PERİNÇEK v. SWITZERLAND JUDGEMENT OF THE EUROPEAN COURT OF HUMAN RIGHTS

(AVRUPA İNSAN HAKLARI MAHKEMESİ'NİN *PERİNÇEK v. İSVİÇRE* KARARI)

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Abstract: *The verdict of the ECtHR in Perinçek v. Switzerland affair is a well-reasoned and balanced judgment; it reduces the concept of genocide to law. The ECtHR acknowledges that the Court is not competent to arbitrate upon controversial historical aspects of the past events as well as on the legal qualification attributed to them. The line of reasoning of the Swiss Courts on the matter was troubling as it came very close to establishing a system which places one single opinion above all others, criminalizes disagreement and precludes any form of debate .The verdict of the ECtHR underlined that expressing opinions on sensitive and debated issues is a fundamental aspect of freedom of expression and the difference between tolerant, pluralist, and democratic society and totalitarian regimes lies in this. The Court concluded that there was no justifiable reason to curtail Dr. Perinçek's freedom of expression.*

Keywords: *European Court of Human Rights, ECtHR, Perinçek v. Switzerland, genocide, Turkey, freedom of expression*

Öz: *AİHM'nin Perinçek-İsviçre davasındaki kararı iyi gerekçelendirilmiş, dengeli bir karardır. Bu karar soykırımı kavramını hukuksal boyuta indirgemektedir. AİHM, tarihsel olayların tartışmalı boyutları konusunda olduğu gibi, bunlara yüklenen hukuksal nitelemeler hakkında hakemlik etme yetkisinin bulunmadığını kabul etmektedir. İsviçre Mahkemelerinin bu dava hakkındaki mantıksal dayanağı rahatsızlık yaratır nitelikteydi; zira tek bir görüşü öbür düşüncelerin önüne geçirmekte, farklı görüş sahibi olanı cezalandırmakta ve o konuda her türlü tartışmayı engellemekteydi. AİHM'ni kararı duyarlı ve tartışmalı konularda görüş serdetmenin ifade özgürlüğünün temel niteliği olduğunun, hoşgörülü, çoğulcu ve demokratik bir toplum ile totaliter rejimler arasındaki farkı da bunun oluşturduğunun altını çizmiştir. AİHM Dr. Perinçek'in ifade özgürlüğünü kısıtlama konusunda geçerli bir gerekçe bulunmadığı sonucuna varmıştır.*

Anahtar kelimeler: *Avrupa İnsan Hakları Mahkemesi, AİHM, Perinçek v İsviçre, soykırım, Türkiye, ifade özgürlüğü*

1. The circumstances of *Perinçek v Switzerland* Case

Doğu Perinçek is a PhD in law, and he is also the chairperson of the Turkish Workers Party. He attended meetings on 7 May, on 22 July, and on 18 September 2005 respectively in Switzerland, during which he publicly denied existence of any genocide perpetrated by the Ottoman Empire against the Armenian people in 1915 and in 1916. Moreover, he described the notion of an Armenian genocide as an "international lie". Switzerland-Armenia Association filed a complaint against Dr. Perinçek for the content of these above-mentioned statements. The Lausanne Police Court found Dr. Doğu Perinçek guilty of racial discrimination in the meaning of Art.261, Paragraph 4 of the Swiss Penal Code[1]. He was sentenced to imprisonment convertible to fine and to fine for which imprisonment could be substituted". Dr. Perinçek's appeal to Federal Tribunal was dismissed by a judgement dated 12 December 2007 (ATF 6B_398/2007).

Thereafter, Dr. Perinçek filed a complaint in 2008 to the European Court of Human Rights (ECtHR) invoking mainly Article 10 of the *European Convention Of Human Rights and Fundamental Freedoms (hereafter: Convention*).

The Second Chamber of the ECtHR determined on 17 December 2013 by five to two votes that the Swiss Court's ruling violated Dr. Perinçek's right to freedom of expression.

- **Switzerland's petition to refer the 17 December 2013 judgement to the Grand Chamber**

On 11 March 2014, Swiss Federal Department of Justice and Police issued a press release stating that they requested referral of the said verdict to the Grand Chamber of the ECtHR. The press release on the matter summarizes the reason of the petition as; *"Switzerland's primary interest is to clarify the scope available to the national authorities in applying the criminal anti-racism provision laid down in the Swiss Criminal Code (Article 261 bis)."*

Article 43 of the Convention, foresees that requests for referral to the Grand Chamber are examined by a panel of five judges of the Grand Chamber. Article 43/2 of the Convention provides that a request for referral may be accepted "*if*

1 Article 261.paragraph 4 of the Swiss Criminal Code refers to denial of a genocide as;

"Whoever publicly by word, writing, image, gesture, acts of violence or any other manner, demands 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... will be punished by a maximum of three years imprisonment or a fine."

the case raises a serious question affecting the interpretation or application of the Convention or the Protocols thereto or a serious issue of general importance."[2]

- **The text of the Switzerland's request has been leaked by the Armenian media**

The text of the Swiss appeal to the ECtHR, which was to be confidential, has been leaked to the Armenian media[3] and disclosed by them on 31.03.2104. The Armenian source said: "*The text of the Swiss appeal has been kept under seal pending ECtHR's consideration. The Armenian Weekly was able to obtain a copy of it; and it is the first time that the content of the Swiss appeal appears in the media".* Few days later, entire text of the letter has been circulated worldwide.

On 31.03.2014, Armenian Weekly informed the general public that Armenian Government, Armenian communities, and Swiss Armenians in particular lobbied in Switzerland to ensure that it appeals to ECtHR's verdict". According to the Armenian media, "one of the factors that guided Switzerland to refer the case to the Grand Chamber was the Armenian "**prodding"**. How elegant!

But this elegance does not change the seriousness of the violation of the secrecy governing the referral procedure to the Grand Chamber. As of mid-April 2014, Dr. Perinçek or his lawyers have not been officially informed by the ECtHR of the Swiss petition's content.

2. What is the Meaning of "Genocide"?

"Genocide" is a legal term; it describes a crime specifically defined by the 1948 Genocide Convention, and must be addressed accordingly. The concept of genocide is not conducive to historical inquiry.[4]

Article II of the *Convention on the Prevention and Punishment Genocide Convention* is as follows:

> *"In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic,*

2 *The General Practice Followed by the Panel of the Grand Chamber When Deciding on Requests for Referral in Accordance with Article 43 of the Convention,* Document of Information of the ECHR, October 2011.

3 Harut Sassounian. "Text of Swiss Appeal to European Court on Armenian Genocide Disclosed" *The Armenian Weekly*, 31.03.2014. "Even though the text of the Swiss appeal has been kept under seal pending ECtHR's consideration I was able to obtain a copy in French. This is the first time that the content of the Swiss appeal appears in the media."

4 M. Hakan Yavuz "Contours of Scholarship on Armenian-Turkish Relations" *Middle East Critique,* Vol.20.No3, p. 233, Fall 2011.

*racial or religious group **as such:** a)Killing members of the group; b)Causing bodily or mental harm to members of the group; c)Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; d)Imposing measures intended to prevent births within the group; e) Forcibly transferring children of the group to another group".*

Donald Bloxham, a leading scholar with a nuanced argument on the Armenian case, aptly argues that"

The ECtHR -in its judgement 27510/08- under review- underlined the fact that genocide is a well-defined strict legal concept. According to precedents of the International Court of Justice (ICJ) and of the International Criminal Tribunal for Rwanda, for a violation to be named as genocide, members of a targeted group must not only be chosen as a target because of their membership in this group, but it is necessary to establish at the same time that the actions committed should be accomplished with special intent of destroying, in whole or in part, the group as such (dolus specialis).

"genocide is a legal term than a historical one, designed for the ex post facto judgmentsof the courtroom rather than the historian's attempt to understand events as they develop" ... ". In fact, the term genocide seeks to moralize a conflict, constantly searching for a victim and a victimizer; it is always in search of intent and functions as a prosecutor; it ignores internal diversity of these communities or movements; and it ignores the causal connections and the role of contingency and human agency. This debate between victim and victimized is a moral debate, not a historical one. In order to understand the chains of events and the role of human agency, we need to demoralize the issue and seek to understand what happened and why...[5]

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5 Donald Bloxham (2011) "The First World War and the Development of the Armenian Genocide" in Ronald Grigor Suny, Fatma Göçek & M. Naimark (eds) *A Question of Genocide: Armenian and Turks at the End of the Ottoman Empire* (New York: Oxford University Press p.275.pp 260-275; in M.Hakan Yavuz op.cit p.233

a. What is the meaning of "Special Intent?" *(Dolus specialis)*

According to Genocide Convention," the intent to destroy a group must be in the form of special intent *(dolus specialis)*. Sociologically and psychologically the intent *"to destroy a group as such"* emerges in the most intensive stage of racism. Racial hatred is quite different from ordinary animosity laced with anger, through which parties engage in a substantial dispute feel towards one another. Racial hatred is a deep pathological feeling or complicated fanaticism. Anti-semitism is an example in this context.[6]" This crucial aspect of the crime of genocide has been emphasized by the ICJ in paragraphs186, 187, and 188 of its judgment in *Bosnia Herzegovina vs Serbia and Montenegro*[7]. The ICJ examined the allegations put forth by Bosnia Herzegovina, and conducted long and detailed investigations regarding the alleged killings and atrocities with the exception of **Srebrenitsa.** The ICJ was not convinced that those killings or atrocities were accompanied by specific intent on the part ofthe perpetrators to destroy the group of Bosnian Muslims in whole or in part. The tragedy of Cambodia in 1975 also do not fulfil the strict requirements of the Genocide Convention; that is why the Courts on Cambodia are prosecuting individuals for crimes against humanity and not for genocide.Accordingly, if "**special intent"** is not proven beyond any doubt, a crime cannot be judicially qualified as genocide. The cases of civil war, rebellion, and mutual killings should not be confused with the crime of genocide. Paragraphs 186, 187, and 188 of the ICJ decision are also reflected in the ECtHR judgement.[8]

This is one of the main reasons why Dr. Perinçek and a great majority of Turkish people do not accept to qualify the tragic events of 1915-1916 as genocide against the Ottoman Armenians.

On this occasion it should be remembered that the **ECtHR judgement makes**

6 Aktan, Gündüz, "The Armenian Problem and International Law", in Ataöv, Türkkaya (ed.), *The Armenians in the Late Ottoman Period*, Ankara: The Turkish Historical Society, 2001, p. 270

7 Paras. 187 and 188 of the ICJ judgment of Bosnia/Serbia: Para 187:

"…Article II [of the Convention] requires a further mental element. It requires the establishment of the intent to destroy in whole or in part the protected group as such. It is not enough to establish, for instance in terms of paragraph (a) That 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 the "specific intent" (*dolus specialis*). It is not enough that the members of the group are targeted because they belong to that group that is because the perpetrator has a discriminatory intent. Something more is required. The acts listed in Article II, must be done with the intent to destroy the group as such in whole or in part. The words "as such" emphasize that intent to destroy the protected group."

Para.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.

"[The] basic moral principle required for persecution is higher than for ordinary crimes against humanity, although lower than for 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...., 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.)

8 Para. 23 of the judgment

it clear that Dr. Perinçek did not deny the existence of deportations, relocations of population, and massacres committed against the Ottoman Armenians; he refused to qualify these events as genocide.

b. National, international, universal jurisdictions: Who decides when an act to be qualified as "genocide"?

The existence of the crime of genocide can be legally determined only by **judges of a competent tribunal** on the basis of the prescribed legal criteria, after a fair and impartial trial. According to Article VI of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948;

> *"**Persons charged with genocide shall be tried** by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties who shall have accepted its jurisdiction".*

The words "**persons charged with genocide shall be tried**, reflect the view that only real persons are supposed to commit the crime in question. In other words, States cannot be charged and tried as suspects of the crime of genocide. On the other hand, according to article IX of the Genocide Convention, States may have a responsibility[9] on the matter.

During the Preparatory Conference of the Genocide Convention in 1948, proposals on **universal prosecution** have been made, but rejected[10]. The principle of "universal prosecution" foresees to hold the trial of the suspect in another country, than the country in which the criminal act was committed; the aim is to hinder impunity.[11]

Furthermore, with regard to the suspects of crimes against humanity and/or genocide, several States recently introduced in their penal legislation, stipulations allowing suspects to be tried outside the national territory where the crime has been committed[12]. Finally, the **Framework Decision (2008/913/JHA) on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law**[13] adopted by the European Union

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

10 William A. Schabas, *Genocide in International Law*, Cambridge University Press 2000, pp 345-417

11 Louis Joinet, "Lutter contre L'Impunité" *La Découverte*, Paris 2002

12 During the 1990's and later there were several efforts to hold trials for genocide in Austria, Germany, Denmark, France, Belgium and Switzerland; without apparent opposition or challenge. See: "Lutter Contre L'impunité"

13 *The EU Framework Decision stipulates that Member States must criminalize the "public condoning, denial or gross trivialization of the crimes defined in the Article le 6,7 and 8 of the Statute of the International Court (crimes of genocide, crimes against humanity and war crimes) directed against a group of persons or member of such a group defined by reference to race, color, religion, descent or national or ethnic origin or one or more of its members in a manner likely to incite violence or hatred against such a group. "*

"criminalizes the denial or gross trivialisation of genocide, in a manner likely to incite violence or hatred against a group, if these crimes have been established by a final decision of a national court of this Member State, and/or an international court..."

The Genocide Convention does not allow legislators, scholars, pamphleteers, politicians, or other individuals to establish the existence of genocide. Nevertheless, some politicians, historians, sociologists, political scientists, members of the media dealing with this issue tend to describe almost any incident which involves a significant number of deaths, as genocide.[14] The term of "cultural genocide" came also to the agenda; a proposal in this respect was discussed but rejected by the Preparatory Conference of the Genocide Convention in 1948.[15]

c. Has the Ottoman Government tried and condemned persons who seriously harmed or killed the displaced Ottoman Armenians during the population transfer of 1915-1916?

During the 1915-1916 *"tehcir"* deportation or relocation *(the majority of Turkish scholars use this word, because the transfer took place within the borders of the Ottoman State)* of individuals or groups who were attacked, killed and/or seriously harmed the Armenian convoys, as well as officials who exploited the Armenian plight and neglected their duties, and/ or abused their powers were court-martialled and punished.

These tragic events are to be labelled as crimes enumerated by the Ottoman Penal Code. In 1915 more than 20 Muslims were sentenced to death and executed for such crimes[16]. Following a report by Talat Pasha,[17] the Ottoman Government created three commissions[18] to investigate the

On the subject of " the competent court", according the Article 1(4) of the Framework decision any member State may make punishable the act of denying or grossly trivializing the above mentioned crimes only if these crimes have been established by a final decision of a national court of this Member State, and /or an international court, or by a final decision of an international court only. This possibility is not provided for the act of condoning the above-mentioned crimes.

14 William Schabas, *Genocide in International Law*, (2000) p. 7; Günther Lewy, "Can there be Genocide without the Intent to Commit Genocide?" *Journal of Genocide Research* , Vol. 10, Issue 1, (2008). p.111; (a second edition of the article appears in G. Lewy, *Essays on Genocide and Humanitarian Intervention*, 2012)

15 William Schabas, op.cit. p. 153 and p.187

16 Günther Lewy, supra.

17 The Swiss Federal Tribunal decision (para.5.2.) maintains that "Talat Pasha was historically, with his two brothers, the initiator and the driving force of the genocide of the Armenians". Minister Talat has no brothers. The degree of his responsibility with regard the tragic events of 1915-1916 is still discussed among historians. We feel obliged to add this correction in order to underline -among many others- the existence of non- verified (careless) data in the verdict of Swiss tribunals. Other examples: The UN never recognized the Armenian genocide. The European Council did not recognize the Armenian genocide; some parliamentarians signed and issued a declaration which does not reflect position of the Council, etc.

18 Yusuf Halaçoğlu, *Facts on the Relocation of the Armenians.1914-1918* Turkish Historical Society Press, Ankara, 2002 pp. 84-86; H. Özdemir and Y. Sarınay (eds) *Turkish -Armenian Conflict Documents*, TGNA Publications, 2007 p. 294

complaints of Armenians and the denunciations of civil servants. As a result, on March-April 1916, 1673 persons, including captains, first and second lieutenants, commanders of gendarme squads, police superintendents and mayors were remanded to courts martial. 67 of them were sentenced to death, 524 were sentenced to jail, and 68 received other punishments such as forced labour, imprisonment in forts, and exile. Several of them were sentenced to death for plunder, and other death sentences were justified not only by murders, but also by robberies[19].

In 1919, the Ottoman government asked its Spanish, Dutch, Danish, and Swedish counterparts to send investigators to examine the Anatolian events of World War I. The request was futile because of the British pressure[20].

As pointed out in the ECtHR judgement, there existed also other trials conducted against the members of the Ottoman Government and other officials in Istanbul and in Yozgat, where some of the defendants were found guilty. Many contemporary authors prefer to dismiss these military tribunals of 1916.

Moreover, occupying British forces sent 144 Ottoman officials to Malta to try them in a tribunal for presumed war crimes and crimes against Armenians. They were released after more than two years of unsuccessful investigations by a British prosecutor and his staff[21]. During Malta prosecutions, the British government declined to use any "fake" evidence developed by the said Ottoman tribunals.[22]

3. The ECtHR judgement on Perinçek *v.* Switzerland case is solely related to the violation of Dr. Perinçek's freedom of expression, and not on the genocide allegations

The ECtHR is not the competent tribunal to evaluate and decide on the materiality of the tragic events that seriously harmed the Ottoman Armenian

19 Y. Sarınay," The Relocation (Tehcir) of Armenians and the Trials of 1915-1916" *Middle East Critique,* XX-3, Fall 2011, p. 308.

20 Halaçoğlu, supra. at 990 and annexes XX-XXI.

21 Lewy, supra.at122-128; Şimşir "The deportees of Malta and the Armenian Question", in *Armenians in the Ottoman Empire and Modern Turkey (1912-1926)* (1984) Boğaziçi University Publications pp. 26-41; Sonyel, "Armenian Deportations: A Re-Appraisal in the Light of New Documents" *Belleten*, Jan. 1972 pp. 58-60; S. R. Sonyel, "The Displacement of Armenians: Documents (1978); Pulat Tacar and Maxime Gauin, "State Identity, Continuity, and responsibility: The Ottoman Empire the Republic of Turkey and the Armenian Genocide; A reply to Vahagn Avedian", *European Journal of International Law*, Volume 23, No.3, August 2012 at 828-829

22 Eric Jan Zürcher, *Turkey: A Modern History* London: I.B.Tauris, 1997 p.121; Andrew Mango. "Turks and Kurds" *Middle East Studies* No: 30, 1994, p.985. Many documents presented to support the Armenian allegations "have been shown to be forgeries." The British historian Andrew Mango mentioned the following (for the telegrams dubiously attributed to the Ottoman wartime minister of interior Talat Pasha): "It is ironic that lobbyists and policymakers seek to base a determination of genocide upon documents most historians and scholars dismiss at worst as forgeries, and at best as unverifiable and problematic."

people during the population transfer which occurred in 1915 and 1916. Consequently, the ECtHR made no pronouncement concerning the appropriateness of legally describing these facts as genocide.

Similarly, Swiss Courts also are not competent to legally determine whether the tragic events of 1915/1916which occurred on Ottoman territory may be qualified as genocide.

On this matter, ECHR considers that its sole task is to audit, - from the perspective of Article 10 of the Convention, the verdicts rendered by the national jurisdiction in virtue of their power of assessment.[23]

4. Reactions Regarding the Judgement of the ECtHR on Perinçek v. Switzerland

The ECHR's judgement has been welcomed by Dr. Doğu Perinçek, by the Turkish authorities and also by many scholars[24].No surprise that it has been criticized by Armenian diaspora organizations, lawyers, and their supporters, because it condemned Switzerland for limiting the freedom of expression of Dr. Perinçek.

The above mentioned Armenian sources revealed that the petition of

23 Para. 111.of the judgment

24 The Ministry of Foreign Affairs of Turkey welcomed the verdict of the ECtHR and affirmed that "the said judgment constitutes a milestone for the protection of the freedom of expression which is the fundamental element of societies committed to freedom, democracy and the rule of law... Although the outlook of Armenian and Turkish peoples on their common history differ, it is important that the parties in dialogue with each other discuss the issue in a scientific basis in a fair and open minded way. Turkey is ready to do its part on this matter".

The Cambridge Journal of International And Comparative Law, welcomed "the verdict as reducing genocide to Law" and added that "the line of reasoning of the Swiss authorities was indeed troubling, as it came very close to establishing a form of a -dictature de la pensée unique- a system which places one single opinion above all others, criminalize disagreement and precludes any form of debate or discussion."

- Paolo Lobba in his comments published by Liberté Pour L'Histore has written: "Great significance should be attached to this ruling which represents a turning point in the ECHR approach to the broader phenomenon of denialism..."

- Ret. Ambassador and former Minister of Foreign Affairs Mr. Yaşar Yakış has commented on 25 December 2013 in Today's Zaman that "A milestone verdict on -Armenian genocide-.... which will no longer be considered a punishable act among 47 member countries of the Council of Europe..."

- Diplomatic Observer: 30.12.2013: "It is no Longer a Crime to Call a Lie "A Lie". "No one will be threatened with imprisonment for being skeptical of legends, unfounded allegations and subjective assumptions" "A victory for the rule of the law" "A milestone ...."

- Rıza Türmen - retired Ambassador and former judge of the ECHR-said:" the Swiss court should not have convicted someone who said that there had not taken place genocide" " Courts should not play the part of referee"..."if the expression of opinions regarding historical events is banned , then society cannot face its past...." "It is very difficult to document genocide against an ethnic group or a race and the court has drawn attention to this"

- Dr. Doğu Perinçek: " The verdict of the ECHR is of dimension beyond the imagination of the Government of Turkey Everyone will soon see that as a fact from the laments being issued by the ideologues of imperialism and from Armenia"

- Prof. Dr. Dirk Voorhoof (Gent University):" We sincerely doubt if a judgment by the Grand Chamber could ever lead to an outcome which will prove Dr. Perinçek conviction is necessary for a democratic society" 07.01.2014 ECHR Blog "Perinçek Judgment on Genocide Denial"

Switzerland to the ECtHR concerning the referral of the judgement to the Grand Chamber contains critical remarks on it.

Similarly the ICJ judgement of 26 February 2007[25] on *Bosnia vs Serbia - Montenegro* was also criticized in Bosnia and many other countries, because it only qualified the Srebrenitsa massacres as genocide and did not consider similar atrocities which took place in other places of Bosnia at the same level.

5. From "general consensus" to the "dictatorship of one single opinion"

For the Swiss courts

"the main ground for the condemnation of Dr. Perinçek, was the denial of the general consensus which seems to exist in the community, in particular in the scientific community, on the genocide description of the events in question."[26] On that point, the ECHR *"was not convinced that the general consensus concept - which the Swiss courts have referred, to justify the conviction of Dr. Perinçek- can bear on these very specific points of law."*[27]

ECtHR justifications on that matter are as follows:

a. The Swiss Federal Court admits that the Swiss authorities and the scientific community are not unanimous on the legal description attributed to the 1915 events;

b. The Federal Council (the Swiss Government) has repeatedly refused to acknowledge the Armenian genocide[28];

   On this respect it is interesting to note that the Swiss Court "criticized" the position of the Federal Council as "political opportunism"and added that the position of the Swiss Government does not change the existence of a general consensus on the matter. According the Swiss Court, *the Swiss Government's position is "to lead Turkey to carry out a work of collective memory regarding the past".* (We think that this condescend attitude of the Swiss judiciary reflects the spirit which dominated their verdict.)

c. The Swiss Council of States did not acknowledge an Armenian genocide.

25 The International Court of Justice; Judgment rendered on 26 February 2007 concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia- Herzegovina v. Serbia and Montenegro).

26 Para. 114 of the judgment.

27 Para. 116 of the judgment

28 Para. 4.5. of the Swiss Federal Court's verdict. See para 13 of the ECtHR judgment (Page 7 of the English text)

Although the National Council, (the Lower House of the Swiss Federal Parliament) acknowledged the Armenian genocide[29], the Council of States did not.

d. The judgment of ECtHR found it necessary to mention that currently only about 20 States (of more 190 in the world) have officially acknowledged the existence of Armenian genocide.[30] *(We would like to add that these acknowledgments are not of legal, but of political in nature.)* Actually, there exists no law which condemns the denial of Armenian genocide.

e. In scientific matters (particularlyin historicalmatters) there could not be a general consensus. Historical research is by definition open to debate, and hardly lends itself to definitive conclusions or objective and absolute truths.[31]

f. ***After the passage of many years, it is inappropriate to come to severe and decisive conclusions on historic questions.*** *The Court specified that hindsight makes it inappropriate, after the passage of many years, to apply certain words concerning historic events the same severity as only a few years passed previously. This contributes to the efforts that every country is called on, to debate openly and calmly its own history[32].*

On this subject, the *Cambridge Journal of International and Comparative Law made the following significant remarks:* ***"This way of reasoning on the part of the Swiss authorities was indeed troubling as it came very close to establishing a form of*** *"dictature de lapensée unique****" a system which places one single opinion above all others, criminalizes disagreement and precludes other form of debate or discussion."***[33]

g. **The Swiss penal law designates "**genocide" **without specifying the acts of genocide that the legislator had in view.** What are the denied genocides that will be punished? And who will decide?

If the act in question is posterior to the Genocide Convention, the tribunal will follow the verb of the Convention which -after its ratification by the Swiss Parliament-became an integral part of the Swiss

29 Para. 115 of the judgment

30 Para. 115 of the judgment

31 Para. 117 of the judgment

32 Para. 103 of the judgment

33 "The Judgment of the European Court of Human Rights in Perinçek v. Switzerland reducing Genocide tor Law" *Cambridge Journal of International and Comparative Law*, 27 January 2014

legislation. The denial of a genocide designed as such **by the competent tribunal** should be reprimanded in accordance with article 261, *bis* of the Swiss Penal Code. For example: the denial of Srebrenitsa genocide is included in that category; also the denial of genocide in Rwanda is to be punished.

If the criminal act in question is anterior to 1948 Genocide Convention and also to Nurnberg Trial, the tribunals face a more complicated problem. In Perinçek Case, the Swiss tribunal based its verdict condemning the denial of the genocidal character of the tragic events that occurred about hundred years ago in East Anatolia, on a "general consensus" regarding the Armenian genocide.

This was not accepted by the ECHR. That is the reason why the Swiss Ministry of Justice and Police is rather disturbed, and maintains that there is no precedent in the Court's jurisprudence which scrutinizes the existence of a multitude of consensus to legitimate the application of a penal disposition.

The verdict of the Swiss Court brings other examples of genocide cases to the agenda. For example" Is the denial of genocidal character of pre-Genocide Convention tragedies, like the *Vendée massacres,* the *Saint Barthélemy slaughters, killings of the Maya people, the Huguenot's and the Bogomil's exterminations, the annihilation of the Turks in Tripolitsa (Peloponnese-Greece),*[34] etc also to be included in the "**historical genocides list**"? Or, will each court decide on the matter after a case by case analysis? The Swiss Government, apparently, defends the stance that Swiss Court's margin of appreciation should be large enough for even to reverse the already existing jurisprudence; e.g. the Bern - Laupen verdict that acquitted 12 Turkish citizens who denied the existence of the Armenian genocide; (the Federal court endorsed that decision!)

On this topic, we should not fail to add that the "historical genocides list" issue is a critical political matter of actuality, and those who follow the subject are aware of the diplomatic horse-trading behind closed doors[35]. Several methods may be experimented to finalize a sort of

34 W. Allison Philips, *The War of Greek Independence 1821-1833*, New York, 1897, pp 60-61: "...During three days the miserable inhabitants (Turks and Jews of Tripolitsa) were given over, to lust and cruelty of a mob of savages. Neither sex, nor age was spared. Women and children were tortured before put to death. So great was the slaughter that Kolokotronis himself says that from the gate to the citadel his horse's hoofs never touched the ground. His path of triumph was carpeted with corpses...(For further reading: Wikipedia ; under the heading of Tripollitsa)

35 Timothy Garton Ash, 16.06.2006."The freedom of historical debate is under attack" *Liberté pour l'histoire*: "A solution for the European Union to agree a list (call it Zypries list) of qualifying horrors. You can imagine the horse -trading behind closed doors in Brussels: An... official to his... counterpart: (OK we'll give you the Armenian genocide if you give us the Ukrainian famine) Pure Gogol!!" (We deleted the names of the countries mentioned there)

"historical genocides list": voting is one of the alternatives; as it was experimented by the International Association of Genocide Scholars ***(funded by the Armenian Zoryan Institute!);*** creating People's Tribunals (like the one in Sorbonne, Paris in 1984) may be another practical solution !

h. The fact the Second Chamber's judgement mentioned the distinction between countries which recognized the Armenian genocide (about 20 countries out of 190) and those who criminalized the denial of it. (Actually there exists no law in the world which criminalizes the Armenian genocide as such. The French has been abolished by the Constitutional Court of France and the Swiss Penal Law makes no reference to the Armenian genocide) seems to disturb the Swiss Government because it weakens the "general consensus" theory of the Lausanne Police Court.

6. Is There a "general scientific consensus" on the Armenian Genocide issue?

A legal scholar is expected to apply the law to the case. Those who operate within a legal framework tend to judge; whereas the task of a historian is to understand. There are two different epistemic communities on how to decipher the events of 1915-1916, and several competing and contradictory efforts to explain the tragic events which harmed the Ottoman Armenian as well as other communities. We will try to summarize the analysis of different groups of scholars on the subject, as presented by Dr. Hakan Yavuz in his comprehensive article entitled *"Contours of Scholarship on Armenian-Turkish Relations"* published by Middle East Critique[36];

> *"**The first group of scholars** agree that the consequences of the events constitute genocide, the Turks are perpetrators and the Armenians are blameless victims. However within the same epistemic community they provide diverse, even contradictory causal explanations. Their causes vary from Islam[37] to the structure of the Ottoman State and to Turkish nationalism[38]; to the leadership of the vengeance oriented CUP leaders, the authoritarian and theocratic Ottoman State structure...; they hardly question the activities of the*

36 M. Hakan Yavuz, "Contours of Scholarship on Armenian-Turkish Relations", *Middle East Critique,* Vol.20.No3, pp. 231-251, Fall 2011

37 Vahakn N. Dadrian (1995) *The history of the Armenian Genocide* Oxford: Berghahn Books; also In Dadrian: "Warrant for genocide" London Transaction Publications, essentializes the conflict as ancient hatred between the Turks and Armenians; Ottoman State being an Islamic State and Islam but nature does not tolerate political equality of the followers of different religions" in M. Hakan Yavuz. op.cit. p.237

38 Richard G. Hovanisian (ed) *The Armenian Genocide in Perspective* Oxford Transaction Books, 1986: Hovanisian explains the deportation as a planned project of Young Turks who acted in accordance with their nationalistic ideas... Turkish nationalism was racist, fascist, and militaristic and braided with Islamic idea of Jihad.

Armenian revolutionary organizations and their close alliance with the occupying forces...; they agree that Turkey should recognize the events as genocide and respond to its legal implications. They do not take the role of Western imperialism or the insurgency tactics of Armenian revolutionary committees into account and ignores the demographic pressure of the deportations of Muslims from the Balkans and the Caucasus… This courtroom-centred type of academic activity solely seeks to display the guilt of perpetrators.

Other (functionalist) scholars treat also the destruction of the Armenian communities as genocide by outcome; they tend to disagree with the essentialist thesis; they reject the premeditation[39] *argument: a) it was an incremental genocide without a single order or plan ;b) the logic of total war, converted the war's foreseeable excesses into unintended genocide; c)the defeats in the Balkans and the anxiety around the collapse of the Ottoman State accelerated Turkish-Armenian conflict beyond control. Ideological, economic, military and political conditions all together may create a toxic mix to explain mass killings*[40]*. David Bloxham argues "that the war was the most important factor in the annihilation of the Armenians; ...there was no well-articulated plan of genocide, but rather a gradual radicalization of the Ottoman policies. Furthermore, the core argument of the premeditation has been challenged by a series of prominent scholars. Ronald Sunny, an Armenian political scientist argues that the most plausible argument to explain the genocide is the role of state elites and emerging modernity.. The deportation was a deliberate elite decision to protect the State and also to prevent the Armenian actors from collaborating with Russia. Fuat Dündar claims that the CUP's main goal was to create a Muslim-Turkish homeland though assimilation and deportation.*

As evidenced above there is an increasing diversity of opinion within the genocide camp over the causes and the contingency of the events of 1915. There is no consensus on what caused the destruction of Armenian communities, even among the scholars who promote that genocide did take place."

For the ***second epistemic community,*** *the events of 1915 must be understood within an interactive framework between the Armenian political activities and the Ottoman State; they insist that the term genocide does not encourage objective inquiry and seek to divide the study between the victims and perpetrators; they disagree over the causes and motives of the events for some are communal massacres; some treat them as unintended consequences of the inability of the State to restore security.... ;some focus on the Ottoman bureaucracy and the Armenian organizations and the way in which they constituted each other's perceptions and the process of estranging.*[41].

39 Question: If there exists no premeditation how can a crime be qualified as genocide?

40 Michael Mann, *Dark Side of Democracy: Explaining Ethnic Cleansing* New York, Cambridge University Press. p.26 cited by M. Hakan Yavuz op.cit.241

41 M. Hakan Yavuz, op.cit. pp. 236-249.

*The Turkish Republic has refused to accept charges of historical guilt and accused in turn its challengers of ignoring the mass killing of Ottoman Muslims during the same period... **The nationalist Turkish perspective** views the actions in 1915 as necessary for stopping Armenian treachery and protecting the homeland; some tend to view the Armenians as treacherous people who were waiting to seize an opportunity to rebel and stab the beleaguered Ottoman State in the back, with the help of imperialist powers, especially Russia; The Ottoman Army and the Muslim communities used the right to self-defence to protect their life and properties[42]. Many Ottoman historians treat the decision to relocate the Armenian population as a security measure to stop them from collaborating with the Russian enemy and also as a means for protecting the civilian population[43]. A group of Turkish historians who embraced the large scale massacres thesis stress the role of the CUP leadership and their dictatorial ideology. Murat Belge argues that the diaspora should give up the term genocide; Fikret Adanır argues that the Turkish State should never recognize events of 1915 as genocide, since they were not genocide in legal terms; he does not think one can prove he intent since there is no such document which calls or killing the Armenians; he argues that CUP and the Armenian nationalists were similar, since both group believed in social Darwinism. The interpretation of the Islamist historiography defend the thesis "not genocide but Kıtal (large scale communal violence)";the Islamist understanding of the Armenian issue, including among the leadership of the Justice and Development Party is filtered through Abdülhamit II's perspective of the Armenian challenges; the removal of the Armenian communities is the result of two conflicting secular nationalistic ideologies, with the Armenians supported by the European Christians..."*

7. The Quest for an equitable memory

At this stage, it is necessary also to emphasize the importance of historical research, and the imperative need of avoiding selective reading of the history." It is important to expand intellectual space, to acknowledge and -if necessary- to question existing narratives without dehumanizing any side.

The Minister of Foreign Affairs of Turkey, Professor Ahmet Davutoğlu, recently said that he was sensitive to the sufferings of the Ottoman Armenians,[44] but he also expected from the Armenians and their supporters the same

42 Dr. Mehmet Perinçek (son of Dr. Doğu Perinçek) (2011); *Armyanskiy Vopros v.120 Dokumentah İz Rossiyskih Gosudarsvennih Archivov*, Moskova: Labıratoriya Kniigi; Dr.Mehmet Perinçek, (2007) *Rus devlet Arşivlerinden 100 belgede Ermeni meselesi*, Istanbul Doğan Kitap.

43 Bernard Lewis, Justin McCarthy, Stanford Shaw, Edward J. Erickson, Andrw Mango, İlber Ortaylı, Norman Stone, Jeremy Salt, Kemal Çiçek, Murat Bardakçı and Yücel Güçlü all conclude that it was not a genocide, but rather a deportation that was necessitated by pressing national security needs to contain an Armenian insurgency which in alliance with the invading Russian troops threatened to destroy the State... The Armenian militia was collaborating with the Russian troops and provoking the Ottoman troops to attack the Armenians so that they could solicit external European support.

44 "WWI inflicted pain to everyone" *Hürriyet Daily News*, 30 Dec.2011

understanding regarding the plight of the Muslim Ottomans, who equally suffered during the tragic events in Eastern Anatolia. Prof. Ahmet Davutoğlu called for spending every possible effort to attain a just and equitable memory on this issue.

On 23 April 2014 the Turkish Prime Minister Recep Tayyip Erdoğan issued a statement on the losses of the Ottoman Armenian during the relocation and said that[45] "It is a duty of humanity to acknowledge that Armenians remember

45 "The Message of the Prime Minister of the Republic of Turkey, Recep Tayyip Erdoğan on the events of 1915" "The 24th of April carries a particular significance for our Armenian citizens and for all Armenians around the world, and provides a valuable opportunity to share opinions freely on a historical matter.

It is indisputable that the last years of the Ottoman Empire were a difficult period, full of suffering for Turkish, Kurdish, Arab, Armenian and millions of other Ottoman citizens, regardless of their religion or ethnic origin. Any conscientious, fair and humanistic approach to these issues requires an understanding of all the sufferings endured in this period, without discriminating as to religion or ethnicity.

Certainly, neither constructing hierarchies of pain nor comparing and contrasting suffering carries any meaning for those who experienced this pain themselves. As a Turkish proverb goes, "fire burns the place where it falls". It is a duty of humanity to acknowledge that Armenians remember the suffering experienced in that period, just like every other citizen of the Ottoman Empire.

In Turkey, expressing different opinions and thoughts freely on the events of 1915 is the requirement of a pluralistic perspective as well as of a culture of democracy and modernity.

Some may perceive this climate of freedom in Turkey as an opportunity to express accusatory, offensive and even provocative assertions and allegations.

Even so, if this will enable us to better understand historical issues with their legal aspects and to transform resentment to friendship again, it is natural to approach different discourses with empathy and tolerance and expect a similar attitude from all sides.

The Republic of Turkey will continue to approach every idea with dignity in line with the universal values of law. Nevertheless, using the events of 1915 as an excuse for hostility against Turkey and turning this issue into a matter of political conflict is inadmissible.

The incidents of the First World War are our shared pain. To evaluate this painful period of history through a perspective of just memory is a humane and scholarly responsibility.

Millions of people of all religions and ethnicities lost their lives in the First World War. Having experienced events which had inhumane consequences - such as relocation - during the First World War, should not prevent Turks and Armenians from establishing compassion and mutually humane attitudes among towards one another. In today's world, deriving enmity from history and creating new antagonisms are neither acceptable nor useful for building a common future.

The spirit of the age necessitates dialogue despite differences, understanding by heeding others, evaluating means for compromise, denouncing hatred, and praising respect and tolerance.

With this understanding, we, as the Turkish Republic, have called for the establishment of a joint historical commission in order to study the events of 1915 in a scholarly manner. This call remains valid. Scholarly research to be carried out by Turkish, Armenian and international historians would play a significant role in shedding light on the events of 1915 and an accurate understanding of history.

It is with this understanding that we have opened our archives to all researchers. Today, hundreds of thousands of documents in our archives are at the service of historians.

Looking to the future with confidence, Turkey has always supported scholarly and comprehensive studies for an accurate understanding of history. The people of Anatolia, who lived together for centuries regardless of their different ethnic and religious origins, have established common values in every field from art to diplomacy, from state administration to commerce.

Today they continue to have the same ability to create a new future.

It is our hope and belief that the peoples of an ancient and unique geography, who share similar customs and manners will be able to talk to each other about the past with maturity and to remember together their losses in a decent manner. And it is with this hope and belief that we wish that the Armenians who lost their lives in the context of the early twentieth century rest in peace, and we convey our condolences to their grandchildren.

Regardless of their ethnic or religious origins, we pay tribute, with compassion and respect, to all Ottoman citizens who lost their lives in the same period and under similar conditions." 23.04.2014, Ankara

the suffering experienced in that period, just like every other citizen of the Ottoman Empire. ..The incidents of the First World War are our shared pain. To evaluate this painful period of history through a perspective of just memory is a humane and scholarly responsibility… And it is with this hope and belief that we wish that the Armenians who lost their lives in the context of the early twentieth century, rest in peace, and we convey our condolences to their grandchildren. *Regardless of their ethnic or religious origins, we pay tribute, with compassion and respect, to all Ottoman citizens who lost their lives in the same period and under similar conditions."*

In Perinçek's trial, the documents presented by Dr. Doğu Perinçek to the Court in order to prove the existence of attacks on the Muslim population carried by Armenian armed gangs, and the mutual killings between ethnic groups in Eastern Anatolia were not taken into consideration by the judges, because these evidences did not support their "general consensus" theory; so, sufferings of the Muslim Ottomans have been systematically ignored by the judges of the Swiss court.

Indeed during that period many Muslim Ottoman citizens also lost their lives. In Perinçek's trial, the documents presented by Dr. Doğu Perinçek to the Court in order to prove the existence of attacks on the Muslim population carried by Armenian armed gangs, and the mutual killings between ethnic groups in Eastern Anatolia[46] were not taken into consideration by the judges, because these evidences did not support their *"general consensus"* theory; so, sufferings of the Muslim Ottomans have been systematically ignored by the judges of the Swiss court.

46 For the Armenian rebellions and their armed attacks: Louise Nalbandian, *Armenian Revolutionary Movement: the Development of Armenian Political Parties through the 19. Century*, Berkeley, University of California Press, 1963, pp. 110-111; "The Hinchak program stated that agitation and terror were needed to elevate the spirit of the people. The people were also to be incited against their enemies and were to profit from the retaliatory actions on these same enemies. Terror was to be used as a method of protecting the people and winning their confidence in the Hinchak program. The party aimed at terrorizing the Ottoman Government, thus contributing toward lowering the prestige of that regime and working toward its complete disintegration... The Hinchaks wanted to eliminate the most dangerous of the Armenians and Turkish individuals… To assist them in carrying out all of these terrorist acts, the party was to organize an exclusive branch specifically devoted to performing acts of terrorism...The most opportune time to institute the general rebellion for carrying out immediate objectives was when Turkey will enter in a war..."

K. S. Papazian, *Patriotism Perverted*, Boston, Baikar Press, 1934, pp.14-15: "The purpose of the Dashnags is to achieve political and economic freedom in Turkish Armenia by means of rebellion... The Dashnags in order to achieve its purpose through rebellion organized revolutionary groups... Method No.8: To wage fight and to subject to terrorism the government officials, the traitors... Method No.11: To subject the government institutions to destruction and pillage"

Michael Reynolds, *Shattering Empires. The Clash and Collapse of the Ottoman and Russian Empires-1908-1918* Cambridge, Cambridge University Press" pp. 141-142: (Russia armed Armenians as well Assyrians and Kurds and sat up Armenian volunteer regiments (druzhiny) to attack the Ottoman forces)

Boghos Nubar, *The Times* 30 .01.1919 "The Armenians have been de facto a party to the war against Turkey and fought with the allies forces in all fronts"

British Ambassador in Istanbul Currie, reported on 28 January 1895 to the Foreign Office: "The aim of the Armenian revolutionaries is to stir disturbances, to get the Ottomans to react to violence and thus get the Foreign Powers to intervene".

Gündüz Aktan *The Armenian problem and International Law* op. cit. p.281: "The Balkan-type use of violence constituted a model in that the terrorist groups would attack the civilian Moslem population to provoke them to retaliate.

History does not emanate from some single omnipotent base.[47] The whole truth about a certain period in the past can never be told.[48] The historians do not agree with one another; they are selective in what they choose to report and there are no principles of selection clearly dictated by the nature of history itself.The choice of a method of presentation is influenced as much by the nature of a particular period or by a historian's personal preferences.Besides, statements about the past are claimed necessarily to diminish in credibility as time goes on[49].There exists the possibility of an indefinite number of causes for a particular event such as the outbreak of upheavals, social revolutions, or wars. This opens up the possibility of disputes over which causes are more important or significant; disputes which may be sharpened by claims that one thing is the true real cause of the "tragic events". There are no absolute "facts" in history, as these are unavoidably subject to selection by the historian[50]. It is inevitable that the historian's own judgments and his moral, political, religious, aesthetic values determine his writings. The historian will make moral judgments of the conduct of men and women of past times who lived by different standards[51].For example; the use of the terms- "executed", "murdered", "killed" which are all value laden items will make difference in history writing. Historical agents have had a variety of reasons for what they did, and accordingly historians will disagree over what their real or main reasons were. Finally the historians are not entitled to judge on the qualification to be accorded to a crime and **there cannot be a general consensus on historical matters.**

8. Historical memory laws

Perinçek vs Switzerland case and the judgment of ECtHR brought to surface evident dangers of memory laws and their arbitrary enforcement by the judges under the spectre of denials. The memory laws, the denial, and the limits of the freedom of speech have been the subject of intensive debates, and research since the past 30 to 40 years[52]. This triggered coming to the stage of the

If the Muslims retaliated or if the administration took military action, there would be loud cries of massacres to the Ottoman Christians."

Justin McCarthy, Esat Arslan, Cemalattin Taşkıran, and Ömer Turan, *The Armenian Rebellion in Van*, The University of Utah Press, 2006.

Kaethe Ehrhold, *Flucht in die Heimat. Aus dem Kriegserleben deutscher Missionerschwester in die asiatischen Tuerkei*, 1937, Dresden.

S. S. Aya *The Genocide of the Truth* Istanbul Commerce University Publications No/15; S. S. Aya *The Genocide of the Truth Continues*, Istanbul Derin Publications; S. S. Aya *Twisted Law versus Documented History Geoffrey Robertson's Opinion Against Proven Facts*

47 Atkinson R. F. *Knowledge and Explanation in History. An Introduction to the Philosophy of History* Cornell University Press, 1978

48 Danto. A. C. *Analytical Philosophy of History* Cambridge 1965

49 Atkinson, R.F. op.cit

50 Atkinson, R.F. op.cit.

51 Acton, Lord *Historical Essays and Studies* London, 1907

52 Kenneth Bertrams and Pierre-Olivier de Broux, *Du négationnisme au devoir de mémoire: L'Histoire est-elle prisonniere ou gardienne de la liberté d'expression?* Université Libre de Belgique, Revue de Droit, 35 (2007)

legislators as well as the judges as the new protectors of the official history and of "historical memory laws". The last is defined as "a *law imposing the official point of view of a State over historical events*"[53]. One of the effects of memory laws is to create a kind of competition among victims of past tragedies at the risk of replacing a collective understanding of the past with the disgruntlement of special interest groups that design themselves through their unique historical experiences.

History is nothing but a long series of crimes against humanity[54]. Since the authors of these crimes are dead, the laws on memory neither can, nor could do anything except pursuing the civil or the criminal court and accuse them of complicity in genocide or crimes against humanity, and the historian or the "denier" who will question the validity of a legal qualification of the historical tragedy-which was not established as such by a final verdict of the competent tribunal.

History is nothing but a long series of crimes against humanity. Since the authors of these crimes are dead, the laws on memory neither can, nor could do anything except pursuing the civil or the criminal court and accuse them of complicity in genocide or crimes against humanity, and the historian or the "denier" who will question the validity of a legal qualification of the historical tragedy-which was not established as such by a final verdict of the competent tribunal.

The historical memory laws show the considerations that underlie their adoption; essentially electoral ones, which have more to do with feeling than reasoning. They arise out of the same desire, as felt by specific religious and ethnic communities to persuade the others, to take seriously their past experience by taking history as a whole as hostage[55].Memory laws were misused by the Governments for political purposes[56]. When dealing with law on memory and their application by the judges, how far one should go back in time? To the Crusaders? Or to the Albigensian massacres? Or to Slave Trade? Can Protestants not demand reparations for the persecution they suffered after the revocation of the Edict of Nantes? Should also the deniers of those crimes be sentenced? More and more the historical memories of these special interest groups are threatening to provoke members of the social groups up against the other?[57] Almost every day we read hate speech filled messages

53 Ibid. p.76, footnote 3.

54 Pierre Nora ,"Historical identity in trouble" *Liberté pour l'histoire* CNRS Editions , Paris 2008.

55 René Rémond, "History and the Law" *Liberté pour l'histoire*, Etudes No. 4036, Paris, June 2006,

56 Timothy Garton Ash, ibid

57 René Rémond, ibid.

in the social media emanating from militant Armenians against the Turkish nation as a whole.[58]

9. The Judgment of the ECtHR in Perinçek vs Switzerland reduced the concept of genocide to that of law

Commenting on the *Perinçek vs Switzerland* judgement, the **Cambridge Journal of International and Comparative Law** (CJICL) has written the following:

> *"The judgment of the European Court of Human Rights in the Perinçek v. Switzerland case* ***has reduced the concept of genocide to that of law***[59]*."According to the CJICL, "The term genocide has been used, misused and abused ad nauseum by a variety of actors seeking to advance their particular agenda. Yet this word should not be ascribed more significance of meaning than it actually has. Genocide remains above all a legal construct - nothing more, and nothing less-. It should be kept in mind that the crime of genocide as defined under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide requires the specific "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."*[60]

10. The Margin of Appreciation of the Swiss courts

As mentioned earlier, Swiss Federal Department of Justice and Police issued a press release on 11 March 2014 stating that:

> *"Switzerland's primary interest -when requesting the referral of the verdict of the Second Chamber to the Grand Chamber-is to clarify the scope available to the national authorities in applying the criminal anti-racism provision laid down in the Swiss Criminal Code (Article 261 bis)"* ."The *ruling of the Second Chamber of the ECtHR, reduced in an undue manner, the margin of appreciation available to Switzerland under the jurisprudence of ECHR."*

On that point the paragraphs 98, 111, and 112 of the *Perinçek vs Switzerland* judgement contain clear indications. Paragraph 98 is on the applicable principles that make it possible to assess the need for interference in the exercise of freedom of expression; paragraph 111 is about the application of

58 E.g. Laurent Leylekian, Former Director of France-Armenie, was recently condemned by the French Justice for insulting Maxime Gauin. He wrote the following in October 2009: "Oh, yes! All the damned Turks are guilty. All Turkish children to be born and all old Turks who will die, they are all guilty, like Cain in the front of history and humanity."

59 *Cambridge Journal of International and Comparative Law* (CJICL), Posted on 27 January 2014.

60 ibid.

these principles on the case point; and the paragraph 112 is about the margin of appreciation enjoyed by the domestic courts.

These are principles established after many years of practical experience. The States that are parties to the Convention accepted the supervision of the Court on verdicts rendered by their national jurisdiction.

11. Task of the ECHR is to supervise the verdicts rendered by the national jurisdictions in virtue of their power of assessment

As mentioned before, regarding the *Perinçek vs Switzerland* case, the ECtHR approached the issue from the perspective of violation of the freedom of expression. **The ECtHR considered that its sole task was to supervise -** from the perspective of Article 10 of the Convention- the verdicts rendered by the national jurisdiction in virtue of its power of assessment. Under this perspective the ECtHR has followed a clearly established judicial method presented as below.

12. Is Dr. Perinçek's petition to the ECtHR an abuse of the Convention?

The Court decided that Dr. Perinçek's petition does not fall within the scope of Article 17[61] of the Convention. Article 17 aims to prevent the abuses of the rights and freedoms. The Court,

> *"considered that the dismissal of the legal characterization of the events of 1915 was* ***not likely to incite hatred or violence against the Armenian people****" and that "Dr. Perinçek did not usurp the right to openly debate even sensitive and/or potentially disagreeable issues. The unrestricted exercise of this right is one of the fundamental aspects of the right to freedom of expression and distinguishes a democratic, tolerant and pluralistic society from a totalitarian or dictatorial regime"*

The Court also considered it important to mention that Dr. Perinçek had never disputed the massacres or deportations during the years in question. Dr. Perinçek refused to accept the legal description of genocide attributed to those events[62]. Second Chamber of the ECtHR underlines that *"ideas* which are

61 "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"

62 Cannie en D. Voorhoof, "The Abuse Clause and Freedom of Expression in the European Human Rights Convention. An Added Value for Democracy and Human Rights Protection" *Netherlands Quarterly of Human Rights*, Vol. 29/1, pp. 54–83, 2011; "The refusal by the ECHR to consider Perinçek's statements as abusive speech under Article 17 of the Convention reflect legitimate concerns about the inherent dangers of applying the so-called "abuse clause" in cases of freedom of political expression and debate on matters of public interest. It is preferable that the application of Article 17 in freedom of expression cases remains very exceptional. One can even argue that applying the abuse clause to resolve free speech disputes is undesirable in all circumstances."

upsetting, shocking or disturbing" **are also protected** by the Article 10 of the Convention.[63]

In the case at hand, it should be stated that, rather than exposing anti-Armenian sentiments, Dr. Perinçek (Chairperson of the Turkish Workers Party) attributes what he calls the "lie of the Armenian genocide"- to the actions of international imperialism rather than to the Armenians themselves; Dr. Perinçek expressed a set of **anti-imperialist considerations** consistent with his own political opinion.[64]

13. Was the Interference of the Swiss Court stipulated by Law?

ECHR found that the disputed decision with regard the condemnation of Dr. Perinçek was foreseen by the Swiss Law in the sense of the second paragraph of Article 10 of the Convention[65].

14. Was the condemnation predictable?

The ECHR came to the conclusion that Dr. Perinçek by describing the Armenian genocide as an international lie, within Swiss territory, must have been aware that he was exposing himself to a penal sanction.

Nevertheless, we are of the opinion that Dr. Perinçek could not have predicted that his words would be judged as criminally reprehensible. First of all because while previous statements by other Turkish citizens denying the existence of Armenian genocide had led to their prosecution, they had been acquitted of these charges in 2001 by the Bern-Laupen tribunal. The Federal Court had endorsed this verdict. One would hardly expect Dr. Perinçek to foresee a decision contradicting the Bern-Laupen acquittal.[66]

Furthermore, the second Chamber of the Swiss Parliament had failed to agree on the issue of whether or not the events of 1915 should be classified as genocide.

Swiss Minister of Justice Mr. Blocher, during an official visit to Turkey stated to the media that the Swiss Government had the intention of revising Article

63 Para. 51,52 and 54 of the judgement

64 "Shared concurred opinion of the judges Raimondi and Sajo" Verdict in the matter Perinçek vs Switzerland; page 61 of the English translation.

65 Para.72 of the judgment

66 On this occasion we would like to indicate that Dr. Perinçek was not one of the suspects in Bern-Laupen tribunal; the decision of the Second Chamber should be corrected on that point.

261. bis of the Swiss Penal Code because that legislation was incompatible with freedom of expression[67] and was hindering historical research. Mr. Blocher added that he was embarrassed because of alegal pursuit conducted in Switzerland against Professor Yusuf Halaçoğlu who rejected the allegations of Armenian genocide *(Professor Halaçoğlu was at that time the chairperson of the Turkish Historical Society)*.

Finally, in two separate cases two Ministers of the Swiss Federal Council, Mr. Deiss and Ms. Calmy-Rey, had refused to endorse two proposals *(from Mr. Zisyadis and Mr. Vaudroz)* for the official acknowledgment of the Armenian genocide. These *"postulats"* have been rejected. Finally, according to the **official information bulletin of Switzerland: The Swiss Government does not officially speak of (an Armenian) genocide.**

Taking into consideration all the above mentioned facts and the non-existence of a competent court decision on the Armenian genocide perpetrated by the Ottoman State, it is fully legitimate to think that a person-with a legal background- could not have predicted that denying the Armenian genocide allegation in Switzerland,-under normal circumstances-be punished by law.

15. Reasons of the refusal of Dr. Perinçek to accept an eventual conclusion of a neutral committee

Federal Tribunal of Switzerland mentions in its verdict that *"Dr. Perinçek ... stated that he would never change his position, even if a neutral committee one day stated that the genocide of the Armenians indeed existed."*[68] According the Swiss Tribunal, this refusal proves his "nationalist and racist behaviour." The Armenian Weekly reveals that the Swiss Government's petition concerning the referral to the Grand Chamber includes the following:

> "*Perinçek had repeatedly stated that he would never change his mind on the Armenian genocide. Perinçek's denial position is particularly offensive." "The Court's contention that such a person would bring value to the debate and historical research on this issue, is a departure from ECHR's established and balanced jurisprudence."*

The truth on this matter is as follows: Dr. Doğu Perinçek refused to accept the conclusions of a so-called neutral committee. Dr. Perinçek did not refuse to abide the verdict of a competent court.

Dr. Perinçek's position on this matter is based toArticle VI. of the U.N. Genocide Convention. How can one expect, a trained lawyer to agree on a de

67 *Swissinfo.ch*. March 5, 2007

68 Verdict of the ECHR. pages 7 and 8 referring to the Federal Tribunal's decision para 5.1 and para 6

facto amendment of the "competent tribunal" rule- foreseen by the Article VI. of the Genocide Convention-and its replacement by a so- called "neutral commission?" Is there in this field one single example, with regard to the creation of a "neutral commission" on penal matters? Is such a proposal consistent with the 1948 Genocide Convention ratified by Turkey and by Switzerland? Moreover, what is the definition of a "neutral commission? Who will create such a commission? What will be the terms of reference of such a body? Those questions do not have an answer in the field of international penal law. We firmly believe that one cannot blame a lawyer-and call him a racist-because he refused to accept a suggestion which tend to reverse one of the cornerstones of the Genocide Convention.

It is extremely difficult to understand the insistence of the Swiss Government to put aside the legal context of the crime of genocide - as provided by the Genocide Convention-and try to replace it by a-political parlance. It is believed that the main misunderstanding and difference of opinion between the Swiss Government and Dr. Perinçek as well as the Second Chamber of ECHR lies there.

It is extremely difficult to understand the insistence of the Swiss Government to put aside the legal context of the crime of genocide - as provided by the Genocide Convention-and try to replace it by a- political parlance. It is believed that the main misunderstanding and difference of opinion between the Swiss Government and Dr. Perinçek as well as the Second Chamber of ECHR lies there.

From a juridical point of view, the views of a committee or the findings of a local tribunal cannot substitute that of a competent tribunal**.** The judgement **of the Second Chamber took back the crime of genocide within its legal framework.**

16. Did the words of Dr. Doğu Perinçek pose a grave threat to public order in Switzerland?[69]

ECHR concluded that the Swiss Government's claim that Dr. Perinçek's words could pose a grave threat to public order was not sufficiently substantiated[70]. The conviction of Dr. Perinçek did not justify any of the legitimate concerns listed[71] in Article 10/2 of the Convention and Swiss Government had not

69 Para 73 to75 of the verdict

70 Para.75 of the verdict

71 Article 10.1; "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."

Article 10.2.; "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."

proven that this legal measure was necessary to prevent a specific and concrete danger to public safety.

Words of denial 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.

None of these elements are present in *Perinçek vs Switzerland* case[72].

The Second Chamber's conclusion on the matter is that the **Swiss Court has not proved 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 and that "the domestic court therefore exceeded the limited margin of assessment that it enjoyed in the case in hand, which was part of a debate ofspecific interest to the public.**

17. Was there a pressing social need for condemning Dr. Perinçek?

ECtHR underlined its doubts that the sentencing of Dr. Perinçek was required by an urgent social need. These doubts are based on the following considerations[73]:

a. Dr. Perinçek's words were **not likely to incite to hatred or violence**[74]. Some of his words may be considered to be provocative; Dr. Perinçek had specifically referred to the notion of "international lie". However, his target was not the Armenian people but the international imperialist forces. Finally, the Court recalled that ideas which are upsetting, shocking or disturbing are also protected by article 10 of the Convention.

b. Furthermore, Dr. Perinçek "never disputed that there had been massacres and deportations during the years in question.[75]" What Dr. Perinçek disagreed was the legal denomination of the tragic events[76]**.**

c. ECtHR considered that the dismissal of legal denomination of the events of 1915 was unlikely in itself, to incite hatred against the Armenian people. Dr. Perinçek's statement was of a legal and political nature; given his well-known political position, it is evident that his remarks were directed not against the Armenian people but against the imperialist powers of the time.

72 Shared concurring opinion of the judges Raimondi and Sajo, attached to the verdict of the Court. p.57 of the verdict

73 Para. 126 of the judgment

74 Para. 119 of the judgment

75 Para. 51 of the judgment

76 Para. 51 of the judgment

Paragraph 4 of article 261 of the Swiss penal code clearly defines the conditions necessary for accusing a person of having discriminative, racist or religious motives; e.g. *"**racial discrimination in a way which undermine human dignity."***[77]

Dr. Perinçek's statements did not incorporate any of these conditions.

Other important developments regarding genocide denial to be taken into account?

- **The Spanish Constitutional Court**: ***The simple denial of the crime of genocide is not a direct incitement for violence***

  In a judgment dated 7 November 2007 (no.235/2007) **Spanish Constitutional Court** ruled that the simple denial of any genocide was not a direct incitement to violence, and that 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 as scientific freedom.[78]

- **The decision of the French Constitutional Court(Council)**

  "*The French Constitutional Court (Council) declared the law unconstitutional which was intended to suppress objections as to the existence of genocide acknowledged by law. It particularly ruled it contrary to the freedom of expression and freedom of researc*h..."[79]

  Furthermore, ECHR points out that in countries that have acknowledged the Armenian genocide - almost all 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."*[80]

77 Article 261 bis .para 4: "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 o seeks to justify a genocide or other crimes against humanity..."

78 Para. 121 of the verdict

79 Para. 122 of the verdict

80 Para. 123 of the verdict

- **Any law criminalizing the expression of opinion on historical facts is incompatible with the UN Covenant on Civil and Political Rights obligations. (UN Human Rights Committee's General Comment No.34/2011)**

  "*The U.N. Human Rights Committee, in its General Comment no. 34, rendered in 2011, concerning the freedom of opinion and expression within the meaning of Article 19 of the International Covenant on Civil and Political Rights, expressed is belief that any law criminalizing the expression of opinions regarding historical facts is incompatible with the obligations that the Covenant imposes on States Parties. (paragraph 49 of the General Comment)"* [81]

- **The acquittal of Turkish citizens by the Bern-Laupen tribunal for the same charge**

  Twelve Turkish citizens "*have been acquitted on 14 September 2001 by Bern—Laupen district court, on the charges of genocide denial in accordance with the provision 261 bis of the Swiss Criminal Code.*"[82]

  These are the reasons why "ECtHR was not persuaded that Dr. Doğu Perinçek's conviction by the Swiss Courts was justified by a pressing social need."

18. It is not just and equitable to compare the Holocaust with 1915 events

The judgement of ECHR underlines that

> *"dismissal of the description of genocide for the tragic events that occurred in 1915 and the following years have not the same repercussions as the denial of the Holocaust"*[83]

> "*The judgment suggests from a legal viewpoint that Holocaust denial remains unique, such that it may justify restrictions on free speech that denial of another grave crime may not. Whereas the denial of Holocaust is presumed to be a subtle form of anti- Semitism, - as such warranting an ad hoc legal regime- other types of denialism* (e.g.the denial of the alleged Armenian genocide) *do not necessarily entail comparable harm, thereby calling for a case-specific analysis... Perinçek case must be distinguished from the cases regarding the denial of Holocaust."*

81 Para. 124 of the verdict

82 Para. 125 of the verdict

83 Para. 119 of the verdict

i. *In Holocaust expressions of denial, challenged the existence of specific historical facts, not their classification;*

ii. *Nazi crimes-the denial of which was in issue-had a clear legal basis, provided by the Statute of the Nurnberg Tribunal*

iii. *Such historical facts had been declared to be clearly established by an international court"*[84]

In this context, it should be added that German Jews neither engaged in a struggle for independence, nor did they ever chase after and stab the German armies in the back by blocking the strategic roads and logistic lines. The Jews in Germany and in other countries of Europe constituted a totally innocent community with respect to politics. A peaceful, civilized and successful community was destroyed with a virulent racist hatred called anti-Semitism in an exceptionally systematic manner, planned in advance and implemented with a massive organizational drive, for no other reason than being Jewish.

> *"When trying to determine whether a case is genocide, one must ask: Did the victim possibly the aggressor toward violent behaviour? Did the victim possibly drag the aggressor into a situation of direct confrontation over a particular matter....or did the aggressor impose force driven by pure hatred and lust for power."*[85]

In Ottoman history, there had never been comparable anti-Armenian feelings.[86] Furthermore, the Holocaust was condemned by the Nurnberg Tribunal and as such became an undeniable established historical fact. There never has been a similar tribunal verdict with regard to alleged Armenian genocide.

According to the above mentioned Armenian source, Swiss Government's petition to the ECHR contains the following:

> "*The Swiss Ministry of Justice and Police put forward that the (ECHR's) ruling creates "artificial distinctions." Perinçek does not simply contest the use of the term genocide, but "qualifies the Armenian mass killings" as an international lie. Furthermore, even though there has not been an international verdict in the case of the Armenian genocide, the Turkish Court's 1919 verdict against the mastermind of the Armenian genocide constituted an element of reliable evidence, acknowledging the facts or unfavourable conduct" relative to the*

84 Paolo Lobba, "The fate of the Prohibition Against Genocide Denial... The penalization of the Denial of the -Armenian genocide- Questioned by the Recent Judgment of the European Court of Human Rights in Perinçek v .Switzerland" *Liberté Pour L'Histoire* 05.02. 2014.; http://www.lph-asso.fr/index.php?option=com_content&view=article&id=194%3Ale-desti

85 Tal Buenos, "Genovive: Hobbes and a Nation's Natural Right to Survive" *Middle East Critique*. Volume 20, Issue 3, 2011, p.325 (Excellent analysis about the differences between the Holocaust and 1915 events)

86 Gündüz Aktan, op.cit

> *International Court of Justice jurisprudence.* ***Even "the Nurnberg Tribunal did not mention the term genocide and did not convict the Nazi perpetrators for committing genocide, but crimes against peace, war crimes and crimes against humanity."***

First of all, Dr. Perinçek did not qualify "mass killings an international lie". The statement of Swiss Ministry of Justice does not reflect the truth. The decision of the ECHR clearly states that Dr. Perinçek did not deny the massacres and deportation of the Armenians (*actus reus*). Dr. Perinçek refused to accept to qualify the said tragic events as genocide because of the absence of a special intent (*dolus specialis)*.

Dr. Perinçek's using the words of "international lie" is not directed to Armenians but to imperialist powers; this statement reflects his political position in his capacity of Chairperson of the Turkish Workers Party. The crimes committed during the tragic events of 1915-1916 have been judged by the Ottoman Tribunals, and those found guilty were condemned in accordance with the Ottoman penal law.[87]

Furthermore, from a legal point of view - *stricto sensu*- Holocaust is not genocide; the majority of the Jews call it: "Shoah". The fact that in colloquial parlance some people qualifies Holocaust as "genocide" do not change the legal qualification of that crime. The same is valid for the crimes committed during the tragic events of 1915-1916. Crimes must be reduced to law.

19. What are the applicable principles that make it possible to assess the need for interference in the exercise of freedom of expression?[88]

(Judgment Stoll vs Switzerland, GC no 69698/01)

a) Freedom of expression applies not only to the dissemination of information, or to ideas and beliefs that are overall accepted favourably or considered inoffensive or indifferent, but also to the articulation of ideas that may offend, shock, or disturb. This is the prerequisite for pluralism, tolerance, and the spirit of openness without which there can be no democratic society;

b) A narrow interpretation and the need to restrain freedom of expression must be established in a convincing manner;

87 Rome Statute of the International Court: Article 20. "Ne bis in idem"

88 The judgment Stoll v. Switzerland GC no 69698/01, 101, ECHR 2007-V); and The judgment Swiss Raelian Movement v. Switzerland (GC no.16354/06, 48 EHCR 2002; and Animal Defenders International v. UK no 48876/08, 100, 22 April 2013 with regard the freedom expression summarize the general principles.

c) The existence of an urgent social need should be proved;

d) The ECHR has jurisdiction to make a final ruling on the point of whether a restriction is in conformity with freedom of expression protected by Article10 of the Convention;

e) The ECHR does not have the task, when it performs its audit function, of inserting itself into the competent domestic jurisdiction, but rather of verifying from the point of view of Article 10 the verdicts they have rendered pursuant to their power of assessment: The ECtHR must consider the disputed interference in light of entire case in order to determine whether it was proportional to the legitimate aim pursued, and whether reasons invoked by the national authorities to justify it appear pertinent and sufficient.[89]"

Judgements of the ECHR condemning Turkey on violations of the freedom of expression

There exist judgements of the ECtHR on cases against Turkey relating hate speech, defence of, or incitementto violence and on the freedom of expression with regard the Armenian issue. The judgement of ECtHR in the Perinçek *vs* Switzerland case refers in its paragraphs 105 to 110to some of them:

- ***No incitement to violence was established***[90]

  In the **Erdoğdu and İnce vs Turkey** (No.2507/94 and 25068/94 ECtHR 1999-IV) case, Mr. Erdoğdu and Mr. İnce had been condemned for having spread separatist propaganda via a magazine. In effect, the published interview had an analytic character and did not contain any passages that could provide an incitement to violence. The ECtHR did not consider as sufficient the reasons put forward by the Istanbul tribunal to justify any interference in their freedom of expression.

- ***There was no call for violence or hate speech based on religious intolerance***[91]

  In **Gündüz vs Turkey** (No. 35071/97 ECHR 2003-XI) case Mr. Gündüz was condemned for statements that were described by the domestic jurisdiction as "hate speech". The Court observed that the words spoken

89 Para. 98 of the verdict.

90 Para.106 of the ECHR verdict

91 Para.107 of the ECHR verdict

by the applicant denoted a resolutely critical stand 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 a hate speech based on religious intolerance. The simple fact of defending Sharia law, without calling for violence to establish it, could not be considered "hate speech".

- ***The grounds put forth to justify the measures taken against Mr. Erbakan were not sufficient to convince the Court that the interference was necessary in a democratic society***[92]

  In **Erbakan vs Turkey** case (No. 59405/00 6 July 2006) Mr. Erbakan was judged guilty of having made a public speech inciting hatred and religious intolerance. ECtHR ruled that the words- assuming they were in fact spoken- of a famous politician pronounced at a public gathering, presented, moreover, a vision of 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. However the grounds put forth to justify the necessity of the steps taken against Mr. Erbakan were not considered sufficient to convince the Court that this interference in the right to freedom of expression was **necessary in a democratic society.**

- ***The crime of "defamation of Turkishness" did not serve any urgent social need***[93]

  In Dink vs Turkey (Nos 2668/07, 6102/08, 30079/08,7072/09 and 7124/09 14 September 2010) case, Mr. Dink was declared guilty of defaming Turkishness (Türklük). Mr. Dink (allegedly) had used the word "poison" to describe the perception of Turks among Armenians, as well as the "obsessional" character of the measures taken by the Armenian Diaspora in their efforts to bring Turks to acknowledge that the events of 1915 constituted genocide. The Court determined that Fırat Dink was only arguing that this obsession poisoned the life of the Armenian Diaspora and prevented them from developing their identity on a healthy basis… The Court concluded that these statements did not target the Turkish community and could not be qualified as hate speech. The articles edited by Mr. Dink did not have an offensive or abusive nature and they did not incite disrespect or hatred.

92 Para. 108 of the ECHR judgment

93 Para. 109 of the ECHR judgment

In view of the above mentioned case law precedents, one would not expect ECtHR to select a different assessment method in the *Perinçek vs Switzerland* matter.

20. Is the *Perinçek v Switzerland* case an issue which has never been considered by ECtHR?

According to Armenian media, Swiss petition referring the matter to the Grand Chamber is as follows;

> *"The ruling of the Second Chamber involves an issue -the Armenian Genocide- which has never been considered by ECtHR. This case raises two fundamental juridical questions that theCourt has not dealt with. The juridical qualification of the Genocide and the scope of freedom of expression, when a State Party to the Convention in the framework of fighting racism, criminalizes the denial of genocide"*

Both of these arguments are wrong. ECtHR is not competent to decide on the juridical qualification of any criminal act. The recognition of the Armenian genocide cannot be an issue of the ECtHR. Regarding the freedom of expression aspect of the Armenian genocide allegations, ECtHR ruled on the *Dink v Turkey* case (see para.18.f. above) that **to assert the Armenian genocide was not reprehensible and must be considered under the protection of the freedom of expression. Now, with its ruling of 17.12.2013 the Court decided that denial of Armenian genocide is equally not an act to condemn; especially in the absence of a competent court decision establishing the existence of the said crime.** A colloquial parlance or references on the existence of a consensus is not legally sufficient to condemn a person for denial of the alleged crime.

21. Convention on the Elimination of All Forms of Racial Discrimination

On this issue, Swiss Government refers to the *(1965) United Nations International Convention on the Elimination of All Forms of Racial Discrimination"* and adds that

> *"the Parties to the said Convention have undertaken to declare illegal, organisations ... which incite to racial discrimination and punish by law the participation to these activities.*" "*The Swiss Government is in the opinion that even only this (element) justifies as such, the referral of the Perinçek's verdict to the Grand Chamber, in order to clarify the scope of the principle of subsidiarity underlying the machinery of control of*

> *the Convention*.".*On the other hand the Swiss Government questions also the reason, why the Second Chamber did not produce in extenso the para 4b of the said Convention.*[94]

Para.4.b in question is produced at the foot-note to prove that the paragraph in question has no connection to the case under review.

Dr. Perinçek's statements and his acts do not have an accent of racial discrimination; he did not promote or incite racial discrimination. His approach to genocide allegations is primarily legal. Also**, the verdict of the Second Chamber points out that the denial of the qualification of genocide-as such- is not an actof racial discrimination.**

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Is the term "pig foreigner" racial discrimination?

On this occasion, we would like to add that the quest for clarification on Perinçek case has -probably- gained particular significance for the Swiss authorities because of a recent (06.02.2014) decision of the Swiss Federal Court[95] which did not condemn a Swiss policeman who "humiliated" a foreigner in Basel, using the words "***Sauauslaender"*** **(Pig foreigner) and "*Dreckasylant"*[96] (Dirty asylum seeker) with the charge of "racial discrimination undermining human dignity**. In our country, to address somebody with the words "pig foreigner" is an act of racial discrimination and is punished.

22. Conclusions

ECHR judgement is solid, well-argued and consistent with the established case law. It reduces the concept of genocide to law.

- The verdict of the ECtHR in *Perinçek vs Switzerland* affair is consistent with the established case-law of the Court. This well-reasoned and balanced verdict is related to the violation of the freedom of expression;

94 "United Nations International Convention on the Elimination of All Forms of Racial Discrimination." Article 4.b.: States Parties "shall declare illegal and prohibit organizations... and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation on such organization or activities as an offence punishable by law"

95 Urteil (Verdict) 6B_715/2012 from 6 February 2014; BGE Publikation (Süddeutsche de.: "Schweizer Gericht findet "Dreckasylant" nicht rassistisch" (The Swiss court did not found the term "Dirty asylum seeker" as racist statement)

96 "Saubere Schweizer Verhaeltnisse" (Clean Swiss Circumstances) *Stern*, 06.03.2014. A cartoon by Haderer shows Honorable Judges of a Swiss Court advising a "pig foreigner or the dirty asylum seeker)" to take a shower in order to get rid of the dirt!

- The ECtHR judgement underlines that expressing opinions on sensitive and debated issues is a fundamental aspect of freedom of expression and the difference between tolerant, pluralist and democratic society and totalitarian regimes lies in this;

- ECtHR observes that it was not competent to arbitrate upon the controversial historical aspects and also on the legal qualification to be attributed to the matter;

- And it was certainly not to an European Court to give a legal opinion on these issues;

- The rejection of legal characterisation as "genocide" of the tragic events of 1915-1916, was not directed to incite hatred against the Armenians;

- The prosecution and conviction of Dr. Perinçek was not necessary in a democratic society;

- The margin of appreciation of the Swiss authorities on deciding whether interference with Dr. Perinçek's freedom of expression was limited;

- And it was very difficult to identify the existence of a general consensus about the qualification of the "Armenian genocide";

- Finally, there was no pressing social need or condemning Dr. Doğu Perinçek.

The judgement of the Second Chamber of ECHR reduced genocide to Law. As stated above, some scholars are in the opinion that *"the line of reasoning of the Swiss authorities was indeed troubling, as it came very close to establishing a form of a-**dictature de la pensée unique**- a system which places one single opinion above all others, criminalizes disagreement and precludes any form of debate or discussion."*

A brief quote of Prof. Dirk Voorhof from Ghent University summarizes all what is presented above:

"***We sincerely doubt if a judgment by the Grand Chamber could ever lead to an outcome (which will prove that Dr. Perinçek's conviction is necessary for a democratic society) in this case. And it would certainly be a sad day for freedom of expression in Europe"***[97]

97 Dirk Voorhoof "Perinçek Judgment on genocide Denial" *ECtHR Blog*, 2014/01

BIBLIOGRAPHY

"The Judgment of the European Court of Human Rights in Perinçek v. Switzerland reducing Genocide tor Law" *Cambridge Journal of International and Comparative Law*, (2014, 27 January).

"WWI inflicted pain to everyone" (2011, 30 December). *Hürriyet Daily News*.

Acton, L. (1907). *Historical Essays and Studies* London.

Aktan, Gündüz (2001). "The Armenian Problem and International Law". In Ataöv, Türkkaya (Ed.), *The Armenians in the Late Ottoman Period*, Ankara: The Turkish Historical Society.

Aktan, Gündüz. *The Armenian problem and International Law* op. cit. p.281:

Ash, Timothy Garton Ash (2006, 16 June). "The freedom of historical debate is under attack" *Liberté pour l'histoire*.

Atkinson R. F. (1978). *Knowledge and Explanation in History. An Introduction to the Philosophy of History* Cornell University Press.

Bertrams, K. & de Broux, Pierre-Olivier. (2007). *Du négationnisme au devoir de mémoire: L'Histoire est-elle prisonniere ou gardienne de la liberté d'expression?* Université Libre de Belgique, Revue de Droit.

Bloxham, Donald. (2011). "The First World War and the Development of the Armenian Genocide". In Ronald Suny, G., Göçek, F. & Naimark, M. (Ed.), *A Question of Genocide: Armenian and Turks at the End of the Ottoman Empire,* New York: Oxford University Press.

British Blue Book, No. 6 (1894)

Buenos, Tal. (2011). "Genovive: Hobbes and a Nation's Natural Right to Survive" *Middle East Critique* (Volume: 20, Issue: 3).

Cambridge Journal of International and Comparative Law (CJICL). (2014, January 24).

Cannie en D. Voorhoof, (2011). "The Abuse Clause and Freedom of Expression in the European Human Rights Convention. An Added Value for Democracy and Human Rights Protection" *Netherlands Quarterly of Human Rights*, (Vol. 29/1).

Dadrian, Vahakn N. (1995). *The history of the Armenian Genocide* Oxford: Berghahn Books.

Danto, A. C. (1965). *Analytical Philosophy of History* Cambridge.

Ehrhold, Kaethe. (1937). *Flucht in die Heimat. Aus dem Kriegserleben deutscher Missionerschwester in die asiatischen Tuerkei*, Dresden.

Halaçoğlu, Y. (2002). *Facts on the Relocation of the Armenians.1914-1918* Ankara: Turkish Historical Society Press.

Hovanisian, Richard G. (1986). *The Armenian Genocide in Perspective* Oxford: Transaction Books

Joinet, Louis (2002). "Lutter contre L'Impunité" *La Découverte*, Paris.

Lewy, G. (2008). "Can there be Genocide without the Intent to Commit Genocide?" *Journal of Genocide Research* (Vol. 10, Issue 1).

Lobba, P., (2014, 5 February) "The fate of the Prohibition Against Genocide Denial... The penalization of the Denial of the -Armenian genocide- Questioned by the Recent Judgment of the European Court of Human Rights in Perinçek vs Switzerland" *Liberté Pour L'Histoire*.

Mango, Andrew. (1994). "Turks and Kurds" *Middle East Studies* (No: 30).

Mann, Michael. *Dark Side of Democracy: Explaining Ethnic Cleansing* New York: Cambridge University Press.

McCarthy, J., Arslan E., Taşkıran C., & Turan Ö. (2006). *The Armenian Rebellion in Van,* The University of Utah Press.

Nalbandian, Louise (1963). *Armenian Revolutionary Movement: the Development of Armenian Political Parties through the 19. Century,* Berkeley: University of California Press.

Nora, Pierre. (2008). "Historical identity in trouble" *Liberté pour l'histoire,* CNRS Editions.

Özdemir H. & Sarınay, Y. (Ed.) (2007). *Turkish -Armenian Conflict Documents*, TGNA Publications.

Papazian, K. S. (1934), *Patriotism Perverted*, Boston: Baikar Press.

Perinçek, Mehmet (2007). *Rus Devlet Arşivlerinden 100 Belgede Ermeni Meselesi*, İstanbul: Doğan Kitap.

Perinçek, Mehmet (2011). *Armyanskiy Vopros v.120 Dokumentah İz Rossiyskih Gosudarsvennih Archivov*, Moskova: Labıratoriya Kniigi.

Philips W. Allison (1897). *The War of Greek Independence 1821-1833*, New York.

Remond, René. (2006). "History and the Law" *Liberté pour l'histoire*, Etudes No. 4036, Paris.

Reynolds, Michael. *Shattering Empires. The Clash and Collapse of the Ottoman and Russian Empires-1908-1918* Cambridge: Cambridge University Press.

S. S. Aya *Twisted Law versus Documented History Geoffrey Robertson's Opinion Against Proven Fact.*

S. S. Aya *The Genocide of the Truth Continues,* Istanbul Derin Publications.

S. S. Aya *The Genocide of the Truth* Istanbul Commerce University Publications (No:15).

Sarınay, Y. (2011). "The Relocation (Tehcir) of Armenians and the Trials of 1915-1916" *Middle East Critique,* Vol. 20 No: 3

Sassounian, Harut (2014). "Text of Swiss Appeal to European Court on Armenian Genocide Disclosed" *The Armenian Weekly*.

Schabas, William A. (2000). *Genocide in International Law*, Cambridge University Press.

Şimşir B. (1984). "The deportees of Malta and the Armenian Question", in *Armenians in the Ottoman Empire and Modern Turkey (1912-1926)*, Boğaziçi University Publications.

Sonyel, S. R. (1972) "Armenian Deportations: A Re-Appraisal in the Light of New Documents" *Belleten*. Volume XXXVI.

Sonyel, S. R. (1978). *The Displacement of Armenians: Documents.*

Tacar, P. & Gauin M. (2012). "State Identity, Continuity, and responsibility: The Ottoman Empire the Republic of Turkey and the Armenian Genocide.

A reply to Avedian, Vahagn" (2012, August), *European Journal of International Law* (Volume: 23, No: 3, August 2012 pp: 828-829)

The General Practice Followed by the Panel of the Grand Chamber When Deciding on Requests for Referral in Accordance with Article 43 of the Convention, Document of Information of the ECHR, (2011, October).

Stoll v. Switzerland (GC no 69698/01, 101, ECHR 2007-V)

Swiss Raelian Movement v. Switzerland (GC no.16354/06, 48 EHCR 2002)

Animal Defenders International v. UK (no 48876/08, 100, 22 April 2013 with regard the freedom expression summarize the general principles.)

Voorhoof, Dirk. (2014) "Perinçek Judgment on genocide Denial" *ECTHR Blog*,

Yavuz, M. Hakan (2011). "Contours of Scholarship on Armenian-Turkish Relations" *Middle East Critique,* (Vol. 20 No: 3)

Zürcher, Eric Jan. (1997). *Turkey: A Modern History* London: I.B.Tauris.