genocide" for the events of 1915 cannot have the same effect. To contest such a legal characterization would not in any way provoke or incite hatred against the Armenian community. Finally, and unlike the case of the national socialist regime

which was responsible for the Holocaust, in the applicant's case, there is also no desire to rehabilitate any particular government.

97- Taking into account the preceding, the Turkish government concludes that there has been a violation of Article 10 of the Convention.

ii. The Court's assessment

- The applicable principles

α) In general

98. The general principles that make it possible to assess the need for interference in the exercise of freedom of expression have been summarised in the judgment *Stoll v. Switzerland* ([GC], no. 69698/01, § 101, ECHR 2007-V) and recalled more recently in the judgment *Swiss Raelian Movement v. Switzerland* ([GC], no. 16354/06, § 48, ECHR 2012 and *Animal Defenders International v. UK* [GC], no. 48876/08, § 100, 22 April 2013):

> "i. Freedom of expression constitutes one of the essential foundations of a democratic society, one of the primordial conditions for its progress and self-fulfilment for all. Subject to paragraph 2 of Article 10, it applies not only to "information" or "ideas" that are accepted favourably or considered inoffensive or indifferent, but also for those that offend, shock or disturb - this is the will of pluralism, tolerance and the spirit of openness without which there is no "democratic society". As is established in Article 10, it is accompanied by exceptions which require, however, a narrow interpretation, and the need to restrain it must be established in a convincing manner (...).
>
> ii. The adjective "necessary" in Article 10 § 2 implies an "urgent social need". The contracting Nations enjoy a certain margin of assessment in judging the existence of such a need, but it is augmented by a European audit bearing on both the law and the decisions that apply to it, even though these emanate from an independent jurisdiction. The Court therefore has jurisdiction to make a final ruling on the point of whether a "restriction" is in keeping with the freedom of expression protected by Article 10.
>
> iii. The Court does not have the task, when it performs its audit function, of inserting itself into the competent domestic jurisdictions, but rather of verifying from the point of view of Article 10 the verdicts that they have rendered pursuant to their power of assessment. It does not mean that it must limit itself to investigating whether the defendant Nation has used this power in good faith, carefully and reasonably - it must also consider the disputed interference in light of the entire case in order to determine whether it was "proportional to the legitimate aim pursued" and whether the reasons invoked by the national authorities to justify it appear "pertinent and sufficient" (...) In doing this, the Court must be convinced that the national authorities have applied rules that comply with the principles established in Article 10 and moreover, that in doing so they are acting on the basis of an acceptable assessment of the pertinent facts (...)."

β) With respect to the debate and the historic research

99. Moreover, the Court points out that, if the search for historic truth is an integral part of the freedom of expression, it is not up to the Court to arbitrate questions in history that arise from a still ongoing debate among historians (see, *mutatis mutandis*, *Chauvy et al*, previously cited, § 69, and *Lehideux and Isorni*, previously cited, § 47). On the other hand, it has the task of examining whether, in the case in point, the disputed measures were proportional to the aim pursued (*Monnat v. Switzerland* , no. 73604/01, § 57, ECHR 2006-X).

100. It should be noted next that Article 10 § 2 of the Convention leaves no room for restrictions of the freedom of expression in the domain of political views or questions of general interest (*Wingrove v. UK* , 25 November 1996, § 58, *Collection* 1996-V, *Lingens v. Austria*, 8 July 1986, § 42, A series no. 103 ; *Castells v. Spain*, 23 April 1992, § 43, A Series no. 236, and *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, § 63, A Series no. 239).

101. The Court points out, moreover, that in the exercise of its auditing power, it must consider the disputed interference in light of the entire matter, including the content of the words for which the applicant is criticised and the context in which he said them (*Lingens*, previously cited, § 40, and *Chauvy et al*, previously cited, § 70).

102. The previously cited principle according to which article 10 also protects information or ideas that are able to offend, shock or disturb also applies in cases involving, as with the case in point, historic debate "in a domain in which certainty is unlikely » (see, *Monnat*, previously cited § 63) and the controversy still current (*Lehideux and Isorni*, previously cited, § 55).

103. Concerning the debate on historic questions, the Court has already had the chance to specify that hindsight makes it inappropriate, after the passage of many years, to apply to certain words concerning historic events the same severity as [if they had been spoken] only a few years previously. This contributes to the efforts that every country is called on to debate openly and calmly its own history (*Monnat*, previously cited, § 64, and *Lehideux and Isorni*, previously cited, § 55 ; see also, *mutatis mutandis, Editions Plon v. France*, no. 58148/00, § 53, ECHR 2004-IV; in this last judgment, the Court recalled the principle according to which the passage of time must necessarily be taken into account to assess the compatibility with freedom of expression of a ban, for example of a book).

104. Concerning the "proportionality" of an interference, the Court points out that the type and severity of the punishments imposed are also items to take into consideration (see, for example, *Chauvy et al*, previously cited, § 78).

γ) The precedents in the case brought against Turkey relating to hate speech, the defence of violence and the Armenian question

105. In many cases, in particular against Turkey, the applicants complained of their sentencing for having engaged in hate speech or inciting violence. Below, just a few examples are mentioned that are relevant to the case in point.

106. In the case *Erdoğdu and İnce v. Turkey* ([GC], nos. 25067/94 and 25068/94, ECHR 1999-IV), the applicants were sentenced for having spread separatist propaganda via a magazine for which one was an editor and the other a journalist (§ 48). The Court determined that the magazine had published an interview with a Turkish sociologist, in which the latter stated his views on possible changes in the attitude of the Turkish government on the Kurdish question. It assessed that the interview had an analytic character and did not contain any passages that could provide an incitement to violence. The Court's assessment was that in the case in point, the national authorities had not sufficiently taken into account the right of the people to be presented with another point of view on the situation in the south east of Turkey, although it might be disagreeable for them.

According to the Court, the reasons put forth by the national criminal court in Istanbul to convict the applicants, although pertinent, could not be considered as sufficient to justify the interference in their freedom of expression (§ 52).

107. In the case *Gündüz v. Turkey* (no. 35071/97, ECHR 2003-XI), the applicant was punished for statements that were described by the domestic jurisdictions as "hate speech". In light of the international instruments and of its own precedents, the Court has in particular stressed that tolerance and respect for equal dignity of all human beings constitute the foundation of a democratic and pluralist society. It can therefore in principle be judged necessary, in a democratic society, to sanction or even prevent all forms of expression that propagate, incite, promote or justify hatred based on intolerance (including religious intolerance), provided care be taken that the "formalities", "conditions", "restrictions" or "sanctions" imposed be proportional to the legitimate aim pursued (§ 40).

The Court observed that the broadcast in question was about a sect whose members were attracting extensive public attention. For the Court, the words spoken by the applicant denoted an uncompromising attitude toward and discontent with contemporary Turkish institutions, such as the principle of secularism and democracy. Examined in their context they could not, however, be taken as a call for violence or as hate speech based on religious intolerance (§ 48). The simple fact of defending Sharia law, without calling for violence to establish it, could not be considered "hate speech" (§ 51).

108. In the case *Erbakan v. Turkey* (no. 59405/00, 6 July 2006), the applicant was judged guilty of having made a public speech in which he spoke words which incited, in particular, hatred and religious intolerance (§ 59). The Court judged that the words – supposing they were in fact spoken – spoken by a famous politician at a public gathering presented, moreover, a vision of a society structured exclusively around religious values, and thus seemed difficult to reconcile with the pluralism that characterizes contemporary societies in which the most varied groups encounter one another (§ 62). Stressing that the fight against all forms of intolerance is an integral part of the protection of human rights, the Court judged that it is of crucial importance that politicians, in their public speeches, avoid disseminating words that may nourish intolerance (§ 64).

However, given the fundamental nature of free play of political debate in a democratic society, the Court concluded that the grounds put forth to justify the necessity of the steps taken against the applicant were not sufficient to convince the Court that the interference in the right of the interested party to freedom of expression was "necessary in a democratic society".

109. In the case *Dink v. Turkey* (nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, 14 September 2010), the applicant was declared guilty of defamation of "Turkishness" (*Türklük*). The Court noted, first, that an examination of the series of articles in which the applicant had disseminated the contested words showed clearly that what he described as "poison" was the "perception of Turks" among Armenians, as well as the "obsessional" character of the measures by the Armenian Diaspora aiming at causing the Turks to acknowledge that the events of 1915 constituted a genocide. The Court determined that Fırat Dink maintained that this obsession, which caused Armenians to always feel like "victims", poisoned the life of members of the Armenian Diaspora and prevented them from developing their identity on a healthy basis. The Court deduced, contrary to the argument by the Turkish government, that these statements, which did not target "the Turks", could not be compared to hate speech (§ 128).

The Court also took into account the fact that the applicant was expressing himself in his capacity as journalist and editor in chief of a bilingual Turko-Armenian magazine, dealing with questions relating to the Armenian minority, in the context of his role as an actor in Turkish political life. When Fırat Dink expressed his resentment of attitudes that he considered to be a denial of the events of 1915, he was only communicating his ideas and opinions on a question that is undeniably of general interest in a democratic society. The Court judged it to be essential in such a society that the debate concerning historic facts of a particular seriousness be able to develop freely. Moreover, it recalled that "the search for historic truth is an integral part of freedom of expression" and "that it is not up to the court to arbitrate" a fundamental historic question that arises from a public debate that is still in progress. Furthermore, according to the court, the articles edited by Fırat

Dink did not have a "gratuitously offensive" or abusive nature, and they did not incite disrespect or hatred (§ 135, with references to the precedents).

Thus, to find Fırat Dink guilty of defamation of "Turkishness" did not serve any "urgent social need".

110. We should once again cite the case of *Cox v. Turkey* (no. 2933/03, 20 May 2010), although it is different from the previously cited cases. The petition had been introduced by an American citizen who taught, in the 1980s, at two Turkish universities. In 1986, she was expelled from Turkey and banned from the territory for having stated in the presence of students and colleagues that "the Turks [had] assimilated the Kurds" and "expelled and massacred the Armenians". She was expelled two other times. In 1996, she filed suit to win the lifting of the ban, but was defeated.

The Court determined that the applicant had not been able to re-enter the country because of her controversial statements on Kurdish and Armenian questions which still caused heated debate, not only in Turkey but at the international level as well.

The Court in the meantime concluded that it was impossible to determine, from the argument stated by the national jurisdictions, how the opinions of the interested party were damaging to Turkish national security. Moreover, the Court could not accept that "the disputed situation did not [arise] from the sphere of application of a fundamental right of the applicants". Since it had never been stated that the interested party had committed a violation, or been shown that she had participated in an activity that could clearly be perceived as damaging to Turkey, the reasoning put forth by the national jurisdictions could not be deemed a sufficient and pertinent justification for the attack on her freedom of expression.

- The application of the principles in the case in point

111. The Court considers it important to specify at the outset that it is not inclined to pronounce, either on the materiality of the massacres and deportations suffered by the Armenian people at the hands of the Ottoman Empire beginning in 1915, nor on the appropriateness of legally describing these facts as "genocide", in the meaning of Article 261bis, paragraph 4, of the penal code. It is incumbent in the first place on the national authorities, in particular on the courts, to interpret and apply the national law (see, among many others, *Lehideux and Isorni*, previously cited, § 50). I The Court's sole task is to audit, from the perspective of Article 10, the verdicts rendered by the competent national jurisdictions in virtue of their power of assessment.

In order to examine whether the conviction of the applicant was ordered by an "urgent social need", the court must balance, on the one hand, the requirement to protect third parties, i.e. the honour of the families and close relations of the victims of the atrocities and, on the other hand, the applicant's freedom of expression. It is necessary in particular to examine whether the disputed interference, in light of all the circumstances in the case in point, was proportional to the legitimate aim pursued and whether the grounds invoked by the domestic authorities to justify it seem pertinent and sufficient.

α) The type of speech by the applicant and the margin of assessment enjoyed by the domestic courts

112. The Court notes that it is not disputed that the topic of the description as "genocide" of the events in 1915 and the following years is an important issue for the public. The applicant's interventions are part of a lively and contentious debate. As for the type of speech given by him, the Court recalls that he is a doctor of law and the President of the Turkish Labourers' Party. Moreover, he considers himself an historian and writer. Although the domestic authorities had described his words as more "nationalist" and "racist" than "historic" (consideration 5.2 of the judgment by the Federal Court, paragraph 13 above), the essence of the applicant's statements and theories is nevertheless part of an historic context, as is shown in particular by the fact that one of his interventions occurred at a conference in commemoration of the Treaty of Lausanne of 1923. Furthermore, the applicant was also speaking as a politician on a question that has to do with the relations between two nations, i.e. Turkey, on one hand, and Armenia, on the other hand, a country whose people were the victim of massacres and deportations. Bearing on the description of a crime, this question also had a legal connotation. Hence, the Court considers that the applicant's speech was of a nature at once historic, legal and political.

113. Taking into account the preceding, and in particular the public interest that the applicant's speech takes on, the Court judges that the domestic authorities' margin of assessment was reduced.

β) Method adopted by the domestic authorities to justify the conviction of the applicant - the idea of "consensus"

114. The main grounds put forth by the Swiss courts and the defendant government have to do with the "general consensus" that seems to exist in the community, in particular the scientific community, with regard to the legal description of the events in question. The Court does not dispute that it is up to the national authorities, first, and in particular to the jurisdictional authorities, to interpret and to apply domestic law (*Winterwerp v. Netherlands*, judgment of 24 October 1979, A Series no. 33, § 46).

Nevertheless, it considers it appropriate to add the following in regard to the use by the domestic authorities of the idea of "consensus".

115. The Federal Court itself admitted that the community is not unanimous with regard to the disputed legal description. The applicant and the Turkish government cite numerous sources, not contested by the defendant government, that attest to divergent opinions. According to them, one could only with great difficulty speak of a "general consensus". The Court shares this opinion, pointing out that even within the political bodies in Switzerland, there are differing points of view - while the National Council, i.e. the lower house of the federal parliament, has officially acknowledged the Armenian genocide, the Federal Council has refused to do so on several occasions (see considerations 4.2 and 4.5 of the judgment by the Federal Court, paragraph 13 above). Moreover, it appears that currently only about twenty nations (of more than 190 in the world) have officially acknowledged the Armenian genocide. Sometimes, following the Swiss example, the acknowledgement does not even come from the government of these nations, but only from their parliament or from one of its chambers (see, in this regard, the declaration by certain members of the Parliamentary Assembly of the Council of Europe dated 24 April 2013, paragraph 29 above).

116. Furthermore, the Court considers, with the applicant, that "genocide" is a well-defined legal concept. It is an internationally described illegal action that can nowadays engage both the responsibility of the nation, in virtue of Article 2 of the Convention of 1948 (paragraph 18 above), and that of the individual on the basis, in particular, of Article 5 of the Rome Statute (paragraph 20 above). According to the precedents of the ICJ and of the International Criminal Tribunal for Rwanda (paragraphs 21-23 above), for the violation to be described as genocide, the members of a targeted group must not only be chosen as a target because of their membership in this group, but it is necessary at the same time that the actions committed be accomplished with the intention of destroying, in whole or in part, the group as such (*dolus specialis*). It is thus a very strict legal concept, which is, moreover, difficult to prove. The Court is not convinced that the "general consensus" to which the Swiss courts have referred, to justify the conviction of the applicant, can bear on these very specific points of law.

117. In any event, it is even doubtful that there could be a "general consensus", in particular a scientific one, on events such as those that are in question here, given that historical research is by definition open to debate and discussion and hardly lends itself to definitive conclusions or objective and absolute truths (see, in this sense, judgment no. 235/2007 of the Spanish constitutional court, paragraphs 38-40 above). IN this regard, the present case is clearly distinct from cases bearing on denial of the Holocaust crimes (see, for example, the case of *Robert Faurisson v. France*, brought 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

these cases had not only contested the simple legal description of a crime, but denied historic facts, sometimes very concrete ones, for example the existence of gas chambers. Secondly, the sentences for crimes committed by the Nazi regime, of which these persons deny the existence, had a clear legal basis, i.e. Article 6, paragraph c), of the Statutes of the International Military Tribunal (in Nuremberg), attached to the London Agreement of 8 August 1945 (paragraph 19 above). Thirdly, the historic facts called into question by the interested parties had been judged to be clearly established by an international jurisdiction.

118. Consequently, the Court considers that the method adopted by the domestic authorities to justify the conviction is subject to caution.

γ) With respect to the existence or not of an urgent social need

119. The Court considers it has shown, from the perspective concerning the application of Article 17 of the Convention, that the applicant's words were not likely to incite hatred or violence (paragraphs 51-54 above). Moreover, it shares the opinion of the Turkish government, according to which the denial of the Holocaust is today the main driving force of anti-Semitism. In fact, it judges that this is still a current phenomenon, and against which the international community must be firm and vigilant. One cannot affirm that the dismissal of the description of "genocide" for the tragic events that occurred in 1915 and the following years might have the same repercussions.

120. The study by the Swiss Institute of Comparative Law dated 19 December 2006, mentioned above (paragraph 30 above), produced before the Court by the Swiss government, shows, moreover, that among the 16 countries analysed, only two, i.e. Luxembourg and Spain, criminalise in general the denial of genocide, without limiting themselves to the crimes committed by the Nazi regime. All the other Nations have apparently not felt an "urgent social need" to provide such a law. In this regard the Court judges, following the example of the Turkish government, that Switzerland has not proven in what way a social need could exist in that country that is more urgent than in other countries to punish a person for racial discrimination on the basis of statements contesting the simple legal description as "genocide" of the events that occurred in the territory of the former Ottoman Empire in 1915 and in the following years.

121. In addition, since the publication of this study in 2006, two important developments have taken place. First of all, in a judgment dated 7 November 2007 (no. 235/2007), the Spanish Constitutional Court ruled that the genocide "denial" infraction envisaged in the first sub-paragraph of Article 607.2 of the Criminal Code (paragraph 36-38 above) was constitutional. In particular, it stated that the simple denial of a genocide crime was not a direct incitement for violence and the simple dissemination of conclusions

regarding the existence or non-existence of specific facts, without making a value judgment on them or on their illegal nature, was protected by scientific freedom (*ibid*.).

122. Then, the French Constitutional Court declared the law unconstitutional which was intended to suppress objections as to the existence of genocide acknowledged by law (paragraph 33 above). It particularly ruled it contrary to the freedom of expression and freedom of research, specifying that the "freedom of expression and communication is especially valuable, as its exercise is a condition of democracy and one of the guarantees of respect for other rights and freedoms, to the extent that attacks on the exercise of this freedom must be necessary, adapted, and proportionate to the intended aim (consid. 5)" and that "by thus suppressing objections to the existence and legal qualification of crimes that they recognised and qualified as such themselves, lawmakers are making an unconstitutional attack on the freedom of expression and communication (consid. 6)."

123. Even if there are no formal precedents, the Court cannot continue to ignore these two developments. In this respect, it reiterates that France explicitly acknowledged Armenian genocide by means of a law in 2001 (paragraph 31 above). It believes that the decision of the Constitutional Court shows perfectly that there is, a priori, no contradiction between the official acknowledgement of certain events such as genocide, on the one hand, and the unconstitutionality of criminal penalties for individuals calling the official stance into question, on the other. Furthermore, the governments that have acknowledged the Armenian genocide – the vast majority of them through their parliaments – have not deemed it necessary to adopt laws laying down criminal punishment, since they are aware that one of the main aims of the freedom of expression is to protect minority points of view likely to encourage debate on questions of general interest that have not been fully established.

124. In addition, the Court reiterates that the UN Human Rights Committee, in its General Comment no. 34, rendered in 2011 and concerning the freedom of opinion and expression within the meaning of Article 19 of the International Covenant on Civil and Political Rights, expressed its belief that "laws criminalising the expression of opinions regarding historic facts are incompatible with the obligations that the Covenant imposes on the States Parties (...). " (paragraph 49 of the General Comment; paragraph 27 above). The Committee also appeared to be convinced that the "Covenant does not permit general prohibitions on the expression of a mistaken opinion or an incorrect interpretation of past events" *(ibid*.).

125. Finally, it should be reiterated that the case in hand is the first sentencing of a person based on Article 261[bis] of the criminal code in the context of Armenian events. Furthermore, the applicant, with 11 other Turkish nationals, was acquitted on 14 September 2001 by the Berne-Laupen district court of the charges of genocide denial in accordance with this provision, as there was no intent to discriminate among the accused.

126. In light of the foregoing, the Court doubts that the sentencing of the applicant was required by a "pressing social need".

δ) Proportionality of the measure on the intended aim

127. The Court also reiterates that the nature and harshness of the penalties imposed are also elements that must be taken into consideration when measuring the proportionality of interference. (for example, see *Chauvy et al vs. France*, aforementioned, § 78). Moreover, it must ensure that the penalty does not constitute a kind of censure that would lead others to refrain from expressing criticisms. In the context of the debate on a subject of general interest, such a penalty risks dissuading others from contributing to the public discussion of issues that are of interest to community life (in this respect, see *Stoll*, aforementioned § 154). As such, it may be the case that the actual sentencing is more important than the minor nature of the imposed penalty (for example, see Jersild, aforementioned § 35, or *Lopes Gomes da Silva vs. Portugal*, no. 37698/97, § 36, ECHR 2000-X).

128. In the case in hand, the applicant was sentenced to 90-days and a fine of 100 CHF, suspended for two years, payment of a 3,000 CHF fine, which was replaceable by 30 days' incarceration, and payment of 1,000 CHF as compensation for moral injury in favour of the Swiss-Armenian Association. The Court believes that although these penalties, one of which could be converted into a measure involving incarceration, are of relative seriousness, they are nevertheless likely to have the dissuasive effects described above.

ε) Conclusions

129. In light of the above, and particularly the elements of compared law, the Court believes that the reasons put forward by the national authorities to justify the sentencing of the applicant are not relevant and, considered as a whole, insufficient. The domestic courts have not, in particular, proved that the sentencing of the applicant responded to a "pressing social need" or that it was necessary, in a democratic society, to protect the honour and feelings of the descendants of victims of atrocities dating back to 1915 and thereafter. The domestic courts therefore exceeded the limited margin of assessment that it enjoyed in the case in hand, which is part of a debate which is of specific interest to the public.

130. Therefore, Article 10 of the Convention was breached.

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

131. Believing that the wording of Article 261bis paragraph 4 of the Swiss Criminal Code is very vague, the applicant also argues that its criminal sentencing violates the principle "no punishment without law" consecrated in Article 7 of the Convention.

132. The grievance drawn from Article 7 does not raise any question different from those that have been reviewed by the Court within the perspective of the grievance related to Article 10 of the Convention, particularly regarding the existence of a legal basis for the interference at issue (paragraphs 66-72 above). In addition, it was not communicated to the parties in the proceedings.

133. As such, there is no basis for separately reviewing the admissibility or the grounds of the grievance based on Article 7 of the Convention.

III. REGARDING THE OTHER ALLEGED VIOLATIONS OF THE CONVENTION

134. The applicant also invokes Article 6 of the Convention to complain that he was not issued a visa by the Swiss government and thus could not meet with his lawyer during the legal proceedings. The applicant also complains that the Lausanne district court and the Federal Court failed to review certain documents that he submitted. In addition, a "major error in the assessment of the evidence" was committed, as the said courts failed, without providing grounds, to take into account the judgment of the Berne-Laupen District Court (judgment of 14 September 2001, paragraph 17 above).

135. Finally, the applicant invokes Articles 14, 17 and 18 of the Convention. In its opinion, the Swiss courts made use of discriminatory terms against them in their judgments.

136. The Court believes that these grievances, although sufficiently supported and understandable, lack grounds and/or have not been submitted to the domestic courts as required by Article 35 § 1 of the Convention.

137. Consequently, these grievances are clearly groundless and must be dismissed in accordance with Article 35 §§ 3 a) and 4 of the Convention.

IV. REGARDING THE APPLICABILITY OF ARTICLE 41 OF THE CONVENTION

138. Pursuant to Article 41 of the Convention,

> "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. Damages

139. The applicant is claiming 20,000 euros (EUR) for tangible losses without specifying the nature of these damages. Furthermore, it is demanding 100,000 EUR for the moral injury that he has suffered.

140. The defending government argues that the applicant has not proven that he has actually suffered moral injury, particularly since he has not demonstrated that he actually paid the fine for 3,000 Swiss francs (CHF) and the amount of 1,000 CHF that he had been ordered to pay to the Swiss-Armenian Association. As regards moral injury, the Government believes that the mere finding of a violation of Article 10 would constitute just satisfaction.

141. The Court believes, like the defending government, that the claim for tangible losses is not sufficiently supported.

142. As regards moral injury, the Court believes, in light of all the circumstances in this case, that the finding of a violation is sufficient to remedy the harm that the sentencing, deemed contrary to Article 10, may have caused to the applicant.

143. Consequently, there are no amounts payable for damages.

B. Costs and expenses

144. The applicant is also claiming 20,000 EUR for his costs and expenses incurred for his travel, and for those of his lawyer and experts.

145. The Government argues, primarily, that no sum should be paid to the applicant in this respect since the claim is not sufficiently supported. Alternatively, an amount of 9,000 CHF seems to cover all the costs and expenses for the proceedings before the domestic judge and before the Court.

146. According to the case records of the Court, an applicant can only obtain reimbursement for their costs and expenses where they are substantiated, necessary, and reasonable (*Philis vs. Greece (no. 1)*, 27 August 1991, § 74, Series A no. 209). In the case in hand, and taking into account the documents in its possession and its case records, the Court believes that the applicant's claim is not sufficiently supported. Therefore, it dismisses the said claim.

147. It follows that no amount shall be due for costs and expenses.

ON THESE GROUNDS, THE COURT,

1. *Declares*, unanimously, that the petition is admissible in relation to the grievance based on Article 10 and inadmissible in relation to those based on Articles 6, 14, 17 and 18 of the Convention;

2. *States*, by five votes to two, that Article 10 of the Convention was violated;

3. *States*, unanimously, that there is no basis for separately reviewing the admissibility or the grounds of the grievance based on Article 7 of the Convention;

4. *States*, by five votes to two, that the finding of a violation of Article 10 is in itself just satisfaction for all moral injury suffered by the applicant;

5. *Dismisses*, unanimously, the claim for just satisfaction in all other respects.

Executed in France, then communicated in writing on 17 December 2013 in accordance with Article 77 §§ 2 and 3 of the regulations.

Stanley Naismith	Guido Raimondi
Clerk	President

Pursuant to Articles 45 § 2 of the Convention and 74 § 2 of the regulations, the following separate opinions are attached to this ruling:

– the shared concurring opinion of the judges Raimondi and Sajó;

– the partially dissident opinion of the judges Vučinić and Pinto de Albuquerque.

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

SHARED CONCURRING OPINION OF THE JUDGES RAIMONDI AND SAJÓ

(Translation)

There are times when the judges of the courts safeguarding human rights have a specific moral obligation to clarify their position to the persons concerned by the judgment. The present case is one of them.

Why do we have this specific obligation regarding the Armenians? Because the destruction of a people ordered by a government always draws special attention and imposes particular obligations on all of us. From 1915 to 1917, the Armenian people were subject to unimaginable suffering. This drama had long-lasting consequences even for the fifth generation after *Mets Yegherrn* (the Great Crime), partially because the injustices and suffering of the past have never been fully acknowledged and compensated.

Many members of the Armenian community shall feel perhaps abandoned, even betrayed, when faced with the position of the majority in this case. They perhaps concluded that once again, there was no evidence in their respect of all the understanding and all the respect that they deserve in light of the calamities that have afflicted Armenian communities in the past. We are expressing ourselves here in anticipation of this reaction.

A large number of Armenians believe that in order to truly recognise the Great Crime, it is necessary to unconditionally qualify it as genocide. However, it is often rightly said that it is not up to the law, and certainly not the courts, to establish the true history. This does not prevent the judge from attributing historic responsibilities. To do this, he must inevitably take a look back over history, which covers more than just the facts. We are convinced that, if we review the period in question in this case in light of the massacres that preceded it (particularly, for example, the Hamidian massacres), we have sufficient data (a terribly legalistic expression in the present context) to demonstrate that the Armenian citizens of the Ottoman Empire suffered from a State policy that caused the death and suffering of hundreds of thousands of people (estimates range from 600,000 to 1,500,000) and nearly caused the extinction of Armenians as a distinct community. It is true that the specific factors that triggered these events remain in dispute. Be that as it may, no reason can justify the action of the State – or, if applicable, its inaction – that is at the origin of such an abominable tragedy, and of the deaths of children and innocent people.

We are left with the moral and symbolic obligation to define and qualify these events, and it as this point that the law, "the moral truth", and history come into confrontation. We know that when Raphael Lemkin (*Axis Rule in Occupied Europe*, 1944) coined the term genocide, he had the massacres and deportations of 1915 in mind. The use of this term to qualify these events is appropriate in current language, and it cannot give rise to any penalty. This is how we read the *Dink* judgment.

With regard to denial of genocide and official recognition of the classification of genocide for certain episodes in history, several countries refer to the penalisation of words corresponding to specific facts and the analysis of these by international jurisdictions, while others, based on the contemporary legal definition of genocide, establish what punishable denial is through special provisions in their domestic law.

This narrow definition is in the interest of legal certainty, which is of the highest importance in the context of freedom of expression. However, this is where Armenians - as with other communities that suffered an extreme injustice before the formation of the modern concept of genocide or that were simply cast aside after 1948 for political reasons - suffer an additional injustice: since the Great Crime took place in 1915, it came before the creation of the term genocide and therefore the corresponding jurisdiction. Some countries therefore adopted special laws that expressly mention the Armenian genocide and established the denial thereof as a criminal penalty.

Switzerland did not do this. The Swiss Federal Court decided to overcome this difficulty by extending the definition of genocide to the Great Crime, indicating that it was "generally admitted" that it was a case of genocide. Such an extension of the legal concept poses a problem in criminal law and, in the circumstances of the present case, it is incompatible with the requirements of the freedom of expression that our Court is called upon to protect under the Convention.

In order to determine whether or not the right to the freedom of expression has been violated, the Court must verify if the interference made in the speech was provided for by the law in a defined, practical, and foreseeable manner. However, the definition of genocide in international law is clear, and does not fall under the same concepts as those admitted by the general population. It is true that the even the concepts of criminal law are open to a certain measure of interpretation based on common sense; however, this particular case relates to the incrimination of a speech. The interpretation of the Federal Court is too broad because, if we were to follow it, a speaker would never know which words were subject to penalty, and this would create a dissuasive effect. Furthermore, Swiss law does not provide for any apology or exceptions for the words used in the scope of scientific research or artistic performance.

The level of precision that must be met by domestic law depends to a considerable extent on the text in question, the field that it is intended to cover, and the number and status of those at whom it is aimed (see *Hashman and Harrup vs. United Kingdom* [GC], no. 25594/94, § 31, ECHR 1999-VIII, and *Groppera Radio AG et al vs. Switzerland*, judgment of 28 March 1990, Series A no. 173, p. 26, § 68).

In the case in hand, the applicant could not predict that his words would be judged as criminally reprehensible. Previously, comparable statements had led to prosecution, but their perpetrators were acquitted. It could therefore be inferred, at least in lower jurisdictions, that the presumption subsequently made by the Federal Court regarding the commonly admitted meaning of the term genocide was not clear. Similarly, the two chambers of the Swiss parliament fail to agree on the issue of whether or not the Great Crime should be classified as genocide.

The Court does not usually push ahead with a review of the grievance if it finds that the interference at issue was not provided for by the law. We believe that it is necessary to go even further in this case.

In the present case, the Court interpreted the aim of the limitation on the freedom of expression as a means of protecting the honour of those who perished in the Great Crime. However, this aim is, at best, secondary, guides the analysis of proportionality towards violation - the duty of remembrance of the dead, as important as it is, perhaps is not as important as the need not to penalise a speech that its author, still alive today, makes in the field of scientific research.

The Swiss Government argued that the incrimination of genocide denial was intended to maintain public order which, in our opinion, is indisputable given the circumstances of the case. The Court must be particularly vigilant when the aim of interference is given *a posteriori*, only once the case has been brought before it, but this is not the case here - the provision related to genocide was introduced into the criminal code in accordance with Switzerland’s obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (1965).

Finally, in support of its position, the Federal Court said the following: "[t]he sentencing of the plaintiff is thus intended to protect the human dignity of the Armenian community members recognised in the remembrance of the genocide of 1915". It is profoundly disturbing when words are incriminated on the basis that they constitute an attack on the identity of certain individuals (in this respect, see the remarks of the Court on Turkishness, particularly in the *Dink* judgment) – even if we are not, of course, in a position to have an opinion on the formation of a national identity or of a national community based on a national tragedy – this is a subject for debate. (In this respect, see the critical stance of Hrant Dink in the *Dink* case.)

The Federal Court did not expand on this point. Justification of a restriction on rights for reasons of dignity is ambiguous even though dignity is often considered to be a founding value of the protection of human rights. It is true that the dignity of an individual can be violated when the humanity of the group to which they belong is denied or diminished: this is the case when this individual's right to belong to humanity just like any other individual is denied on the pretext that he or she is a member of a group that is excluded therefrom. Nevertheless, we cannot see to what extent denying the existence of an extermination plan led by Talaat Pasha and his acolytes would, in this respect, harm the dignity of the members of the Armenian community, unless such a statement is to be understood as qualifying the component of Armenian identity linked to the genocide as a falsification. However, this is not the clear meaning of the challenge on legal quality made by the applicant, and it is certainly not the meaning attributed by the Swiss authorities.

Even if the words of the applicant were disrespectful, even outrageous, they do not diminish the humanity of the group concerned. Of course, denialist words may be criminal if they incite hatred and violence and if they represent a real danger in light of the history and social conditions prevalent in a given society. But none of these elements were present in Switzerland.

In fact, the primary objective of the law and the interference made in this case to the applicant's freedom of expression centre around racial discrimination (with "racial" in this context including national discrimination, just as genocide may target not only an ethnic group but also a religious or national community). The legal approach, as interpreted in this case, is that any speech that denies the legal qualification attributed to the destruction of a people is racist or racially discriminatory, or is analysed as an act of discrimination. Such unconditional incrimination at the legal level practically makes it impossible to review the aspects of the speech that are protected by freedom of speech - even if used in the scope

of a disrespectful scientific discourse, the words concerned automatically become an act of racial discrimination[22].

The Court thus rightly determined that it was necessary for it to proceed *sua sponte* to analyse the case from the standpoint of Article 17. This unconditional incrimination of all acts of genocide denial (which is extended to the events of 1915, or else may be considered to apply in this case, by implication) means that this act of denial has been analysed as a violation of human rights (see, in this regard, the position of the French courts in the *Faurisson* case cited above - these courts determined that the revisionist statements constituted an aggression, rather than an act of speech). In consideration of the Court's past history of rulings made in connection with Articles 10 and 17, such statements ought to be considered to be destructive in practice, and not just theoretically shocking. In the past, whenever the Court has declared a human rights violation according to the meaning of Article 17, it has done so because Article 10 had already been brought up by the groups who were inspired by totalitarian motives (*Vajnai vs. Hungary*, no. 33629/06, § 24, ECHR 2008) and so the act of making the statements could potentially cause harm in and of itself.

The decision to interpret such verbal statements as a criminal offence that is unconditionally punishable by law is reflective of the set of considerations underpinning Article 17, and such a decision continues to be intrinsically problematic for many reasons, including because of the fact that it will no longer be possible to examine whichever aspects of the statement fall under the scope of freedom of expression within the unconditional context of such a criminal case whenever some portion of the statement constitutes a criminal offence in and of itself, at the same time that it would be legally impossible to conduct an assessment of the proportionality of the examination that is made of the statement.

In its statements on the case *Robert Faurisson vs. France* (Communication no. 550/1993 , UN Doc. CCPR/C/58/D/550/1993 (1996)), the United Nations Human Rights Committee has expressly

[22] For one possible consequence of this approach, see the *Bernard Lewis* case: in an interview conducted with the newspaper Le Monde, Professor Lewis had given the statement: "No serious proof exists that the Ottoman government either made a decision or enacted a plan to exterminate the Armenian nation (...)." On 21 June 1995 (civil judgement, Superior Court of Paris), he was sentenced on the grounds of Article 1382 of the Civil Code to pay one Franc in damages and interest to the associations that were the plaintiffs of the case, who were accusing him of "massacre denial." In its judgement, the court expressed its position as follows: "It was in the act of hiding the elements that contradicted his thesis (...) that he (...) failed to uphold his duties to maintain a sense of objectivity and caution in his work, instead expressing his findings in an outright manner (...) [as such,] his statements, which were capable of unjustly rekindling the collective pain of the Armenian community, are tortious and do justify compensation for the harm that was caused."

acknowledged that the applicability of the provisions of the Gayssot Act (which set forth, by fully lawful effect, that the act of calling into question the validity of the findings and verdict of the International Military Tribunal in Nuremberg does constitute a criminal offence) might lead a court of law to make decisions or order legal measures that are inconsistent with the Pact.

According to the present ruling, the appellant has expressed his scientific viewpoint on a topic of historical debate. The Federal Court seems to have upheld a slightly different interpretation: **"**[i]nsofar as intentionality is concerned, the correctional court has maintained that the appellant, who is a Doctor of Law, a politician and a self-proclaimed writer and historian, had acted in full awareness of the cause, declaring that he would never change his position even if an impartial commission might one day assert that the Armenian genocide very well indeed did exist." In our opinion, the appellant has attempted to make use of historical arguments in court in order to prove his assertions, yet his statements were not originally being considered in the context of a scientific debate, nor was his attitude even truly scientific in nature, considering the fact that he had already ruled out any and all other research findings that might possibly run contrary to his own arguments from the very start. The litigious statements were originally uttered within the context of a political debate held on a topic of public interest with the intent of bearing some influence on Swiss parliamentary (legislative) policies. We are, nevertheless, in agreement with the statement that the academic freedom to conduct research is also at stake in the examination of this case.

The Federal Court seems to admit that the appellant has never contested the historical reality that the massacres did actually occur, along with the fact that the act of "genocide denial" on his part was in fact the result of his attempt to set forth an argument that there was another cause for these events: "[i]t must, moreover, be acknowledged that the appellant does not refute the existence of either the massacres or the deportations, which may only be qualified (even when showing some measure of reserve) as crimes against humanity. However, the justification of such crimes, whether it was in the name of the right of war or alleged security reasons, already falls within the scope of Art. 261 bis par. 4 CP (...)." We believe that the appellant's arguments, which consist of the assertion that some "Armenian aggression" lies at the origin of these well-known tragic events, are even more troubling. In certain circumstances (see, to the opposite effect , the case *Fáber vs. Hungary*, no. 40721/08, 24 July 2012), when such statements uttered in combination with a denialist agenda, this may constitute an act of incitement to racial hatred that poses a clear and imminent danger to society, and, as such, the act does meet the same criteria according to which the Court has deemed that criminal indictment

is lawfully appropriate in other similar cases *Gül et al. vs. Turkey*, no. 4870/02, § 42, 8 June 2010.

Nevertheless, in the case at hand, nothing has shown that the statements in question have come to constitute any sort of act directly intended to inspire hatred, which would thereby constitute an act of discrimination. Was it necessary for Switzerland, as the democratic society that it is, to impose sanctions on the appellant for the statements he made? We share the Court's position, according to which the act of refusing to use the legal qualification given to the 1915 events is not in and of itself an act of such a nature that would be capable of inciting racial hatred toward the Armenian people.

In the *Faurisson* case, it was argued that the revisionist account might steer its readers to adopt anti-Semitic behaviour. To the contrary, in the case at hand it may be stated that, rather than expressing an anti-Armenian sentiment, the appellant has expressed a set of anti-imperialist sentiments consistent with his own political opinions – he attributes what he calls the "lie of Armenian genocide" to the workings of international imperialism rather than to the Armenians themselves.

In theory, a hate crime must be directed toward identifiable individuals and such an act is not understood as a form of defamation of a group of people as a whole. In their individual opinion for the *Faurisson* case, Elizabeth Evatt and David Kretzmer (whose opinion was co-signed by Eckart Klein) have brought up one possible exception[23], in these terms: "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 (...). Such is the case when, within a particular social and historical context, it may be proven that certain statements, while they may not meet the strict legal definition set for incitement, have nonetheless been uttered in the context of systematic provocation against a particular racial group, religious group, or group of a determined nationality; this is also the case when the same individuals who have a stake in instilling hostility and adopt subtle forms of expression that are not punishable by racial slander laws, even when the effects of their words may also be as pernicious, or even more pernicious, than blatant incitement."

We consider that a similar set of circumstances must also be clearly demonstrated in the current case at hand. Should such circumstances be found not to exist, the criminal nature of the statements made by the appellant (even if these statements may potentially verge on genocide denial) do not meet the necessary requirements for criminal indictment;

[23] Our intention here is not to blindly reiterate their conclusions with regard to the facts of the present case.

accordingly, the penal sanctions imposed in the present case would be disproportionate. The legitimate purpose of the law could have been obtained with a less drastic set of provisions, rather than through the use of legislative dogma that could never again be called into question, regardless of the reasons why the law might be called into question and irrespective of any potential consequences.

DISSENTING OPINION ISSUED BY JUDGES VUČINIĆ AND PINTO DE ALBUQUERQUE

(Translation)

1. The *Perincek* case brings to light two fundamental legal questions that the European Court of Human Rights (the Court) has never before addressed: the international recognition given to the Armenian genocide, and the criminal nature of any act of denying this genocide. Even though we are convinced that questions of such a scope would require a ruling issued by the Grand Chamber, we nevertheless wish to examine these matters in as extensive a manner as is possible within the narrow limits of the present opinion. Even though we were highly doubtful of the admissibility of the appellant's complaint concerning the subject of Article 17 of the European Convention on Human Rights (the Convention), we have ultimately agreed to examine the merits of the case in order to take into consideration all of the legal arguments set forth by this individual with regard to Article 10 of the Convention. In effect, we do not wish to forego a closer inspection of thorny legal concerns simply on the pretext that the litigious statements are in and of themselves against the nature of the values underpinning the Convention, as they seem to have been considered in the current case *prima facie*. However the case may be, after careful consideration, we have arrived at the conclusion that there has not been any violation of Article 10 in the present case. On the other hand, we are in agreement with the statement that it is not necessary to separately examine the grievance filed on the basis of Article 7.

The international acknowledgement of the Armenian genocide.

2. In an official statement proclaimed by the National Council on 16 December 2003, the respondent Government has issued an acknowledgement that the events inflicted on the Armenian people in 1915 under the rule of the Ottoman Empire were indeed a "genocide."[24] In accordance with this official position, the Police Tribunal, the Criminal Chamber of the Court of Cassation and the Federal Court have all

[24] Prior to this date, the legislature had already stated that the Armenian genocide was a prime example of a case for which the newly punishable crimes set forth in the fourth paragraph of Article 261 bis of the Criminal Code ought to apply (see the Official Bulletin of the Swiss Federal Assembly - Swiss National Council 1993, p. 1076).

determined that the Armenian genocide is a historical fact recognised by the Swiss national government and by Swiss society for the purposes of Article 261 bis of the Swiss Criminal Code. Accordingly, they have ruled that legal grounds do in fact exist in Swiss society for lawfully repressing any acts of denial of the Armenian genocide. This conclusion is not devoid of a rational basis.

3. Switzerland was not the only country to acknowledge the Armenian genocide – the Armenian genocide was acknowledged by the Turkish government itself, by numerous public figures, several institutions and various governments that existed at the time when the massacres occurred, and later on by many other international organisations, national and regional agencies and national court systems in every corner of the world.

4. Shortly after these tragic events occurred, the Turkish government itself acknowledged that the "massacres" of Armenians did indeed occur and brought some of the individuals who were responsible for these massacres to justice. This laudable act of repentance on the part of Turkey has resulted in the instatement of two types of procedures. The crucial criminal procedure was the Court-martial trial of the former Grand Vizier of the Ottoman Empire, Talaat Pasha, ex-Minister of War, Enver Pasha, ex-Minister of the Navy, Djemal Pasha, ex-Minister of Education, Nazim Bey, and several other ministers of the former Ottoman government and senior officials of the Union and Progress Party (*Ittihat ve Terakki Cemiyeti*), a trial for which some of the accused defendants were tried *in absentia*. The court-martial issued its verdict on 5 July 1919, ordered the death penalty for several individuals accused of various crimes, including for the "massacre" of Armenians, upholding in this way the same terms appearing in the bill of indictment, which stated that "the massacre and destruction of Armenian citizens had come as the result of decisions made by the Central Committee of the *Ittihat*"[25]. The legal grounds for these guilty sentences and for the penalties that were ordered were Articles 45 and 55 of the Turkish Criminal Code.

5. The second type of criminal procedure involved several lawsuits brought against dozens of individual defendants: proceedings brought against the regional heads of the party (judgment delivered on 8 January 1920), proceedings concerning the massacres and deportations in the Sanjak of Yozgat (judgment delivered on 8 April 1919, with a death penalty sentence issued for former Governor Mehmet Kemal Bey, among other sentences), proceedings concerning the massacres and deportations in the vilayet of Trebizond (judgement delivered on 22 May 1919, with a

[25]See the essential text published by Vahakn Dadrian on the elements of law that were brought together by the Turkish military tribunal, corroborating the existence of planned mass murders, the systematic use of torture and the 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) along with the special edition of the *Journal of Political and Military Sociology* (vol. 22, no. 1, 1994) and the special edition of *Shoah History Review* (no. 177-178, 2003).

death penalty sentence issued for Djemal Azmi Bey and Nail Bey, among other sentences), proceedings concerning the massacres and deportations in Büyük Dere (judgement delivered on 24 May 1919), proceedings concerning the massacres and deportations in the vilayet of Kharput (judgement delivered on 13 January 1920, with a death penalty sentence issued for the former President of the Special Organisation and member of the central committee of the Unionist Party, Behaeddin Shakir, among other sentences), proceedings concerning the massacres and deportations in Urfa (judgement delivered on 20 July 1920, with a death penalty sentence issued for the ex-Governor Behramzad Nusret Bey, among other sentences), and proceedings concerning the massacres and deportations in Erzincan (judgement delivered on 27 July 1920, with a death penalty sentence issued for the ex-Chief of Police Abdullah Avni, among other sentences). The capital punishment sentences ordered for Mehmet Kemal Bey, Behramzad Nusret Bey, and Abdullah Avni were all carried out.

6. The fact that the Turkish government later rehabilitated some of the accused defendants does not call into question the international validity of these judgements, which were issued in accordance with all standards of international law that were in force during that era[26]. Furthermore, as soon as the international community became aware f these events, there was an immediate official reaction issued in the form of a declaration jointly signed by France, Great Britain and Russia on the date of 15 May 1915, in which these three countries denounced the commission for "Turkish crimes against humanity and civilisation" perpetrated upon the Armenians, for which "all members of the Ottoman government and those of its agents who [were] involved in these massacres" were called to respond. This reaction was followed up with an official political and diplomatic acknowledgement of the atrocities that had been committed, as declared in

[26] Issuing a stern statement, Mustafa Kemal himself made the following declaration in an interview published on 1 August 1926, in the *Los Angeles Examiner:* "these leftover traces of the former Young Turks party, who ought to have been made to answer for the brutal mass expulsion of several million of our Christian subjects from their homeland and the massacres to which they were subjected, are resistant to the rules of the republic." Many just-minded Turks were opposed to these actions, and even worked to save Armenians (see "Turks Who Saved Armenians: an Introduction," at zoryaninstitute.org). For example, Mehmet Celal Bey, the governor of Aleppo and Konya who saved a large number of Armenians, one day stated: "The goal was to wipe them out and they were wiped out. It is impossible to hide or cover up this policy that was instituted by *İttihat ve Terakki* [the Turkish Committee of Union and Progress], which was developed by the directors of this party and ultimately accepted by the public at large." Mustafa Arif, the Minister of the Interior for the Ottoman Empire in 1917 and 1918, on his end declared that: "Unfortunately, those people who served as our directors during the war, taken over by a spirit of roguery, applied the country's deportation laws in a way that would make even the most bloodthirsty bandits grow pale. They decided to exterminate the Armenians, and then they exterminated them." On 21 October 1918, Ahmed Riza, President of the Turkish Senate, likewise acknowledged that the mass murders of Armenians were indeed an "officially" recognised crime. A more recent example is the bold and direct declaration made on 24 April 2006 by the Turkish Association for Human Rights.

particular in the joint resolution of the US Senate and the US House of Representatives that was issued on the date of 9 February 1916, which deplores the "untold suffering" and the "terrible atrocities" inflicted upon hundreds of thousands of Armenians, as well as by the 1919 report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, which concluded that the treatment afforded by the Ottoman Empire to the Armenians within its national territory had violated "the established rules and customs of war and the elemental laws of humanity," declaring that the Ottoman officials who were responsible for these acts ought to be prosecuted. Later on, Articles 226, 227 and 230 of the Treaty of Sèvres, signed by Great Britain, France, Italy, Japan, Armenia, Belgium, Greece, Al-Hejaz, Poland, Portugal, Romania, the State of Slovenes, Croats and Serbs, Czechoslovakia, and Turkey on 10 August 1920, conferred upon the Allied Forces the right to bring to justice all of the persons accused of having committed acts that go against the laws and customs of war before a military tribunal, "notwithstanding any proceedings or prosecution before a tribunal in Turkey," while also establishing the obligation for the Turkish state to hand over all individuals responsible for the "massacres committed during the continuance of the state of war on territory which formed part of the Turkish Empire on 1 August 1914," in order to have them tried. Even if the Treaty of Sèvres never actually did take effect, it is nevertheless no less true that these clauses did in fact match up with the standard conventions of international law during that time period, insofar as these clauses did acknowledge that an international crime had been committed and that individual people could be held responsible for such a crime. Even though the principle of criminal liability failed to prevail in the later negotiations that led to the Treaty of Lausanne, the historical fact, in and of itself, that "massacres" had been committed as part of a national policy instituted by the Ottoman Empire that was in breach of the "laws of humanity" was indeed acknowledged by all parties that signed the Treaty of Sèvres, in accordance with the Joint Declaration of 15 May 1915[27].

[27] The genocidal policies of the Ottomans were revealed to the world by witnesses who had directly observed the events. In this way, Henry Morgenthau, the United States ambassador to the Ottoman Empire from 1913 to 1916, said the following: "The large-scale massacres and persecution of the past seem nearly insignificant when they are compared with the suffering that was inflicted on the Armenian race in 1915 (...) Each time the Turkish authorities ordered such deportations, they were purely and simply condemning an entire race to its death; they were perfectly aware of this fact, and in their conversations with me, the directors never tried to cover up this fact (...) the only motivation at play was a government policy instituted with cold-blooded callousness." Count Wolff Metternich, the German Ambassador to the Ottoman Empire, sent the following telegraph 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, Italy's Consul General in Trebizond, explained the matter in the following way in an interview he gave on 25 August 1915: "Armenians were

Article 230 of the Treaty of Sèvres even stands as the irrefutable legal precedent for Article 6 c) of the Nuremberg Charter, and Article 5 c) of the Tokyo Charter, which both make mention of "crimes against humanity" in a way that is in keeping with the understanding given to this concept ever since the start of the 20th century[28].

7. The Treaty of Lausanne dated 24 July 1923, signed shortly after this time, included neither a clause governing war crimes nor a clause on sanctions, nor any sort of reference to "massacres" committed during wartime, but it was accompanied by a "declaration of amnesty" by virtue of which "full and complete amnesty" was granted respectively by the Turkish government and the Greek government for all crimes and offences committed during the period under consideration (from 1 August 1914 to 20 November 1922) that were "obviously connected with the political events" that had taken place during this same period. The personal and material scope of Section III of the declaration of amnesty, as in other sections of the declaration, obviously does not extend to cover the "massacres" perpetrated by the Turkish Empire on the Armenian population. In any scenario, "crimes against humanity and civilisation" such as those described in the joint declaration issued of 15 May 1915, may not lawfully be granted amnesty, and they are not subject to the impunity of any statutory limitation, in consideration of the imperative, non-derogable nature of any criminal indictment for genocide or crimes against humanity established by virtue of a customary principle set in international law and treaty law[29].

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treated differently from one vilayet to another. They were categorically suspect and spied upon all throughout the country, yet it was in the "Armenian vilayets" that they were subjected to something even worse than a massacre - an outright extermination." On 4 September 1915, Carl Ellis Wandel, the Danish diplomat in Constantinople, drafted a long and detailed report on "the Turk's dark plot: the extermination of the Armenian people." These testimonials were confirmed by Fridtjof Nansen, the League of Nations' High Commissioner for Refugees, who declared the following: "The whole plan for extermination was nothing more nor nothing less than a political ploy that was calculated in cold blood, with the intent of annihilating an entire major portion of the population that was seen as a source of problems; on top of this, avarice should also be added as another motivation." Winston Churchill was emphatic in this regard: "The Turkish Government began and ruthlessly carried out the infamous general 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 on the websites armenocide.de and genocide-museum.arm)

[28] Just as with 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 serve as precedents for Article 6 b) of the Nuremberg Charter, and Article 227 of the Treaty of Versailles serves as a legal precedent for Article 6 a) of the Nuremberg Charter.

[29] With regard to the non-applicability of statutory limitations to acts of genocide and crimes against humanity, see Article 29 of the Rome Statute of the International Criminal Court (1998), which contains 122 States Parties, including Switzerland, the Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity (1968, 54 States Parties), the Convention on the Non-Applicability of Statutory

8. The reality of the Armenian genocide was thereupon acknowledged by several international organisations, and in particular by the Parliamentary Assembly of the European Council, in the declaration issued on 24 April 1998, by 51 members of Parliament, in the declaration issued on 24 April 2001, by 63 members of Parliament, and in the declaration issued on 24 April 2013, by 26 members of Parliament; by the European Parliament in its resolutions on 18 June 1987, 15 November 2000, 28 February 2002, and 28 September 2005; by the MERCOSUR (Mercado Común del Sur [Southern Common Market], an organisation that serves to unite the nations of South America) in the Parliamentary resolution issued by it on 19 November 2007; by the International Centre for Traditional Justice in the memorandum independently drafted by it on 10 February 2003, at the request of the Turkish Armenian Reconciliation Commission; par European Young Men's Christian Association (YMCA) in a declaration issued by it on 20 July 2002; by the Human Rights League in its resolution of 16 May 1998; by the *Association of Genocide Scholars* in its resolution of 13 June 1997; by the Kurdish Parliament in Exile in the resolution it issued on 24 April 1986; by the *Union of American Hebrew*

Limitation to Crimes against Humanity and War Crimes (1974, 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, as adopted by the General Assembly of the United Nations in Resolution 60/147 on 16 December 2005. In the report he issued on 23 August 2004, entitled, "Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies," UN Secretary General Kofi Annan recommended that all peace agreements, along with the resolutions adopted by the Security Council and all mandates it approves "should condemn any and all measures authorising amnesty for acts of genocide, war crimes or crimes against humanity" (§ 64 c)). He reiterated this recommendation in the follow-up report he issued on this matter on the date of 12 October 2011 (§§ 12 and 67). On the subject of the categorical ban on amnesty for acts of genocide and 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; United Nations Human Rights Committee, General Comment no. 31 on Nature of the General Legal Obligation Imposed on States Parties to the Covenant (2004), § 18; along with the established practice in international courts of law (Special Court for Sierra Leone, *Prosecutor v. Morris Kallon* (Case no. SCSL-2004-15-AR72(E)), *Prosecutor vs. Brima Bazzy Kamara* (Case no. SCSL-2004-16-AR72(E)), Appeals Chamber Decision on challenge to jurisdiction: Lomé Amnesty Agreement (13 March 2004, §§ 67-73), and *Prosecutor vs. Anto Furundžija* (Case no. IT-95-17/1-T, ruling on 10 December 1998, § 155) ; Inter-American Court of Human Rights, *Almonacid-Arellano et al. vs. Chile* (ruling on 26 September 2006, § 114) and the case *Velásquez-Rodríguez* (ruling on 29 July 1988, § 172), and the Inter-American Commission on Human Rights, *Alicia Consuelo Herrera et al. vs. Argentina* (Report 28/92, 2 October 1992), *Santos Mendoza et al. vs. Uruguay* (Report 29/92, 2 October 1992), *Garay Hermosilla et al. vs. Chile* (Report 36/96, 15 October 1996), concerning the matter of the *Las Hojas* massacre (vs. El Salvador, Report 26/92, 24 September 1992) and *Ignacio Ellacuría et al. vs. El Salvador* (Report 136/99, 22 December 1999); along with the position of the European Court of Human Rights to back the principle that amnesty should not be granted in the face of violations of Article 3 of the Convention that was brought up in the case *Okkali v. Turkey* (no. 52067/99, 13 October 2006, § 76)).

Congregations in the declaration issued by it on 7 November 1989; by the Sub-Commission on Prevention of Discrimination and Protection of Minorities (United Nations) in the report issued by it on 2 July 1985; by the Ecumenical Council of Churches in the declaration issued by it on 10 August 1983, and by the United Nations War Crimes Commission in its report on 28 May 1948.

9. The Armenian genocide has also been acknowledged by the national court systems in numerous countries. As such, in the United States of America, the *Ninth Circuit Court* made a statement in a ruling issued on 10 December 2010 (for the case *Movsesian vs. Victoria Versicherung AG*) that "no federal policy exist[ed] which expressly banned individual states from employing the expression "Armenian genocide;" the *First Circuit Court*, in a ruling on 11 August 2010 (in the case *Griswold, et al. vs. David P. Driscoll*), confirmed the right to use the term "Armenian genocide," as found in a school programs guide on human rights designed for instructors [sic] by the *District Court of Massachusetts* on 10 June 2009, for this same case; and, the *District of Columbia Circuit Court* made a statement in a ruling issued on 29 January 1993 (for the case *van Krikorian vs. Department of State*) that the United States had a long-standing policy of acknowledging the existence of the Armenian genocide. In Europe, in a judgement issued on 1 June 1995, a Parisian court of law found Bernard Lewis guilty of denying the existence of the Armenian genocide; furthermore, more notably, in a judgement issued on 3 June 1921, a Berlin court of law acquitted Soghomon Tehlirian, the killer of the ex-Grand Vizier of the Ottoman Empire, Talaat Pasha, on account of temporary insanity due to the trauma caused by the massacres (of which he was a survivor).

10. Finally, the Armenian genocide has been recognised by the following national and regional governments: Germany (Parliamentary resolution on 15 June 2005), Argentina (Laws of 18 March 2004 and 15 January 2007), Belgium (Senate resolution on 26 March 1998), Canada (Senate resolution on 13 June 2002, and resolutions of the House of Commons on 23 April 1996 and 21 April 2004), Chile (Senate resolution on 5 June 2007), Cyprus (resolutions of the House of Representatives on 24 April 1975, 29 April 1982 and 19 April 1990), United States of America (resolutions of the House of Representatives on 9 April 1975, 12 September 1984, and 11 June 1996)[30], France (Law of 29 January 2001)[31],

[30] On 24 April 2012, President Barack Obama declared: "Today, we commemorate the *Meds Yeghern*, one of the worst atrocities of the 20th century. In doing so, we honour 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." On 28 April 2008, he said the following: "It is imperative that we recognize the horrific acts carried out against the Armenian people as genocide. On 20 April 1990, President George Bush had previously made the following statement: "[We join with] Armenians around the world [in remembering] the terrible massacres suffered in 1915-1923 at the hands of the rulers of the Ottoman Empire. The United States responded to the victims of the crime against humanity by leading international diplomatic and private relief efforts." Even

Greece (Parliamentary resolution on 25 April 1996), Italy (resolution of the Chamber of Deputies on 16 November 2000), Lebanon (Parliamentary resolution on 11 May 2000, and resolution of the Chamber of Deputies on 3 April 1997), Lithuania (resolution of the Assembly on 15 December 2005), the Netherlands (Parliamentary resolution on 21 December 2004), Poland (Parliamentary resolution on 19 April 2005), Russia (resolution of the Douma on 14 April 1995), Slovakia (resolution on 30 November 2004), Sweden (Parliamentary resolution on 11 March 2010), Uruguay (resolution of the Senate and the House of Representatives on 20 April 1965, and the Law of 26 March 2004), the Vatican (joint declaration issued by His Holiness Pope John Paul II and His Holiness Catholicos Karekin II on 10 January 2000), Venezuela (Resolution of the National Assembly on 14 July 2005); 43 individual states of the United States of America; the Basque Country, Catalonia, the Balearic Islands (Spain); Wales, Scotland, Northern Ireland (United Kingdom); New South Wales (Australia).

The Legality of Criminal Charges for Genocide Denial

11. As the Armenian genocide has been recognised by the international community and also by the respondent Government, the criminal indictment brought about in opposition to the appellant's freedom of expression was in fact lawful, since the criminal nature of the act of denying the existence of the Armenian genocide had already been sufficiently established in the Swiss legal system, and the corresponding provisions that were laid down as law had been defined in a manner that was neither too broad nor too vague.

12. The fourth paragraph of Article 261 bis of the Swiss Criminal Code upholds the principle of the legality of such criminal charges, for the expression "genocide or crimes against humanity" refers back to certain crimes defined in the Swiss Criminal Code and in international law, and these crimes are sufficiently defined both in Swiss law and in international law, in particular in the Genocide Convention and in the Statute of the

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before him, President Ronald Reagan made a declaration 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." On 16 May 1978, President Jimmy Carter in turn declared: "It's 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."

[31]President François Mitterrand declared: "It is not possible to wash away the trace of the genocide that has affected you." President Charles de Gaulle in turn made the statement: "I bow down before the victims of the massacres perpetrated against your peaceful people by the Turkish governments in power at that time with the intention to carry out their extermination."

International Criminal Court[32]. Moreover, the criminality of this offence is in keeping with a common European standard[33]. In addition to this, the lawmaking technique used by the Swiss legislature in the clause dealing with genocide denial and crimes against humanity is not uncommon, and it may be compared to the lawmaking technique used for Article 259 of the Swiss Criminal Code ("public exhortation to commit a crime or an act of violence"), which makes mention of the notion of "crime" in a general way in paragraph 1 and later goes on to specifically mention the crime of genocide in paragraph 1 bis. More significantly, the fourth paragraph of Article 261 bis of the Swiss Criminal Code contains an extremely important definitional limit (*aus einem dieser Gründen/for the same reason*), which sets a restriction on the reprehensible conduct covered by this article to include those acts inspired by motives of discrimination, that is, out of discrimination founded on the basis of race, ethnic origin or religion[34].

13. Such a conclusion is all the more so required in the case of denial of the Armenian genocide, given that the fourth paragraph of Article 261 bis

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[32] This point is established in various legal analyses of Swiss criminal law (Niggli, *Rassendiskriminerung, Ein Kommentar zu Art. 261bis StG und Art. 171c MStG*, 2 Auflage, 2007, no. 1363 ; Vest, *Zur Leugnung des Volkermordes an den Armeniern 1915*, *in* AJP 2000, pp. 66-72 ; Aubert, *Article on Racial Discrimination and the Federal Constitution*, *in* AJK, 9/1994 ; Dorrit Mettler, *Annotation 63 to Article 261bis*, *in* Niggli/Wiprächtiger, *Strafrecht II*, 3 Auflage, 2013).

[33] Various penal provisions concerning genocide denial may be found in Article 458 of the Andorran Criminal Code, in Article 397 § 1 of the Armenian Criminal Code, in Article 1 § 3h of the Austrian National Socialism Prohibition Act (1947, as amended in 1992), in Article 1 of the Belgian Law of 23 May 1995 (as amended in 1999), in Article 405 of the Czech Criminal Code, in Article 24 bis of the French Law of 29 July 1881, as amended by the Law of 13 July 1990, in Article 130 § 3 of the German Criminal Code, in Article 269 c) of the Hungarian Criminal Code, in Article 325 § 4 of the Croatian Criminal Code, in Article 283 of the Criminal Code of Liechtenstein, in Article 170 § 2 of the Lithuanian Criminal Code, in Article 82 B of the Maltese Criminal Code, in Article 457 § 3 of the Luxembourg Criminal Code, in Article 407-a of the Macedonian Criminal Code, in Article 370 § 2 of the Montenegrin Criminal Code, in Article 55 of the Polish Act of 18 December 1998, on the Institute of National Remembrance, in Article 422d of the Slovakian Criminal Code, in Article 297 § 2 of the Slovenian Criminal Code, in Article 242 § 2 b) of the Portuguese Criminal Code, and in Articles 5 and 6 of Romanian Government Emergency Ordinance no. 31 of 13 March 2002. Article 8 of Italian Law no. 962 of 9 October 1967, criminalises all acts condoning genocide. The current version of Article 607 § 1 of the Spanish Criminal Code exclusively mentions the act of justifying genocide. Finally, in certain European countries, there are no specific penal provisions concerning this matter, yet the courts in these countries have made application of a more general set of provisions concerning acts inciting hatred or discrimination - in particular, this is the case in the Netherlands, where Articles 137c and 137d of the Criminal Code are applied to acts of genocide denial (judgment delivered by the *Hoog Raad* on 27 October 1987).

[34] A certain number of Swiss universities have determined that not only is genocide denial an affront to the memory of the victims of the genocide, but it is also an implicit incitement to discrimination against the survivors (Aubert, opus cit., no. 36; Niggli, *Es gibt kein Menschenrecht auf Menschenrechtsverletzung*, in *Völkermord und Verdrängung*, 1998, p. 87 ; Niggli/Exquis, *Recht, Geschichte und Politik, in* AJP 4/2005, 436).

of the Swiss Criminal Code must be interpreted in a way that is consistent with the declaration of the National Council dated 16 December 2003, a declaration which leaves no doubts about the official position taken by the Nation of Switzerland and by the national laws on the subject of the legal qualification given to the massacres and deportations perpetrated against Armenians in Turkey in the beginning of the 20th century[35]. Indeed, both this provision of criminal law and the declaration of the National Council were made public and were known by the appellant, as he himself has acknowledged.

The proportionality of the criminal nature of genocide denial

14. In addition to being lawful, criminal charges that override an individual's freedom of expression must meet two criteria in order to be justified: on the one hand, these charges must be necessary, and on the other hand, they must be proportionate with the objective that is being sought. Whenever the Court examines the lawfulness of criminal charges with respect to these two criteria, the Court must verify that the grounds set forth in support of litigious criminal accusations are both pertinent and sufficient, and that the criminal accusations do indeed stem from a pressing social need.

15. Decisions made by domestic courts of law must make an assessment of all negative obligations stemming from Article 10 of the Convention that are capable of restricting the scope of the State's margin of appreciation. In addition, by principle all Nations are granted a narrow margin of appreciation with regard to the expression of statements made in a public place that are political in nature. Nevertheless, tragic events occurring in the history of humankind may be considered to constitute a relevant topic that is capable of justifying the restriction of the freedom of personal expression by governmental authorities, thereby enlarging the State's margin of appreciation[36]. Supposing, for the purposes of this argument, that the statements made by the appellant did indeed fall under

[35] In fact, the Federal Court ruled consistently in case law with regard to acts of genocide denial (see the rulings issued by it on 5 December 1997 (BGE 123 IV 202), on 30 April 1998 (BGE 124 IV 121), on 3 November 1999 (BGE 126 IV 20), on 7 November 2002 (BGE 129 IV 95), on 16 September 2010 (no. 6B.297/2010) and on 24 February 2011 (no. 6B 1024/2010)): it is the court's belief that the penal provision in question does apply to genocides other than the *Holocaust* because this provision covers all acts that are considered, according to an "extremely general notion of consensus," as acts of genocide, and the legal values being protected (*geschützte Rechtsgüter*) by criminalising such acts are of two orders: on the one hand, these values directly cover the notions of human dignity and public safety (*öffentliche Sicherheit*) along with peace and public order (*öffentliche Friede*), and on the other hand, they indirectly extend to cover the safety and honour of each of the members of the group of people that were the victim of the genocide. With regard to the clarifications that are presented later on in this opinion, such an interpretation of the law is not arbitrary.

[36] See the separate opinion issued by Judge Pinto de Albuquerque for the ruling for *Faber v. Hungary* (no. 40721/08, 24 July 2012).

the protection of Article 10, then it would precisely follow from this circumstance that such a form of expression would no longer be protected by the law whenever this form of expression is a source of clear and imminent danger, [sic] public disturbance, criminal offences or other forms of infringement on the rights of another citizen, such as, for instance, whenever the act of personal expression is carried out in a manner that would instil violence or hatred[37]. In general terms, there is cause for applying a broad margin of appreciation in this case.

16. The decision to criminalise genocide denial is consistent with the principle of freedom of expression, and such a decision is even required within the context of the European Human Rights System. In fact, all States Parties to the Convention are bound by an obligation to prohibit all verbal expressions and public gatherings that serve to promote racism, xenophobia or ethnic intolerance, along with all similar messages disseminated in any other form, and they are also bound to dissolve any and all groups, associations or political parties that extol messages of this kind. This international obligation ought to be acknowledged as a customary principle of international law that is binding for all other Nations, and also as a mandatory regulation that no other rules of national or international law may ever possibly overrule[38]. Genocide denial is considered by the European Council itself to constitute a serious form of disseminating racism, xenophobia and ethnic intolerance, if not as hate speech. In effect, Article 6 of the Additional Protocol to the Convention on Cybercrime establishes the criminality of genocide denial, as in the case of the Holocaust[39]; and so, any and all acts of genocide denial must be punished criminally whenever these acts deny the occurrence of any genocide that has been officially acknowledged by means of definitive, binding decisions issued by the International Military Tribunal that was created by means of the London Agreement of 8 August 1945, or else by any other international court of law that has been instituted by other valid international legal instruments, whenever the jurisdictional authority of

[37] An introductory presentation of the concept of clear and imminent danger may be found in the separate opinion issued by Judge Pinto de Albuquerque for the case *Swiss Raëlien Movement vs. Switzerland (GC)* (no. 16354/06, 13 July 2012).

[38] See the separate opinion issued by Judge Pinto de Albuquerque for the ruling for *Vona vs. Hungary* (no. 35943/10, 9 July 2013).

[39] STE no. 189. It is true that the respondent Government has only signed, and not ratified, the Additional Protocol, yet this circumstance alone does not justify a decision to overrule the standards of law set by the European Council, for this protocol has already come into effect and has been ratified by 20 States. It is also true that States may reserve the right to forego application of Article 6 § 1, yet the fact that this right exists only serves to demonstrate that this legal provision is as yet not reflective of a customary norm of international law. In other words, the legal ban placed on all acts denying the existence of a genocide has not yet been incorporated into the mandatory customary standards of law as an example of racism, xenophobia and intolerance. Nevertheless, it may be asserted that, at least in Europe, there is an internationally binding obligation to indict all acts of genocide denial with criminal charges, and the nature of this obligation is still undergoing change.

this court is recognised by the State Party[40]. This obligation is even more pronounced when, as in the present case, the genocide being denied has not be recognised either by the system of courts in the very Nation in which it was carried out or by any constitutional body of the Nation in which the act of denial took place.

17. In addition, Framework Decision 2008/913/JAI of the Council of the European Union on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law imposes criminal charges for any and all acts 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, as well as any crimes defined in Article 6 of the Charter of the International Military Tribunal, whenever the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin. The framework decision affords Member States the option to make a declaration, whether at the time when the Member State adopts the Framework Decision or at any other later time, that they will only hold acts of denial or gross trivialisation of the aforementioned crimes to be incriminating whenever these acts involve crimes that have been previously acknowledged by means of a definitive decision made by one of their national judiciary bodies and/or by an international court of law, or else solely as the result of a definitive decision made by an international court of law.

18. Accordingly, in the European Human Rights System, genocide denial covers all acts of genocide that have been officially acknowledged 1) by the International Military Tribunal established by virtue of the London Agreement of 8 August 1945, 2) by any other international court of law, 3) by any court in the Nation in which the genocide was committed or in the Nation in which the statement denying the existence of the genocide was made, or 4) by any other constitutional body, such as the President, National Assembly or national government of the Nation in which the genocide was committed or those of the Nation in which the statement denying the existence of the genocide was made. In addition, when exercising the vast margin of appreciation granted to them in this area of law, Nations may also choose to criminalise genocide denial 5) whenever some social consensus exists concerning the factuality of the genocide committed in this same Nation or in some other Nation[41], even

[40] To be more accurate, none of the individuals who were accused during the Nuremberg trial were found to be guilty of the crime of genocide. As such, any reference made to the crime of genocide such as this crime was recognised in "a definitive, binding decision made by the International Military Tribunal" in fact refers to the crime of genocide according to the way it was understood at that time – as a type of crime violating all laws of humankind – just as this crime was codified in the Genocide Convention.

[41] This corresponds to an "established historical fact," to take up the expression used by the Court (*Lehideux and Isorni v. France*, 23 September 1998, no. 24662/94, § 47,

when no official declaration exists or no prior decision has been made by any constitutional body in this Nation or any other Nation, or by any national or international judiciary. In these five cases, declaring the criminality of all acts of genocide denial that are carried out in a manner capable of inciting violence, racial hatred or discrimination is a matter of urgent social concern.

19. The Spanish Constitutional Court distinguishes between genocide denial, which is constitutionally acceptable, and the justification, diminishing or relativising of genocide, which is not acceptable according to the constitution. This distinction is inadmissible both with regard to the Additional Protocol to the Convention on Cybercrime and with regard to Framework Decision 2008/913/JHA[42]. In fact, the distinction between simple denial and the diminishing or justification of genocide is an artificial distinction in terms of semantics, which may be easily subverted by a capable solicitor through the use of elaborate, euphemistic language, as in the case at hand, where an act of genocide denial has been confounded with an attempt to provide a justification for the Turkish "response" to alleged "attacks" from Armenians. In addition (and this is the essential point), this legal distinction is not ethically viable, since, just as with any justification of genocide, genocide denial is humiliating to the victims and their families, is an affront to the memory of those individuals who were massacred, unjustly forgives those responsible for the massacres of their crimes, and thereby constitutes a serious incitement for others to commit acts of hatred and discrimination and, insofar as this is true, it paves the way for further discriminatory and violent actions to be committed against members of the same people that were the victims of the genocide[43]. The academic freedom to conduct scientific research and

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Recueil [Casebook] 1998-VII, and *Garaudy vs. France (Dec.)*, no. 65831/01, ECHR 2003-IX).

[42] See Ruling no. 235/2007 of the Constitutional Court on the date of 7 November 2007, with four strongly pronounced dissenting opinions. In the first place, it is important to stress that Spain has not yet ratified the abovementioned Additional Protocol, and as such it has not yet taken into account the terms of this protocol in the ruling; moreover, as this ruling was also issued prior to the appearance of Framework Decision 2008/913/JHA, which invalidated the distinction that was set. The *Abogado del Estado* (Attorney General) and the *Fiscal General del Estado* (Public Prosecutor) As the *Abogado del Estado* has stated, the mere act of denying a genocide may be "an extremely acute act of incitement" (*impulso directissimo*) to commit serious criminal offences, and "such a presumption is neither unreasonable nor excessive, as it comes as the product of painful historical experiences." Such an act is also, as the *Fiscal General* has noted, the residue of "an overall atmosphere of acceptance and forgetfulness" (*un clima de acceptación y olvido*) with regard to serious historical events that may be sources of violence.

[43] On this, see the decisions of the German Federal Constitutional Court dated 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 fact that the "Auschwitz lie" (*Auschwitzlüge*) is not protected by freedom of expression; the decision by the Supreme Court of Canada in the case *R. vs. Keegstra* case (1996, 3 S.C.R. 667), on whether the infraction of promoting racial hatred applies, as provided for in Article 319 § 2 of the Criminal Code of Canada, to the anti-Semitic statements of the accused, who in particular had denied that the Holocaust had occurred; and General Recommendation no. 35 of the Committee for

the freedom of information may not be invoked in order to legitimise the legal distinction that is being contested, in contrast with the estimations of the majority of the judges presiding over the Spanish Constitutional Court. If this were the case, it would be easy for a solicitor with wrongful intentions to abet racism, xenophobia and intolerance by hiding behind the notions of historical and scientific research[44]. To restate the matter in crude terms, the act of tolerating genocide denial is tantamount, in the words of Élie Wiesel, to a "double killing" of the victims. Yet again, as worded by the Turkish Human Rights Association in a declaration issued on 24 April 2006, "denial is an constituent part of the genocide itself and results in the continuation of the genocide. The act of denying a genocide is a violation of human rights in and of itself."

The need to criminalise the denial of genocide

20. The French Constitutional Council has deemed that "a legislative provision the purpose of which is to "acknowledge" a crime of genocide cannot, in and of itself, have the normative scope that is attached to the law"[45]. In other words, the principle of necessity would be infringed upon if genocide had to be acknowledged by a formal act of the legislative body. This warning is incorrect where it implies that the purpose of laws known as "memorial laws" belongs to historians, and that therefore, these laws are devoid of legal effects (i.e. normative effects), for the obvious reason that when a court deems that an event is a crime of genocide, this has legal consequences both in criminal and civil law. Furthermore, it is inappropriate to imply that memorial laws are trespassing on the authority of judges and that they therefore constitute an abuse of legislative power that violates the separation of powers, for the obvious reason that when a court rules that an event constitutes genocide, this does not imply that a specific individual or group of individuals is being accused - this is a task that falls upon judges. This conclusion, *a fortiori*, is valid for all official declarations made by members of other branches of power, for example by the head of state or the government, in exercising their constitutional powers. The legislative body, the head of state or the government are well able to make official statements or even approve laws on the legal nature of an event, but this does not imply that they have evaluated the legality of the conduct and the personal guilt of a given individual[46].

Eliminating Racial discrimination on 26 September 2013 (§ 14). It is appropriate to underscore that the Committee for Eliminating Racial Discrimination does not demand that genocide or crimes against humanity be proven by a final decision made by a domestic or international court.

[44] Broadcasting scientific information that rests on appropriate elements asserted by a speaker in good faith can obviously constitute a method of defence regarding scientific discourse on genocide.

[45] French Constitutional Council, decision on 28 February 2012.

[46] In its decision on 28 February 2012, the Constitutional Council added the following: "the legislative body has infringed on the exercise of freedom of expression and communication, in an unconstitutional manner". This laconic statement is not sufficient

21. Because this is so, making it a criminal act to deny genocide corresponds to a policy of the State that is necessary to fully implement the spirit and the letter of Article 1 of the Convention on Genocide, which obliges states to prevent the crime of genocide from being committed, and the Resolution of the General Assembly of the United Nations dated 26 January 2007, which calls on all UN member states to "unreservedly reject any denial of the Holocaust as a historical event, whether this denial is full or partial, or any related activity." At least in Europe, a continent that has had much blood spilled on its soil over the course of the 20th century with the purpose of carrying out terrible plans to exterminate entire groups of people, denying genocide should be considered as a seriously threatening and shocking type of discourse, tantamount to "fighting words", which do not deserve protection.[47] Furthermore, in the specific case of denying the

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to prove that freedom of expression has been violated. Not one word is said about the necessity and the proportionality of the disputed restriction on freedom of expression with regard to the criminal policy goals being pursued by making it a criminal act to deny genocide.

[47] The Supreme Court of the United States has addressed the question of "fighting words" a number of times since the *Chaplinsky vs. New Hampshire* case (315 U.S. 568, 1942), and "expressive behaviour" that has the same insulting or threatening meaning (for example, consisting of desecrating a flag or burning a cross). In *Cohen vs. California* (403 U.S. 15, 1971), it admitted that the expression "Fuck the draft" constituted speech that was protected by the Constitution, because no individual who was present or would likely be present could reasonably consider that the words found on the jacket of the person who lodged the appeal were a direct personal insult and there was nothing to indicate that their use was intrinsically likely to cause acts of violence or to incite violence - it therefore deemed that these were not unconstitutional "fighting words". In *Street vs. New York* (394 U.S. 576, 1969), the Supreme Court considered that the simple fact that the words spoken against the flag were shocking was also not enough to allow them to be qualified as "fighting words". It reached the same conclusion in regards to the expressive behaviour consisting of burning the flag, opining that such behaviour still did not constitute an immediate threat of illegal action, according to the Brandenburg criteria (*Texas vs. Johnson*, 491 U.S. 397, 1989). In *R.A.V. vs. City of St. Paul* (505 U.S. 377, 1992), it ruled that criminalizing the behaviour of actions consisting of burning a cross or placing a Nazi swastika or any other symbol on a public or private asset where there is a reasonable belief that they will cause anger, fear or resentment towards third parties because of their race, colour, beliefs, religion, or gender was unconstitutional, because it deemed that this criminalization was too broad, and that it would prohibit not only "fighting words" but also protected speech, and because the provisions being challenged were based on the words in the message; it only prohibited actions that transmitted a message about certain subjects. Nevertheless, in *Virginia vs. Black*, (538 U.S. 343, 2003), its actions practically amounted to a reversal of jurisprudence, and it judged that those who burned crosses could be sanctioned for committing a criminal infraction inasmuch as their behaviour was a signal of imminent intimidation and that the State had proven the intent to intimidate. It nevertheless deemed that in all cases, the burden of proof should not rest on the accused, who should not have to prove that he did not have the intention of intimidating anyone by burning the cross. In his dissenting opinion, Judge Thomas for his part went even farther, explaining that the act of burning a cross was always a threat of some kind or another, and that the behaviour, therefore, in his opinion, was not protected by the First Amendment. One can say, therefore, from a concrete point of view, that the opinion of the Swiss Federal Court on denying genocide is in accordance both with the

genocide of Armenians, there is an additional imperative need to halt the hatred and discrimination sometimes directed against Armenians, who are a vulnerable minority in some countries, and who should therefore benefit from special attention and protection, like all other vulnerable minorities, if necessary through criminal provisions[48].

22. As the Court stated in the *Garaudy* case, accusing the victims themselves of falsifying history is "one of the most pointed types of racial defamation towards them and of inciting hatred towards them", and that furthermore, it is "such that it seriously disturbs the public good" and is an infringement on the rights of others[49]. This consideration must also apply to Armenians. The suffering undergone by an Armenian because of the genocidal policies of the Ottoman Empire are no less significant than those of a Jew under the genocidal policies of the Nazis. And denying *Hayots Tseghaspanutyun* (Հայոց Ցեղասպանութիւն) or *Meds Yeghern* (Մեծ Եղեռն) is no less dangerous than denying the *Holocaust*.

Applying European standards to the facts of the case

23. The facts that constitute denial of genocide have been proven, both in regards to *actus reus (the guilty act)* and *mens rea (the guilty mind)*. In

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majority opinion of the US Supreme Court in *Virginia vs. Black* as well as with the opinion of the Supreme Court of Canada in *R. vs. Keegstra*.

[48] See the disquieting reports on the situation of the Armenians in the fourth report of the ECRI on Turkey (2011, §§ 90-91 and 142), the third report of the ECRI on Azerbaijan (2011, § 101), the third report of the ECRI on Georgia (2010, § 74) and the third report of the ECRI on Turkey (2005, §§ 35 and 89-93). We do not agree, therefore, with the presumption that underlies the reasoning of the majority, which consists of thinking that the need for protection of a criminal nature has diminished with the passing of time. This aspect of the need to criminalize denying genocide has been ignored by both the French Constitutional Council and the majority of the Spanish Constitutional Tribunal, but not by the dissenting judges and the *Attorney General*, who deemed that the fact that racist and xenophobic movements still exist in Europe was enough of a reason to justify criminalising the denial of genocide.

[49] *Garaudy*, already cited, and before the Human Rights Commission, *Robert Faurisson vs. France*, communication no. 550/1993, 8 November 1996. Thus, paragraph 49 of General Comment no. 34 of the Human Rights Commission does not reflect either the former jurisprudence of the Human Rights Commission or the consistent jurisprudence of the Court. In addition, it does not address the question of the justification and apology for a crime perpetrated in the past, which unequivocally calls for a criminal sanction. Finally, it only targets "the expression of an erroneous opinion" and "the incorrect interpretation of events from the past". These expressions are ambiguous and misleading. It is true that the Commission did not intend to include in it "deliberately false statements regarding the existence of a crime", and even less so, deliberately false statements about the existence of genocide, the worst of crimes. If this were the case, it would also grant the status of speech that deserves to be protected by freedom of expression to the apology and justification of a murderer and his infamous actions, to wit, the deliberate negation of the *Holocaust*. This paragraph with its unfortunate wording, therefore, inasmuch as it has not been revised, must be interpreted strictly in accordance with paragraph 3 of Article 19 and Article 20 of the International Agreement on Civil and Political Rights. Furthermore, this is exactly what the Commission did to eliminate racial discrimination in its aforementioned General Recommendation no. 35.

regards to *actus reus*, the plaintiff publicly denied the genocide of the Armenians, calling it an "international lie"; he accused the Armenian people of having attacked Turkey, and he stated that he espoused the ideas of the Grand Vizier Talaat Pasha, who was found guilty of the "massacres" of the Armenian people by a Turkish Court Martial in 1919. His words did not objectively contribute to a public, democratic debate about this matter; to the contrary, they were a serious incitement to intolerance and hatred towards a vulnerable minority. In fact, the plaintiff neither presented nor analysed any element related to the scope and the goal of the atrocities, and he even acknowledged that he would never admit the existence of this genocide, even if a neutral scientific commission established it.

24. As regards the *mens rea*, the domestic courts with jurisdiction established that the plaintiff had been inspired by a "racist" and "nationalist" motivation (paragraph 52 of the ruling). They did not find any scientific, historical or political purpose for his speech. In acting as he did, the plaintiff showed on numerous occasions and very consciously that he had little respect for the existing legal framework in a foreign country, where he had gone with the premeditated goal of making this statement and thus defying the country's laws. By attempting to whitewash the Ottoman regime through denying and justifying its genocidal policies, he was laying the foundations for an increase in intolerance, discrimination, and violence with his statements.

25. The motivation of the plaintiff is a factual element that could only be established by the internal court, which gathered the evidence and considered it. The Court is bound by the established fact that he was inspired by a "racist" motive, and it cannot change this fact. This fact is crucial. It shows that the plaintiff's intention was not only to deny the existence of the Armenian genocide, but also to accuse the victims and the world of falsifying history, making the Armenians seem like the aggressors, and justifying the Ottoman Empire's genocidal policy by presenting it as an act of legitimate defence, minimizing the scope of the atrocities and the suffering caused by the Turkish State to the Armenian people, and defaming and insulting the Armenians of Switzerland and the world with deliberately hateful and "racist" words[50]. The expressions "international lie", "*historische Lüge* " and "*Imperialistische Lüge* " that he used, clearly went beyond the limits of admissible freedom of expression, because they amounted to calling the victims liars[51]. In this,

[50] Therefore, we cannot limit ourselves to the opinion expressed by the majority in paragraph 52 when they said that "it also does not appear that the plaintiff expressed any lack of respect for the victims of the events in the case". Not only is this statement completely unsupported, it also contradicts the facts established by the domestic courts. The majority here acts like a trial court, re-evaluating the intentions of the plaintiff, while it had not had the opportunity to hear him and personally question him.

[51] See the statements made by the plaintiff before the prosecutor (23 July 2005), the investigating judge (20 September 2005) and the police tribunal (8 March 2007), which are found in the case file. In the decision on *Witzsch vs. Germany* dated 20 April 1999

the plaintiff acted with the same unacceptable *dolus* (tort) that Mr Garaudy had. He even acted in a more repugnant way, by identifying with the person who had promoted the Armenian genocide, according to the authorised Turkish military courts – Talaat Pasha.[52]

26. Given that the facts were clearly established by the domestic courts and that the provisions that criminalize denying genocide are legal, proportional to the intended purpose, and necessary in the light of the principles stated by the European Commission, the European Union, the Commission for the Elimination of Racial Discrimination, the German Constitutional Court and the Supreme Courts of the US and Canada, the question that remains to be considered is the question of the proportionality of the sanction imposed upon the plaintiff, given the scope of his freedom of expression, taking into account the alleged public interest of his discourse made in the context of public political meetings, in order to determine whether, as he alleges, the penalty that was imposed upon him is excessive.

27. In a civilised world, there is no public interest in protecting statements that denigrate and humiliate victims of crimes, exculpate criminals, or identify with them and encourage people to hate and discriminate against others, even if the horrible crimes that these statements refer to took place 70 years ago (the genocide of the Jews) or even 90 years ago (the genocide of the Armenians). Furthermore, the criminal policy goals sought by the courts of the defendant State when they punished denying the genocide of the Armenians - preventing disturbances to public order in the face of the "provocation" of the plaintiff, to use the same term employed by the Federal Court, and protecting the dignity and honour of the victims and the Armenian people in general - are pertinent factors to restrict freedom of expression in the light of Article 10 § 2 of the Agreement. In balancing out all of the appropriate factors in order to test proportionality, the scales are clearly weighted in favour of the State's goal of interference rather than the spatial-temporal element[53]. Thus, the grounds for the disputed guilty

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(no. 41448/98), the Court judged that the expression "historical lies" applied to the mass murders perpetrated by the Nazis was not protected by Article 10. It confirmed this reasoning in the decisions in *Schimanek vs. Austria* (no. 32307/96, 1 February 2000) and *Witzsch vs. Germany* on 13 December 2005 (no. 7485/03).

[52] This important fact was also highlighted by the Federal Court (point 5.2 of the ruling dated 12 December 2007) as well as by the defending government in its comments to the Court (§ 25). We cannot therefore admit the theory that consists of saying that the goal of the plaintiff's statements was to legally evaluate the events in question and not these events in themselves. This theory goes against common sense. The plaintiff did not only challenge the legal evaluation of the facts, he also put the massacre of the Armenians on the same level as the wartime losses undergone on the Turkish side, and justified the genocidal policies of Talaat Pasha by attempting to make people believe that it was an act of legitimate defence against an Armenian attack.

[53] The fact that a speech was held in the context of a political debate or a political meeting obviously has no impact on its racist or discriminatory nature. See the separate opinion of Judge Pinto de Albuquerque in the *Vona vs. Hungary case*, *already cited*, *as well as the Féret vs. Belgium* case (no. 15615/07, §§ 75-76, 16 July 2009) and, before the

finding were both appropriate and sufficient, and the interference of the State did indeed respond to an imperative social need.

28. Finally, the penalty is absolutely not disproportional compared to the seriousness of the actions. The plaintiff was ordered to pay two fines: 90 days of judicial fine with deferment and a 2500 euro fine, as well as a suspended custodial sentence of 30 days in prison. He was not condemned to a prison sentence, although the infraction that he was found guilty of made him eligible to spend 3 years in prison. He was neither arrested nor imprisoned in Switzerland. The Swiss courts showed considerable restraint in this serious matter, which could have led to a much more severe penalty in the interest of dissuading others and for special preventative purposes.

Conclusion

29. In an interview given to CBS in 1949 that is available on the Internet, Raphael Lemkin, who invented the term "genocide" and who was the inspiration for the Genocide Convention, said the following: "I became interested in genocide because it had happened to the Armenians, and their situation had been completely ignored at the Versailles Conference: their executioners were guilty of genocide, and they were not punished." After several decades, the mass premeditated murder, systematic torture, and organised deportation of the Armenian people and the pre-meditated eradication of Christianity in Turkey that took place at the beginning of the 20th century are considered to be a "forgotten genocide". But the authors of this opinion have not forgotten it. We believe, therefore, that criminalising the denial of genocide, and the sanction imposed upon the plaintiff, which is fully concordant with the laws in effect in the defendant State, for having denied the existence of the Armenian genocide, have not led to any violation of Article 10 of the Convention.

Commission for the Elimination of Racial Discrimination, communications nos. 34/2004 (§ 7.5), 43/2008, (§ 7.6) and 48/2010 (§ 8.4).