Special Issue on ECHR
Perinçek v. Switzerland Case

REVIEW OF
ARMENIAN STUDIES
A Biannual Journal of History, Politics and International Relations

no: 29
2014

TERAZI publishing

REVIEW OF ARMENIAN STUDIES

A Biannual Journal of History, Politics and International Relations
2014, No 29

PUBLISHER
Ali Kenan ERBULAN

Review of Armenian Studies is published biannually

Review of Armenian Studies is a refereed journal. Review of Armenian Studies is indexed in EBSCO and TUBITAK-ULAKBIM databases. Articles submitted for publication are subject to peer review. The editorial board takes into consideration whether the submitted article follows the rules of scientific writing. The articles are sent to two referees known for their academic reputation in their respective areas. Upon their decision, the article will be published in the journal, or rejected. The reports of the referees are kept confidential and stored in the Journal's archives for five years.

On behalf of AVRASYA BİR VAKFI (1993)

Publication Office
Terazi Yayıncılık Bas. Dağ. Dan. Eğt. Org. Mat. Kırt. Ltd. Şti.
Abidin Daver Sok. No. 12/B Daire 4 06550 Çankaya/ANKARA
Tel: 0 (312) 438 50 23-24 • **Faks:** 0 (312) 438 50 26
www.avim.org.tr

ISSN: 1303-5304

Subscription Office

Hülya ÖNALP
Terazi Yayıncılık Eğt. Org. Mat. Kırt. Ltd. Şti.
Süleyman Nazif Sok. No.12/B Daire 2 06550
Çankaya/ANKARA
Tel: 0 (312) 438 50 23-24
Fax: 0 (312) 438 50 26
E-mail: teraziyayincilik@gmail.com

Design
Ruhi ALAGÖZ

Printing
Özyurt Matbaacılık
Büyük San. 1. Cad. Süzgün Sok. No: 7 İskitler / ANKARA
Tel: +90 312 384 15 36 **Fax:** +90 312 384 15 37

Printing Date: 8 May 2014

Annual Subscription: 20 US $
15 TL

Please send your payment to the following bank account:
For TL - Terazi Yayıncılık, Garanti Bankası-Çankaya/ANKARA Branch 181/6296007
Postal Check Account Ankara/Çankaya/Merkez 5859221

For US $ - Garanti Bankası- Çankaya/ANKARA Branch 181/9086957
IBAN: TR60 0006 2000 1810 009 0869 57

CONTENTS
(İÇİNDEKİLER)

Page

It has been an orchestrated practice to accuse Turkish views on historical events of the First World War, particularly on the Eastern Anatolian Front and on the Armenian allegations pertaining there to, as being denialist or negationist. Fueled by religious bonds and the psychological burden of having made unfulfilled promises to incite the Armenian population of the Ottoman empire to armed rebellion against the state, the political alliances of current times appear to continue, one hundred years after the First World War, to castigate the successor state of the Ottomans, the Republic of Turkey and its people, the Turks.

Indeed, the Armenian allegations have found a fertile ground to propagate their version of wartime tragedies in a completely one sided manner, singling themselves out as the only victims in the global turmoil. Over the century, this version of history has become the one single myth to forge a diaspora identity as well as a means of livelihood for many. The Republic of Turkey on the other hand, having been born from the ashes of a collapsed empire, in dire struggle for survival to reach contemporary level of civilization, utilizing all its resources forward to the future than taking issues with the past, was compelled to start refuting those allegations very late in the process, may be the last twenty-five years at most.

Hence, politically, particularly vis-à-vis those states with an established Armenian diaspora, Turkey continues to encounter unjustified, biased, uncorroborated accusations. However and fortunately, history cannot be based on hearsay or one sided memory. It is derived from concrete evidence kept in the archives. As such, there are now academicians, scholars of international reputation who have come up with a balanced, objective account of historical facts, exonerating Turkey of fanatical, hate-mongering allegations.

Accusations of denialism or negationism against Turkish views are also refuted on the legal, judicial front. One recent, spectacular instance is the judgment of the very prestigious international tribunal, the "European Court of Human Rights" (ECtHR) of the 47-member Council of Europe. ECtHR confirmed in its 17 December 2013 verdict, the right of Dr. Perinçek, within freedom of thought and expression, to call Armenian allegations as an "international lie".

This special issue of the "Review of Armenian Studies" is dedicated to the analysis and significance of the 17 December 2013 judgment of the European

Court of Human Rights on the Perinçek case. Prominent personalities and scholars assess aspects of the judgment. H.E. Yaşar Yakış analyses the judgment, concluding that the verdict does not mean that the court rejects Armenian claims; rather it upholds the principle of freedom of expression. Professor Dr. Hüseyin Pazarcı focuses on the application of Switzerland for a review of the case by the Grand Chamber of the Court. Ambassador (R) Pulat Tacar points that the Court verdict 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. Dr. Farhad Mammadov argues that Armenian allegations cannot be considered as historical facts but a political mythology. Academician Maxime Gauin depicts the court decision as a major victory for freedom of speech and praises its recognition of the scholarly debate on the Armenian question. The book review is on the latest work of historian Edward J. Erickson "Ottomans and Armenians: A Study in Counterinsurgency" by Prof. Jeremy Salt. The special issue is also supplemented with a chronology of the case of Perinçek v. Switzerland.

Alev KILIÇ
Director of Center for Eurasian Studies

A VERDICT OF THE EUROPEAN COURT OF HUMAN RIGHTS AND ITS IMPLICATIONS

(AVRUPA İNSAN HAKLARI MAHKEMESİ'NİN BİR KARARI VE BU KARARIN YANSIMALARI)

Yaşar YAKIŞ
Former Minister of Foreign Affairs
yasaryakis@hotmail.com

Abstract: *This article analyses the verdict of the European Court of Human Rights regarding the Perinçek v. Switzerland case. It firstly outlines why the case was filed, what Perinçek stated in his defense, and also what Switzerland based its accusations on regarding Perinçek. It also lists some ECtHR cases that bear resemblance to the Perinçek v. Switzerland case. It indicates that the Perinçek v. Switzerland case, and also any legal case that is related to the Armenian genocide claims, are carried out in the absence of a competent tribunal that came to a verdict on the nature of the events of 1915. As such, any attempt to persecute individuals who reject Armenian genocide claims are done so without the legal backing of such an authoritative tribunal verdict. The article concludes by indicating that ECtHR's verdict does mean that the court rejects Armenian genocide claims, it simply removes itself from such discussions and focuses solely on whether the curtailment of Perinçek's freedom of expression was justified or not. Based on this reasoning, the article states that the ECtHR found Switzerland's argument for convicting Perinçek to be insufficient and unjustified.*

Keywords: *European Court of Human Rights, (ECtHR), European Convention on Human Rights, (ECnHR), Perinçek v. Switzerland, genocide, freedom of expression, Switzerland, Turkey*

Öz: *Bu makalede Avrupa İnsan Hakları Mahkemesi'nin Perinçek v. İsviçre Karşı davası hakkında verdiği kararı incelemektedir. Makale ilk olarak davanın neden açıldığını, Perinçek'in savunmasında neler ifade ettiğini ve aynı zamanda İsviçre'nin Perinçek'i mahkûm etmede kullandığı suçlamalara değinmektedir. Makale aynı zamanda Perinçek İsviçre'ye Karşı davasına benzerlik taşıyan diğer bazı AİHM kararlarını sıralamaktadır. Perinçek İsviçre'ye Karşı davasının ve aynı zamanda Ermeni soykırımı iddialarıyla bağlantılı diğer başka davaların, 1915 olaylarının niteliğine ilişkin karar vermiş bir uzman mahkemenin yokluğunda ilerletildiğini belirtilmektedir. Bu sebeple, Ermeni soykırımı*

iddialarını reddeden herhangi bir şahsı yargılama çabası yetkili bir mahkeme kararının yasal desteğinden yoksun bir şekilde yapılmaktadır. Makale, AİHM kararının Mahkeme'nin Ermeni soykırım iddialarını reddetmediğini, aslında sadece kendisini bu tür tartışmalardan uzak tuttuğunu ve Perinçek'in ifade özgürlüğünün kısıtlanmasının haklı gerekçelere dayanıp dayanmadığına odaklandığı sonucuna varmaktadır. Makale, AİHM'in bu muhakemeden yola çıkarak İsviçre'nin Perinçek'i mahkûm etmesindeki savının yetersiz ve haksız olduğu kanaatine vardığını ifade etmektedir.

Anahtar kelimeler: *Avrupa İnsan Hakları Mahkemesi, (AİHM), Avrupa İnsan Hakları Sözleşmesi, (AİHS), Perinçek İsviçre'ye Karşı, soykırım, ifade özgürlüğü, İsviçre, Türkiye*

The European Court of Human Rights (ECtHR) brought in on 17 December 2013 a milestone verdict on the denial of the so-called Armenian genocide. The present article is an attempt to analyse this verdict.

The ECtHR's verdict is made on a law suit filed by the Turkish Politician Doğu Perinçek against Switzerland[1]. In various public statements made on 7 May, 22 July and 18 September 2005 in Lausanne, Opfikon and Könitz respectively, Perinçek said: *"The claim that the Ottoman authorities perpetrated the crime of genocide against the Armenians was an international lie"*. A Swiss civil society organization by the name of *Association Suisse-Arménie* took this statement to the Local Court of Minor Offences of Lausanne. The Court decided on 9 March 2007 that Perinçek committed the offence of racial discrimination according to the Article 261/4 of the Swiss Penal Code. In its justification for the decision the court pointed out that *"the Armenian genocide is, according to the Swiss public opinion as well as more generally, a proven fact"*. To prove its reasoning, the court referred to various parliamentary acts, to the juridical publication as well as to the statements made by various federal and cantonal political authorities. The court referred also to the recognition of this genocide by various international bodies such as the Council of Europe[2] and the European Parliament.

Perinçek took the case to the Penal Court of Cassation of the Vaud Canton. This Court rejected Perinçek's demand. The cantonal Court of Cassation pointed out in its justification that, *"like the Jewish Holocaust, the Armenian genocide was a historical fact recognized as such by the Swiss legislation"*. Therefore the Court did not need the opinion of historians in order to admit its existence. It further pointed out that Perinçek stopped short of referring at all to the massacres and deportations of Armenians after he denied the Armenian genocide (*implying that a person who denies the Armenian genocide is also expected to refer to the massacres and deportations of Armenians*).

Perinçek took this time the decision of the Cantonal Court of Cassation to the Federal Court, which rejected the demand on the grounds that the Swiss Penal Code did not make any distinction among the genocides when it provides for the repression of their denial.

After having exhausted the internal recourse procedures, Perinçek filed a lawsuit at the ECtHR against this decision and the Court decided that Switzerland had violated Perinçek's freedom of expression contained in the Article 10 of the European Convention of Human Rights (ECnHR).

1 *Affaire Perinçek c. Suisse*, Requête no 27510/08, Judgements of the European Court of Human Rights

2 The ECtHR points out that there is no decision adopted on this subject by the Council of Europe. It was only the personal opinion of a member of the Parliamentary Assembly of the Council of Europe that he expressed during his address to the Assembly.

An earlier case of denial of the Armenian genocide

In a similar case, earlier on 14 September 2001, 11 Turkish citizens were taken to the local court of Bern-Laupen on the accusation of having committed the offence of the denial of the Armenian genocide. They were acquitted by the local court on the grounds that the defendants did not have the intention of discrimination contained in the Article 260 bis of the Swiss Penal Code. The plaintiffs appealed both the Court of Appeals of Bern and the Federal Court, but they both reconfirmed that the acquittal of 11 Turks were right.

Perinçek referred to this file in his petition to the ECtHR and questioned why the Swiss Federal Court reconfirmed his sentence while it acted differently in the case of 11 Turks.

On the admissibility of the Perinçek's case

The ECtHR discussed first the question of the admissibility of Perinçek's demand. After considering similar or comparable cases, it tried to find out whether the statement made by Perinçek was aimed at inciting hatred or violence. It was led to the conclusion that *"rejecting the legal characterization of the events of 1915 was not an incitement to hatred against the Armenian people. Neither was he prosecuted for having incited to hatred. He did not express any contempt for the victims of the events of 1915. Therefore he did not misuse his right to publicly debate subjects that may be sensitive and even unpleasant. The free exercise of this right is one of the fundamental aspects of the freedom of expression and this is what distinguishes a democratic, tolerant and pluralistic society from a totalitarian and dictatorial regime"*.

On these grounds, Perinçek's request was found admissible.

Two points are important in this decision on admissibility.

a) Rejection of the legal characterization of the events of 1915 as genocide is not regarded by the ECtHR as an incitement to hatred against the Armenian people.

b) The ECtHR has persistently avoided the reference to the 1915 events as genocide. We will see further below that the ECtHR rejected, in the past, the appeal of a plaintiff who was punished because of his denial of the holocaust (since the holocaust is characterized as genocide by the Nurnberg Court).

On the substance of the demand

Neither the plaintiff nor the defendant questioned that there was interference in the exercise of Perinçek's freedom of expression. They both agree that there is interference in Perinçek's exercise of his right of expression. The subject matter of the complaint is whether this interference is justified or not.

Such inference is a violation of the Article 10 of the European Convention on Human Rights (ECnHR) except in case it falls within the purview of the paragraph 2 of the said Article. The Article 10 of the ECnHR reads as follows:

Article 10

Freedom of Expression

1. *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and import information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

2. *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are described 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 reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

Neither the plaintiff nor the defendant questioned that there was interference in the exercise of Perinçek's freedom of expression. They both agree that there is interference in Perinçek's exercise of his right of expression. The subject matter of the complaint is whether this interference is justified or not.

The ECtHR had therefore to see:

a) whether such interference was "*provided by the Swiss law*",

b) whether the Swiss law was trying to fulfil one or several legitimate goals contained in the paragraph 2, and

c) whether such interference was "*necessary in a democratic society*" to achieve these goals.

Other texts of international legislation on this subject

There is a *UN International Pact on Civil and Political Rights* adopted on 16 December 1966. Switzerland ratified it in 1992. Articles 19 and 20 of the said Pact contain provisions on the freedom of opinion and expression. The UN Human Rights Commission adopted in its 102nd session in 2011 a *General Observation no.34*, which sheds light more specifically on the penal sanctions regarding the expression of opinion on the historical facts. Its relevant paragraph reads as follows:

(Paragraph 49 of the General Observation no. 34 of the UN Human Rights Commission)

> *The laws that criminalize the expression of opinion regarding historical facts are incompatible with the obligations that the Pact imposes on the States party concerning the respect for the freedom of opinion and freedom of expression.* ***The Pact does not allow general interdictions on the expression of a wrong opinion or an incorrect interpretation of the past events.*** *Restrictions should never be imposed on the freedom of opinion and, regarding the freedom of expression, should not go beyond what is allowed by the paragraph 3 or required by the Article 20.*

The said paragraph 3 and Article 20 read as follows:

Paragraph 3 (of the Article 19 of the General Observation no. 34 of the UN Human Rights Commission)

3. *The exercise of the freedoms contained in the paragraph 2 of the present Article* (Everyone has the right of freedom of expression; this right includes the right to research, to receive and propagate all sorts of information and ideas, without consideration of frontiers, orally, written, printed or artistic, or by any other means of his choice) *comprises special duties and responsibilities. Therefore it may be subjected to certain restrictions that should however be identified expressively by law and that are necessary:*

   a) *For the respect of rights and reputation of others;*

   b) *For the preservation of the national security, of the public order, public morality and health;*

Article 20 (of the General Observation no. 34 of the UN Human Rights Commission

1. *All types of propaganda in favour of war are forbidden by law.*

2. *All types of call to national, racial or religious hatred that constitute an incitement to discrimination, hostility or to violence are forbidden by law.*

The first legitimate ground for a government to impose a restriction on the exercise of the freedom of expression is the right and reputation of others. For instance the State may introduce restriction to the freedom of expression in order to protect the right to vote regulated by the Article 25 of the Pact. These restrictions have to be interpreted with caution. It is legitimate to protect the voters against the intimidation or coercion to vote in favour of a person or political party however these restrictions should not prevent holding a political debate even invitation to boycott the elections that is not compulsory.

The Claims of the Parties

The claims of the parties to the case were as follows:

Perinçek referred, in this claim, to the Article 10 of the ECnHR and said that, the Swiss court, by condemning him for having stated publicly that there has never been Armenian genocide, violated his freedom of expression. He added that Article 260 bis/4 of the Swiss Penal Code is not predictable enough and that his condemnation was not motivated by a legitimate aim and that the violation of his freedom of expression was *"not necessary in a democratic society"*.

Perinçek further claimed that, because the Swiss courts acquitted 11 Turks for the same type of offence in the past, he thought that such behaviour will not be considered as an offence. Furthermore he said that a former Justice Minister of Switzerland criticized the contested Article during his visit to Turkey.

The Swiss government pointed out that Perinçek was condemned under the paragraph 4 of the Article 261 bis of the Swiss Penal Code, which reads as follows:

(Paragraph 4 of the Article 261 bis of the Swiss Penal Code)

Whoever ... denies, grossly trivializes or tries try to justify genocide or other crimes against humanity... will be punished to a prison sentence of maximum 3 years or will be fined.

The Swiss government further said that initially the draft law submitted by the Swiss government to the parliament was criminalizing only the holocaust, but the parliament amended the draft to cover all genocides. Therefore the criminalization of the Armenian genocide is in line with the wish of the lawmakers. The rapporteur of the Commission was on the record to point out that the amendment covered also the Armenian genocide.

The Swiss government elaborated also on the decision of the Federal Court that confirmed Perinçek's punishment. The federal Court thought that the judge of the Minor Offences Court of Lausanne did not need determine whether the paragraph 4 of the Article 261 bis of the Swiss Penal Code Article 4 covered only the holocaust or it also covered the Armenian genocide. The Courts do not need, according to the Swiss Federal Court, to turn to the work of historians on this particular issue. If the judge has to penalize the denial of holocaust because it is recognized as genocide, he should use the same criteria in penalizing the other genocides. In this case what is to be clarified is whether there is similar consensus on whether the 1915 events that are denied by Perinçek are also genocide. Here the judge should look at the general assessment of the public and the community of historians, rather than on the question whether or not the massacres and the deportations that took place in the Ottoman Empire should be qualified as genocide. This is how the decision of the Lausanne Court of Minor Offences should be assessed, which pointed out in its decision that it was not its duty to make history and that its duty was to see whether this genocide was "*known, recognised and even confirmed"*.

Perinçek challenged exactly this point, in the defence of his attitude, pointing out that he did not deny any genocide since there has never been Armenian genocide.

The Swiss government pointed out as well that at the time of the ratification of the *International Pact on Civil and Political Rights*, it put a reservation by which it reserved the right of adopting a penal provision that will take care of the Article 20/2 of the Pact (see above) which provides that "*all types of calls to national, racial and religious hatred that constitutes an incitement to the discrimination, to hostility or to violence is prohibited by law"*. With the entry into force of the Article 261 bis, this reservation has been withdrawn.

The Swiss government referred also to the Recommendation (97)20 adopted on 30 October 1997 by the Ministerial Council of the Council of Europe on hatred speech. This Recommendation condemns all types of expression that incite racial hate, xenophobia, anti-Semitism and all forms of intolerance.

The Swiss government mentioned also that over 20 national parliaments recognised that the deportations and massacres that took place between 1915 and 1917 constitute genocide in the sense of the 1948 UN Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention). Furthermore the European Parliament invited Turkey on 15 November 2000 to publicly recognize the Armenian genocide perpetrated during the First World War.

The Swiss government said that in light of this international background and in view of the Article 261/4 of the Swiss Penal Code, Perinçek should know that his statements would expose him to a penal sanction under the Swiss law. It further added that Perinçek declared in his speech on 20 September 2005 that he did not deny the Armenian genocide since there was no genocide and that he was fighting against an international lie.

The Turkish government also took part in the law suit as a third party and pointed out that the penal sanction of the Switzerland was not clear and that therefore the interference in the Perinçeks's freedom of expression does not stand on a sufficient legal basis.

The Verdict of the ECtHR

In light of these arguments the ECtHR decided that:

- the reasons put forward by the Swiss authorities to justify the punishment were not all pertinent.
- Overall, these reasons were insufficient.
- The Swiss authorities could not demonstrate that the Perinçek's condemnation was responding a '*pressing social requirement',* neither that it was necessary in a democratic society for the protection of the honour and the sentiments of the descendants of the atrocities of 1915.
- The Swiss authorities thus trespassed the restricted margin of assessment that they were benefiting from in the present case.

Five of seven judges voted in favour of the decision that Article 10 of the ECnHR was violated.

Five other judges out of seven voted in favour of the decision that no compensation was needed to be paid to Perinçek since the ECtHR verdict was a sufficient satisfaction for him.

Other decisions of the ECtHR on the Freedom of Expression

There are other decisions made by the ECtHR on the freedom of expression. I will pick three cases that are relevant to our subject:

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

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

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

The first two of these three cases were brought to the court by the prosecution under a law that is called in France *Loi Gayssot* (Law no: 90-615 of 13 July 1990). The ECtHR decided in the first case that the applicant Garaudy was guilty under *Loi Gayssot*, for having denied a fact that was established by the Nürnberg court. However the same court, decided in the second case that Lebideux was innocent, under the same *Loi Gayssot*, for having published an advertisement to call for the rehabilitation of the Marshal Pétain. In the third case the Court points out the inappropriateness for a penal court to arbitrate historical issues.

A closer examination of these three cases will shed more light on the approach of the ECtHR to the question of the freedom of expression:

a) The *Garaudy vs France* case

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

"There can be no doubt that denying the reality of clearly established historical facts, such as the Holocaust, as the applicant does in his book, does not constitute historical research akin to the quest for the truth. The aim and the result of that approach are completely different, the real purpose being to rehabilitate the Nationalist-Socialist regime and, as a consequence, accuse the victims themselves of falsifying history. Denying crimes against humanity is

therefore one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to the public order. Such acts are incompatible with democracy and human rights because they infringe the rights of others. Its proponents indisputably have designs that fall into the category of aims prohibited by Article 17 of the Convention.

Accordingly the Court considers that, in accordance with Article 17 of the Convention, the applicant cannot rely on the provisions of Article 10 of the Convention regarding his conviction for denying crimes against humanity".

b) The *Lebideux and Isorni vs. France* case

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

"*The applicants did not call into question the category of clearly established historical facts (by the Nürnberg Court) –such as holocaust- whose negation or revision would be removed from the protection of Article 10 by Article 17 (of the European Convention of Human Rights).*

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

Important points in these verdicts

One of the important points of these two verdicts of the ECtHR is that, in the *Garaudy vs France* case, the Court makes a distinction between the denial of a fact that is established by an authorized international court

and other cases of debatable nature. It reconfirms the punishment of Garaudy because Garaudy had denied holocaust that was recognized as genocide by the Nürnberg Court.

The second important point is that, in the *Lebideux and Isorni vs. France* case, the ECtHR thought that the call for the rehabilitation of Marshal Pétain would not hurt the feelings and the memory of the French people who did not like what he has done to France in 1940s, because these events had occurred 40 years ago (at the time when the call for the rehabilitation was published in 1980s). It commented that "*the lapse of time makes it disproportionate to deal with such remarks, forty years on, with the same severity as ten or twenty years previously".* Lebideux and Isorni were challenging events that occurred 40 years ago and the ECtHR believes that they are too old to be remembered. Perinçek challenges the events that occurred 100 years ago.

c) *Chauvy vs France* case

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

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

ECtHR Verdict and an EU Framework Decision

There is an EU Framework decision that covers partly the field of the freedom of expression vs. the offence of the denial of a crime. The full title of the Decision is the *Council Framework Decision 2008/913/JHA on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law*[3].

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

The Framework Decision was enacted for the purpose of combating racism and xenophobia and standardizing among the EU Member States the criminalization of the offences committed by denying a crime of genocide or a crime against the humanity.

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

Article 1

Offences concerning racism and xenophobia

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

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

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

The Framework Decision was enacted for the purpose of combating racism and xenophobia and standardizing among the EU Member States the criminalization of the offences committed by denying a crime of genocide or a crime against the humanity.

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

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

2. *For the purpose of paragraph 1, Member States may choose to punish only*

conduct which is either carried out in a manner likely to disturb public order or which is threatening, abusive or insulting.

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

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

The paragraph 1 (c) makes punishable the denial of genocide (which is among the crimes defined in Articles 6, 7 and 8 of the Rome Statute of the International Criminal Count) as well as the denial of all other crimes against humanity. There is nothing questionable in incorporating the denial of such crimes within the scope of the punishable acts if there is a decision of an authorized body establishing that such an act is in fact committed. On the contrary it would be incomplete if such offenses were to be kept out of the scope of the punishable acts.

The controversial point in the Framework Decision is in the underlined phrase of Article 1 (4) above. This article authorizes the Member States to opt for either of the following two alternatives:

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

or

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

Any Member State will be able to make a statement, on adoption of this Framework Decision or later, *"that it will make punishable the act of denying the crimes defined in the Rome Statute only if this crime has been* ***established by a final decision of a national court of this Member State".*** After having made such a statement it will have to pass a law that makes the denial of crime a punishable act.

This option made available to the EU Member States is in contradiction with

the provisions of the Genocide Convention[4], but this aspect of the question is outside the scope of the present article.

The ECtHR did not yet bring in any verdict to distinguish between the denial of a genocide characterized as such by an authorized international court and the denial of a genocide characterized as such by an unauthorized national court according the Genocide Convention. Therefore, it is difficult to tell whether the ECtHR will look at all in the future verdicts into this aspect of the question in the first place. It may or it may not.

Therefore the ECtHR verdict on Perinçek may only have an indirect implication on the EU Framework Decision that can be summarized as follows:

a) In case the ECtHR is of the opinion that the denial of a genocide that is not established by a court authorized by the Genocide Convention is not punishable, it may reject the admissibility of a case where the defendant is punished for the denial of such genocide. If this happens, one part of the Article 1 para. 4 of the EU Framework Decision will become devoid of a field of application. The Member States were called by this Article to make punishable the act of denying genocide *"only if this crime has been established:*

There is nothing questionable in incorporating the denial of such crimes within the scope of the punishable acts if there is a decision of an authorized body establishing that such an act is in fact committed. On the contrary it would be incomplete if such offenses were to be kept out of the scope of the punishable acts.

   1) *by a final decision of a national court of this Member State and/or an international court, or*

   2) *by a final decision of an international court only".*

The part that will become devoid of the field of application will be the case covered by the paragraph *a (1)* above, because the Genocide Convention does not authorise the courts of the EU Member States to establish whether the events of 1915 could be characterized as genocide. The Genocide Convention specifies which courts shall be authorized to establish whether genocide has taken place, in its Article 6, which reads as follows:

4 Yakış, Yaşar, "A European Union Framework Decision on the Offence of Denying a Crime", *Review of Armenian Studies*, No. 23, July 2011, pp. 63-92.

Article 6 (of the Genocide Convention)

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

According to this article the court that are authorized to determine whether genocide has taken place are the following:

- a competent tribunal of the State in the territory of which the act was committed *(in the case of the Armenian genocide it has to be Turkey),*

- such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

b) If the national courts of the EU Member States follow scrupulously the jurisdiction of the ECtHR, they would know that the ECtHR overrules their judgments punishing individuals for having denied the Armenian genocide.

The ECtHR verdict has no other direct implication on the EU Framework Decision.

This may look as a minute detail, but the problem faced by those who deny the "Armenian genocide" stems exactly from this minute detail. They are punished for having denied an act that is not characterized as genocide by a competent tribunal.

French experience of criminalizing the denial of "Armenian Genocide"

Another example of Armenian efforts to make the denial of genocide a punishable act is the initiative that they took in France. It started by passing a law in the French parliament that consisted of one single sentence, which reads as follows:

> *"France publicly recognizes the Armenian genocide of 1915."*

Since there is no sanction attached to it, which will be applied if it is violated, this text looks more like a political declaration than a law in due form. This harmless initiative was the first step of a bigger aspiration, namely the

criminalization of the denial of the "Armenian genocide". In fact, a law to achieve this goal was adopted by the lower chamber of the French parliament in 2006, but it was overturned by the upper chamber, the Senate. The Armenians did not give up. In 2012, a French deputy, Mme. Boyer, initiated another law with similar content. This time, the same Senate, contradicting what it had done six years ago, voted in favour of this law. But this time the French Constitutional Council disappointed the Armenians by overturning the Boyer's law.

President Sarkozy instructed his close associates to prepare another law to circumvent the obstacles identified by the Constitutional Council, but his term in office did not suffice to achieve this goal. His successor Mr. François Hollande voiced his resolve to achieve what his predecessor was not able to achieve. He repeated during his official visit to Turkey, that passing a law criminalizing the denial of genocide was an EU obligation for them.

In light of the verdict of the French Constitutional Council, it is difficult to tell how the French legislators will find a way both to satisfy the Armenian aspirations and to remain within the frame drawn by the Constitutional Council on the one hand and by the ECtHR verdict on the other.

Implications of the ECtHR Verdict

The ECtHR verdict has implications beyond recognizing the Perinçek's freedom of expression.

First, Turkey has so far been hesitant to go to international courts to challenge the Armenian claim of genocide because of fear of losing the case. Now, the verdict has eased Turkey's hand.

Second, the Swiss Armenian association hoped to teach Perinçek a lesson on what not to do on the Armenian genocide issue, but it inflicted serious damage to the Armenian efforts to criminalize the denial of genocide, because the verdict will now push several countries to think twice before they consider passing a law in their respective parliaments to recognize the Armenian genocide. True, the recognition of genocide and punishing its denial are two different subjects. But now that the denial has ceased to be a punishable act, passing a law to recognize the Armenian genocide will become an ineffective gesture to the Armenians at the cost of antagonizing Turkey unnecessarily. Turkey should try to explain to the member countries of the Council of Europe that passing such a law is a futile exercise that is devoid of a field of application.

Third, more Turks will feel free to voice their opinion loudly without fear of being prosecuted. Armenian initiatives to take such cases to the court will only serve to reconfirm the present case law.

Fourth, the ECtHR verdict invalidates one part of a provision contained in the Article 1(c) of the EU Framework Decision on Combating Racism and Xenophobia. Turkey should raise this issue with the EU at the meetings of the Turkey-EU Association Council.

Fifth, one may expect that the motherland and Diaspora Armenians must have understood that the European culture is consistently opposed to limit the freedom of expression. This is proven by the decision of the French Constitutional Council and it is now reconfirmed by the ECtHR verdict. The ECtHR verdict is of course more important because it constitutes jurisprudence for the national courts of the member countries of the Council of Europe.

Finally, if the wisdom prevails, the verdict may be used Turkey and Armenia as an opportunity to overcome their reciprocal prejudices and put an end to their centennial conflict.

Conclusion

There is no doubt that this is a milestone decision on the question of denying the so called Armenian genocide. However the scope of the ECtHR verdict has to be understood properly:

The ECtHR verdict does not deny that the Armenian genocide took place. It simply says that denying Armenian genocide is not an offence. It avoids entering the field of discussing whether it is genocide or not. It refers to these facts as "*the events of 1915"* or as "*Atrocities of 1915*".

There are further details in the verdict that are worth analysing: The ECtHR identifies that there is interference by the Swiss authorities in the exercise of Perinçek's freedom of expression. It even admits that the Swiss authorities have the right to interfere in the exercise of Perinçek's freedom of expression. The efforts of the ECtHR are therefore focused on whether this interference is justified under the criteria contained in the Article 10/2 of the ECnHR. In other words the ECtHR was led, out of hand, to the conclusion that there was interference, but that interference went beyond the point that was required by the national security, public safety or reputation or rights of others.

It will not be appropriate to attribute any other significance beyond that to the verdict.

BIBLIOGRAPHY

Affaire Perinçek c. Suisse, Requête no 27510/08, Judgements of the European Court of Human Right.

Yakış, Y. (2011). "A European Union Framework Decision on the Offence of Denying a Crime"*, Review of Armenian Studies,* (No: 23).

PERİNÇEK v. SWITZERLAND CASE (ECHR, 17 DECEMBER 2013)

(*PERİNÇEK* v. *SWITZERLAND* DAVASI
(AİHM, 17 ARALIK 2013)

Prof. Dr. Hüseyin PAZARCI

Abstract: *This article focuses on the legal basis of the ECHR Perinçek v. Switzerland case and especially on the likelihood of the case being referred to the Grand Chamber of the Court. It first elaborates on the details of the Perinçek v. Switzerland case, and gives explanations on the Swiss laws used to prosecute Perinçek, and the European Convention on Human Rights through which the ECHR come to a judgment. The article then elaborates on the process that can lead to a case being referred the Grand Chamber. It indicates that the panel of judges that decides on referrals convenes only a few times a year, meaning that the referral process will take time. It indicates that the referral average in the Court is only around 5%, and that referrals are usually made when a case is deemed to be exceptional. In terms of the Perinçek v. Switzerland case, the article points out that the case being referred to the Grand Chamber depends on whether the panel of five judges deems it to be exceptional in the sense of it being a high profile case or a case with a serious issue of general importance. As such, the article advises the Turkish government that intervened as a third party to thoroughly prepare its legal arguments and consider all possibilities in preparation for a possible reexamination of the case.*

Keywords: *European Court of Human Rights, ECHR, European Convention on Human Rights, the Convention, Grand Chamber, Perinçek v. Switzerland, genocide, Switzerland, Turkey*

Öz: *Bu makale AİHM Perinçek İsviçre'ye Karşı davasının yasal dayanaklarına ve özellikle de bu davanın Mahkeme'nin Büyük Dairesi'ne gönderilmesi olasılığına odaklanmaktadır. Makale ilk olarak Perinçek İsviçre'ye Karşı detaylarına girmekte, Perinçek'i yargılamak için kullanılan İsviçre yasaları ve AİHM'in dava konusunda karar vermek için kullandığı Avrupa İnsan Hakları Sözleşmesi'ni açıklamaktadır. Bundan sonra ise davanın Büyük Daire'ye gönderilmesiyle ilgili? süreci detaylandırmaktadır. Davanın Büyük*

Daire'ye gönderilip gönderilmeyeceğine karar veren hâkim kurulunun senede birkaç defa toplandığını ve bu yüzden bu sürecin zaman alacağını belirtmektedir. Makale, Mahkeme'de davaların gönderilme oranının sadece yaklaşık %5 olduğunu ve göndermelerin genelde davanın istisnai bir durum teşkil ettiğine kanaat getirildiğinde gerçekleştiğini belirtmektedir. Perinçek İsviçre'ye Karşı davasına gelindiğinde ise, gönderme kararının davanın istisnai bir durum teşkil edip etmediği kanaatine, yani davanın yüksek profilli veya genel önemde ciddi bir sorunu temsil etmesi yönünde alınabilecek karara bağlı olduğunu belirtilmektedir. Bu sebeple makale, davanın gönderilme olasılığı çerçevesinde davaya müdahil olan Türkiye'ye hukuki argümanlarını titizlikle hazırlamasını ve her türlü olasılığı göz önünde bulundurması tavsiyesinde bulunmaktadır.

Anahtar kelimeler: *Avrupa İnsan Hakları Mahkemesi, AİHM, Avrupa İnsan Hakları Sözleşmesi, Sözleşme, Büyük Daire, Perinçek-İsviçre davası, soykırım, İsviçre, Türkiye*

INTRODUCTION:

On 15 July 2005, the Association of Switzerland-Armenia sued Doğu Perinçek due to his first speech on the grounds that he publicly denied that the Ottoman Empire had committed genocide against the Armenian people in 1915 in a number of conferences on 7 May 2005 in Lausanne, on 22 July 2005 in Opfikon and on 18 September 2005 in Köniz.

The Lausanne Police Court handled the case as criminal court of first instance. On 9 March 2005, the court found Perinçek guilty of racial discrimination in accordance with Article 261bis paragraph 4 of the Swiss Criminal Code.

Perinçek lodged an appeal to the Criminal Cassation Division of the Vaud Cantonal Court. The Vaud Cantonal Court rejected this appeal and confirmed the verdict of the court of the first instance.

Following this ruling by the Vaud Cantonal Court, Perinçek then appealed his case to the Federal Tribunal, the highest court in Switzerland, for reconsideration and his conviction to be lifted. The Federal Tribunal has rejected this appeal on 12 December 2007.

Perinçek, upon the Swiss verdict becoming final, has applied to the European Court of Human Rights (ECHR) in accordance with Article 34 of the European Convention on Human Rights ("the Convention", from hereon) on 19 June 2006. The Turkish Government has exercised its right to intervene as a third party in accordance with Article 36 Subclause 1 of the Convention, and presented its opinion to the ECHR on 15 September 2011. A seven member chamber of the ECHR has reached a judgment on 17 December 2013.

For the judgment of the ECHR Chamber to become final, one of the conditions mentioned in Article 44 paragraph 2 of the Convention should be met. One of these conditions is that the case must be referred to the Grand Chamber within the three months after the judgment. The Convention Article 43 titled "Referral to the Grand Chamber" anticipates that within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases; request that the case be referred to the Grand Chamber. Switzerland has requested that the Perinçek case to be referred to the Grand Chamber on 17 March 2014. The Switzerland Federal Department of Justice and Police has justified the reason for referral in order to "to clarify the scope available to Swiss authorities" in applying Swiss criminal law to combat racism.

In view of these developments, the first section of our study shall summarize

the stance of the Swiss judicial bodies with regard to the Perinçek Case and their verdicts. The second section of our study shall summarize the judgment of the Chamber of the ECHR that handled the case is going to be summarized. The third section of our study shall assess future prospective developments by taking into consideration the Swiss verdicts and ECHR Chamber judgment.

SECTION I: THE PERİNÇEK CASE BEFORE SWISS JUDICIAL BODIES

The Lausanne Police Court had handled the case in accordance with Article 261bis paragraph 4 of Swiss Criminal Code. The aforementioned article penalizes racial discrimination, and is translated to English as follows;

> *"Any person who publicly incites hatred or discrimination against a person or a group of persons on the grounds of their race, ethnic origin or religion, any person who publicly disseminates ideologies that have as their object the systematic denigration or defamation of the members of a race, ethnic group or religion, any person who with the same objective organises, encourages or participates in propaganda campaigns, any person who publicly denigrates or discriminates against another or a group of persons on the grounds of their race, ethnic origin or religion in a manner that violates human dignity, whether verbally, in writing or pictorially, by using gestures, through acts of aggression or by other means, or any person who on any of these grounds denies, trivialises or seeks justification for genocide or other crimes against humanity, any person who refuses to provide a service to another on the grounds of that person's race, ethnic origin or religion when that service is intended to be provided to the general public, is liable to a custodial sentence not exceeding three years or to a monetary penalty."*

The Lausanne Police Court has convicted Perinçek by taking note of the Swiss public opinion and identifying the Armenian Genocide as a generally confirmed fact. The court has ordered Perinçek to serve 90 days in prison and fined him 100 Swiss Francs and with 2 years suspension of the sentence 3000 Swiss Francs fine and 1000 Swiss Francs to be paid in compensation to Switzerland-Armenia Association. The court in its verdict found Perinçek guilty in accordance with Article 261bis paragraph 4 of the Swiss Criminal Code. The court attributes the recognition of the Armenian Genocide to Switzerland's cantonal and federal parliamentary acts, judicial publications and various edicts of the Switzerland political offices along with some members of the European Council Parliamentary Assembly and the European Parliament recognizing the Armenian Genocide. The court also is of the opinion that Perinçek had acted on racist purposes and his conduct does not originate from a historical debate.

Against the Lausanne Police Court verdict, Perinçek applied to the Vaud Cantonal Court and requested that the judgment be nullified. Perinçek also requested the court that a complimentary inquiry to be made about the historical data and the positions of historians on the Armenian question.

On 13 June 2007, Vaud Cantonal Court rejected Perinçek's request. According to the Cantonal Court, during the acceptance of Article 261bis paragraph 4, like the Holocaust, the Armenian Genocide is recognized as a historic fact. Consequently, the Court does not require the works of historians to verify its existence. The court also acknowledges that Perinçek only rejects the notion of genocide and he does not mention the existence of the manslaughter of Armenians and their displacement.

Upon Vaud Cantonal Court's rejection of his request, Perinçek appealed to Switzerland Federal Tribunal for revision of the judgment and lifting of the sentence. In his appeal, Perinçek emphasized that, in order for Article 261bis to be applied to him and his fundamental rights to be violated, the material data for describing the events of 1915 as genocide were not sufficiently investigated. The Swiss Federal Tribunal has also rejected Perinçek's appeal on December 12th, 2007. According to the Federal Tribunal, Article 261bis paragraph 4, penalizes hatred or discrimination against a person or a group of persons on the grounds of their race, ethnic origin or religion or any person who on any of these grounds denies, trivializes or seeks justification for genocide or other crimes against humanity; and leaves no genocide including the Armenian Genocide outside its scope. The aforementioned tribunal, by investigating the protocols and reasons while adjudicating on this Article concludes that this Article does not only cover Nazi crimes but the denial of other genocide crimes.

Along with this, the Federal Tribunal, despite the nature of the term genocide in Article 261bis, accepts that in reality the term is handled on the basis of the Holocaust and the Armenian Genocide was not distinctively handled excluding when two members of parliament took the floor. In this context; it is pointed out that; because of the Holocaust's clear emergence and acceptance both in Swiss judicial opinion and doctrine, the courts do not require the expertise of historians. Thus, the Court evaluates that it should be known whether consensus is reached or not with regard to the events that Perinçek denies. In this context, for the Court the question should be whether the public and community of historians characterize the events of 1915 as genocide or not. It should not be whether or not the manslaughter and deportations attributed to the Ottoman Empire should be characterized as genocide. The Federal Court, in its ultimate assessment, concludes that the retroactive judicial decisions do not make history but they determine whether genocide

was recognized or not. Hereby, it rules that the previous court's decision on this matter is binding for the Federal Court.

The Federal Court in this context indicates that Perinçek could not show any concrete evidence against the findings of the Lausanne Police Court. The Court points out that Perincek's argument that a number of states refuse to recognize the existence of the Armenian Genocide may originate from political reasons and this claim would not negate the consensus within the scientific community. On Perinçek's justification that on 2009, Switzerland by adopting that a commission of historians to be formed between Turkey and Armenia, implicitly accepted that the existence of genocide was not determined, the Federal Court indicated that the Federal Council had taken this decision in order to induce Turkey to partake in a collective memory study related to its history. The court has the opinion that, this event, especially in the scientific community, does not appear to hold sufficient doubt about genocide. The Federal Court, thus, underlines that Perinçek's argument that the Lausanne Police Court has given an arbitrary decision is not justified and the Cantonal Court has not rightfully entered into a historical-judicial examination.

The Federal Court indicates that article 261bis paragraph 4 looks for intentional conduct and that this conduct should be originating from racial discrimination. The Federal Court, stresses on Perinçek's statement about him being a doctor of law and that he would not change his stance even if an unbiased commission certainly proves the existence of the Armenian genocide before the Cantonal Court, accepts that Perinçek has acted deliberately. The Federal Court, joining the Cantonal Court, accepts that Perinçek's allegations that the Armenians are the assailants of the Turkish people and referring to his membership to Talat Pasha Committee, holds that he has acted on racist and nationalist reasons and his attitude do not originate from historical debates. For the Court, the Armenians being pointed out as assailants is especially debilitative to members of that community and bears racist qualities apart from nationalism.

Also, in its interpretation of Article 261bis paragraph 4, the Federal Court takes into account the 10th Article of the Convention. However, by taking the 10th Article of the Convention into account, the Court has ruled that Perinçek knew he violated Swiss laws by denial of genocide, which he dubbed as an "international lie". The Court in this context concludes that defect of unforeseeability of the law in support of Perinçek is out of question. In this way, the Court concludes that Perinçek with his "provocateur" stance attempted to influence the Swiss judiciary in the direction of his own views

on an issue which is central to the members of the Armenian community. For the Court, Perinçek's conviction harbors the purpose of defending the honor of the Armenian community. For the court, also, the punishing of genocide denial constitutes the measure of preventing genocides in accordance with 1948 Convention on the Prevention and Punishment of the Crime of Genocide. According to the Federal Court, Perinçek by means of not denying massacres and deportation, even though the mentioned acts are not characterized as genocide, constitutes crimes against humanity and is taken within the scope of Article 261bis.

The Swiss Federal Court indicates that when Swiss national law is examined, it accepts the crime of genocide in Article 264. On the other hand, the Court referring to Swiss judicial opinion, on 14 September 2001 the Berne-Laupen Court has absolved Turkish citizens of genocide denial on the absence of intention of discrimination and this verdict was approved by Berne Cantonal Court and by the Federal Court on 7 November 2002.

The Swiss Federal Court, later, continues with the assessment of international law and its enforcement. The Court assesses the various conventions and practices starting with the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. The Federal Court, secondly, states that the status of the International Military Tribunal is an Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (London Charter of 8 August 1945), on its 6th Article, crimes against peace, war crimes and crimes against humanity are punished. The Court, thirdly, states that The Rome Statute of the International Criminal Court 5th Article counts genocide, crimes against peace, war crimes and crimes against humanity in its jurisdiction and that it gives the definitions of genocide in Article 6 and crimes against humanity in Article 7. The Federal Court, fourthly, underlines that for the crime of genocide to occur, *dolus specialis* of extermination of a national, ethnic, racial or religious group should be present as the 2 September 1998 dated Akayesu Case decision of the International Criminal Tribunal for Rwanda indicates. The Federal Court indicates that the Rwanda Tribunal also explains the differences of the crime of genocide from crimes against humanity and war crimes, and that the same action may provide legal basis for more than one crime.

The Swiss Federal Court continues its evaluation of international law enforcement, fifthly with the 26 February 2007 decision of the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro). The Federal Court informs that the Council put emphasis on the clear existence of intention to exterminate and, as understood from the Kupreskic decision of the Former

Yugoslavia Criminal Tribunal, this intention and other conditions separates genocide from crimes against humanity.

The Swiss Federal Court, sixthly, refers to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) dated 21 December 1965 which Switzerland ratified on 1994, states that Article 2 and 3 of the mentioned convention forbids racial discrimination.

The Swiss Federal Court, seventhly, refers to the International Covenant on Civil and Political Rights (ICCPR) dated 6 December 1966, which Switzerland ratified in 1992. Article 19 of the mentioned covenant grants freedom of expression, but its paragraph 3 accepts that legal exceptions could be brought to this freedom. The first exception is the need of showing respect to other people's rights and reputation. The second group of exception is the protection of national security, public safety, public health, or public decency. Two bans are brought with Article 20 of the abovementioned covenant. The first of which is the prohibition of war propaganda, the second is the prohibition national, racial or religious hate speech advocating discrimination, enmity or violence.

The Swiss Federal Court, again, refers to the UN Human Rights Committee's General Observation No. 34 on UN's aforementioned Civil and Political Rights Covenant Article 19 that was issued in its 102nd term in 2011, reminds that freedom of thought should be protected; limiting of this is not accepted; all opinions -regardless of its content- are protected; the punishing of thought and various oppressions on this matter is against Article 19 paragraph 1. The aforementioned Committee, in its observation, in accordance with Article 19 paragraph 2 of the Covenant, the freedom of expression is completely free other than the exceptions in paragraph 3 and bans in Article 20. The Committee, in its aforementioned opinion, indicates that the precaution related to exceptions mentioned in Article 19 paragraph 3 should be approached with caution.

The Swiss Federal Court, later in its decision, indicates that on the problem of penal sanction of statements about historical data, the UN Human Rights Committee finds that aforementioned penal sanctions are against Civil and Political Rights Convention and that the Convention does not sanction general bans and bans other than the ones indicated in Article 20 paragraph 3 cannot be issued.

The Swiss Federal Court, henceforward, reminds that the Committee of Ministers of the Council of Europe on 30 October 1997, with its 97/20 "Hate Speech" decision recommends the member states to fight against hate speech,

to ratify the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and to update national legislation and practices accordingly. Hereby, the Federal Court indicates that about twenty European Council Parliamentary Assembly members with a communiqué dated 24 April 2013 has recognized the Armenian Genocide.

The Swiss Federal Court, after analyzing the situation on crimes against humanity and genocide denial in terms of international law and practice, goes on to examine 14 European states and USA and Canada's national legislation and practices. For that purpose, the Federal Court which consults a report Swiss Institute of Comparative Law dated 19 December 2006 concludes that in the aforementioned countries the situation is very problematic. In this context, the Court while determining that Spain, France and Luxembourg have a strong stance in banning genocide denial only Spain and Luxembourg strongly punishes genocide denial. On the other hand the Court points out that states like Germany, Austria and Belgium only criminalizes the denial of acts during the Second World War and adds France to this list. The Court also indicates that in countries like The Netherlands and Canada, while laws do not include special provisions; the courts criminalize the denial of such acts based on some judgments. The Court, while indicating that the US is more flexible, goes on to indicate that it may punish such denials on some conditions by loss-recovery. On the other hand the Federal Court indicates that countries like Italy, Norway, Denmark and Sweden may criminalize hate associated denials in accordance with more flexible judgments. The Court on the contrary indicates that England and Ireland makes no mention of denial crime.

The Swiss Federal Court, after the report of the Swiss Institute of Comparative Law, indicates that some developments are encountered in France and Spain. France, after recognizing the Armenian Genocide in 1915 by law on 20 January 2001, on 23 January 2012 the Assemblée Nationale with a new law it accepted, has criminalized the praising, denial or foully banalizing war crimes, but this law has been found adverse to the constitution and thus overturned by the Constitutional Council of France. The Constitutional Council found the aforementioned ban to be against freedom of thought and speech in essence. In Spain, a decision of the Constitutional Court dated 7 November 2007 has separated denial of genocide by opinion and justification of genocide and provocation against another group from each other and criminalized the latter and has taken the first as part of freedom of thought. Luxembourg is the one which punishes genocide denial as a whole and the Swiss Institute of Comparative Law has inspired from the Luxembourg example and the Swiss Federal Court has taken this into account.

SECTION II: THE CASE BEFORE ECHR AND THE EVALUATION OF THE ECHR

Against the decisions of the Swiss national courts and their justifications, Perinçek applied to the ECHR asserting that Switzerland has acted against the freedom of expression principle in accordance with article 10 of the Convention. According to Perinçek, while Article 261bis paragraph 4 of Swiss Criminal Code does not possess adequate prévisibilité (foreseeability), the conviction is not supported by a legitimate reason. In this framework, Perinçek indicates that it is not necessary to restrict freedom of expression in a democratic society.

The problem is about the Swiss Government being incongruous with Perinçek's speech, which surpasses freedom of thought and expression and the rights and liberties which are protected by the Convention.

Upon the opposition of the Swiss Government to Perinçek's claim, the ECHR firstly evaluated whether Perinçek's appeal was admissible. To this end, the first consideration of the ECHR was on; even though Switzerland does not put forward this argument, by handling the issue *ex officio*, in accordance with Article 17 of ECHR, Perinçek's statements prompts an abuse of rights (abus de droit) through surpassing freedom of expression.

The problem is about the Swiss Government being incongruous with Perinçek's speech, which surpasses freedom of thought and expression and the rights and liberties which are protected by the Convention. In this framework, the ECHR in accordance with the Lawless Case[1], Garaudy Case[2], Norwood Case[3] and the Ivanov Case[4]; which form the basis of the ECHR court practices, and in accordance with freedom of expression regulated by article 10 of the Convention, concludes that Switzerland acted against the Convention's word and essence. The ECHR, also based on Jersild Case[5] judgment, indicates that the intention is to combat against all kinds of racial discrimination and indicates that it does not certainly contain violence. For the European Court of Human Rights, insulting a group or mocking this group or promoting discrimination is enough.

1 1 July 1961, Series A, n.3, parag.7

2 No. 65831/01, ECHR, 2003-IX

3 No. 23131/03, 16 November 2004

4 No. 35222/04, 20 February 2007

5 23 September 1994, Series A, n. 298, parag. 30

The ECHR, in accordance with its aforementioned court practices, ruled that Perinçek's statements should be investigated in accordance with the Article 17 to determine whether they fall within the protection of freedom of expression provided for Article 10 in the Convention. The ECHR hereby underlines that in its capacity as intervenor; the Turkish Government on the grounds that the Swiss Government's not being based on Article 17, asserts that the Court should not consider the aforementioned article as the inadmissibility of the appeal.

The ECHR on its assessment concerning the statements of Perinçek found some of them and especially the phrase "international lie" as provocative, hurtful, shocking and disturbing, but stated that such comments are also protected in accordance with Article 10 of the Convention. The court also underlines that Perinçek does not deny manslaughter and deportation and only opposes the legal characterization of the events as genocide. The ECHR in this context indicated that what should be clarified is whether Perinçek's statements are tolerable or not and in accordance with Article 17, and whether they provoke grudge and violence. The Court concludes that Perinçek's statements in accordance with the events of 1915 should not be characterized as genocide do not provoke grudge against Armenian people. The Court also indicates that Perinçek has not been put on trial because of Swiss Criminal Code Article 261bis where hate crimes are listed as separate crimes and consequently ruled that Perinçek has remained within the boundaries of freedom of expression. For the ECHR, ultimately Perinçek has not been involved in an expression that exceeds article 10 and can be included in accordance with Article 17 and his appeal is thus acceptable.

Regarding the compendium, the ECHR thinks that Switzerland's verdict of conviction should be taken into consideration as violation of freedom of expression. According to the Court for such an intervention be not contradicting with Article 10, it must fulfill the conditions specified in paragraph 2. In this context, it is imperative to know that the intervention be "foreseen by law" and one or more of the legal purposes in accordance with the paragraph are aimed and these purposes should be "realized in a democratic society".

Perinçek on the constitution of crime foreseen by law, Swiss Criminal Code Article 261bis paragraph 4 mentions a total denial of genocide and the Armenian genocide is not specifically characterized; the Berne-Laupen Court has not given verdict of conviction on different acts of similar nature and the aforementioned ruling was criticized by a former member of the Swiss Government and ergo the condition has not been fulfilled. Against this, the

Swiss Government has indicated that during the discussion of the law in the Parliament, the rapporteur of the Commission has indicated that this law also includes the Armenian Genocide. The Swiss Government also announce that when Switzerland ratified The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) 1965, Switzerland has stated that by law it will prevent any nationalist, racist or religious hatred foreseen by Article 20 paragraph 2. Again, Switzerland indicates that it complies with the restrictions brought by the European Council Committee of Ministers communiqué dated 30 October 1997. On the other hand, Switzerland puts forth that more than 20 countries parliaments have recognized the events of 1915-1917 as genocide and the European Parliament called on Turkey to recognize the Armenian Genocide in 15 November 2000. The Swiss Government, in light of all this data and in accordance with Article 261bis, argues that Perinçek needed to foresee that his actions would have brought conviction in Switzerland and that the Swiss law is adequately clear. According to the Swiss Government, even though the characterization of genocide is not valid, 261bis contains all kinds of crimes against humanity and Perinçek's statements fall under this scope.

The Turkish Government, while using its right to intervene as a third party, put forth the argument that Perinçek's conviction predicated on the consensus in Swiss public opinion is not something that is foreseeable.

While considering the arguments put forth by both sides, the ECHR, reminding its judicial opinion ruled that the condition of being "foreseen by law" is not only limited by finding a base in domestic law, the quality of the relevant law is also included, and so the law should be open and its outcome should be foreseeable by both parties. However, according to the Court, this foreseeability does not have the requirement of giving an exact conclusion. On the application of the aforementioned data to the case at hand, Perinçek asserts that Article 261bis does not contain the necessary clarity and foreseeability. The ECHR, while accepting that the wording of the Swiss law uses the term "(a) genocide", doubt can arise on the issue of the demanded clarity in the Convention Article 10 paragraph 2, Perinçek as being a Doctor of Law and a politician, would have foreseen the criminal sanction while presenting the Armenian genocide as "international law". As a result the European Court of Human Rights ruled that Switzerland's actions are suitable for the Convention Article 10 paragraph 2 which demands "foreseeable by law" condition.

The second condition demanded by the aforementioned Article 10 paragraph 2; the issue of conviction being realized by legal means, the Swiss Government advocates that the verdict of conviction is especially aims to

protect others' reputation and rights. In this context, the Swiss Government asserts that Perinçek's characterization of the Armenians as tools of the Imperialist powers and Turks defending their homeland hurts the honor of the victims and at the same time, declare that it fulfills the condition of defending order demanded by Article 10 paragraph 2. The intervenor Turkish Government, on the other hand, indicates that the conviction does not carry any legal means and Switzerland cannot prove that it eliminates any special and concrete danger to public safety. Before all these allegations the ECHR rules that the conviction is given to protect the rights of another by protecting the honor of the Armenians, on the other hand it cannot be proven that Perinçek's statements severely threatens the public order.

During the evaluation of the third condition within the framework of the aforementioned Article 10 paragraph 2; punishment as precaution is a "necessary in a democratic society", Perinçek puts forth that restriction of freedom of expression is not proportionate with preventing racial discrimination and xenophobia and according to the sixth article of the 1948 Genocide Convention, if there is (a) genocide, it has to be determined by a court. Perinçek also declared that his conviction does not answer a public necessity, and if his conviction is realized for the honor of the Armenian society, it would dishonor the Turkish society which denies the Armenian genocide. Perinçek also rejects his statements being characterized as nationalist and racist by Swiss courts and states that his argument only emanates from the legal characterization of the 1948 Convention. On the other hand Perinçek, according to the court practices of the European Court of Human Rights, on the issue of punishing the denial of the Holocaust; puts forth that Holocaust has been characterized as a crime against humanity by the Nuremberg Tribunal and the historical data is clearly established and thus it constitutes a different case. Perinçek, on the issue of the Swiss Court attributing its ruling on a consensus within the Swiss public, points out that there isn't such a consensus on the issue and in this framework, points out that in two non-promulgated protocols signed on 10 October 2009 between Turkey and Armenia on the creation of an intergovernmental commission to investigate the events of 1915 is an evidence of the aforementioned historical events not being clearly presented.

Before all these allegations the ECHR rules that the conviction is given to protect the rights of another by protecting the honor of the Armenians, on the other hand it cannot be proven that Perinçek's statements severely threatens the public order.

Again, Perinçek remarks that genocide is a well-defined international crime in Article 2 of the 1948 Convention and an intention to wholly or partially

exterminate (*dolus specialis*) an ethnic, racial or a religious group is needed to point out is existence. Perinçek, hereby underlines that the International Court of Justice's decision of The Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) on 26 February 2007 defines the crime of genocide and while deportation of a population from one place to another could be counted as a war crime or a crime against humanity, it does not necessarily carry the components constituting the crime of genocide. According to the ICJ, the side which alleges the crime of genocide must present it with its evidence.

Perinçek on the other hand announces that the Bernard Accoyer, Rapporteur of the French Parliament during the works on incriminating the denial of the Armenian genocide, stated that the assessment of historical events is not the duty of the legislative branch and the legislation cannot replace courts and this remark has been shared by former head of the French Constitutional Council Robert Badinter. Perinçek again reminds Prof. Stefan Yerasimos's notion of separating law from history and while the first has the mission of proving and judging, the second has the aim of explaining without holding any standard of judgment. For these reasons Perinçek advocates that peoples personal believes should not be uniformed and that his statements are not against Article 10 of the Convention.

On the aforementioned third condition, the Swiss Government states that its national courts have emphasized on Perinçek denying or belittling the events of 1915-1917 and that the court decisions are based on the opinions or reports of specialists. The Swiss Government also argues that the courts have emphasized on a large scientific consensus on the issue. According to the Swiss Government, Perinçek's description of the Armenians as the assailants of the Turkish people and addressing the Armenian Genocide issue as an "international lie" shows that Perinçek acts on racist and nationalist motives. The Swiss Government also indicates that the court of first instance has acknowledged Perinçek as a supporter of Talat Pasha who has been accepted as the leading perpetrator of the Armenian Genocide. The Swiss Government also underlines Perinçek's statement that even though he was disproven in an unbiased commission, he would not change his views on this event not being a genocide does not look like a study to question the history. In the light of these data, the Swiss Government argues that its national courts did not overstep the boundaries of the tenth article of the Convention.

The Turkish Government as the intervenor of the case, pointed out that Perinçek did not deny the manslaughter and the deportation of 1915, he only rejected the characterization of genocide within the framework of international

law and Swiss law, and that there is a clear distinction between its legal characterization and "clearly established historical events". The Turkish Government also stated that that a precaution of punishment is not necessary in a democratic society and that many people do not believe the events of 1915 events as genocide. The Turkish government gives the example of the British Government's answer in a parliamentary session in 8 March 2008. The Turkish Government also indicates that no other country in European Council other than Switzerland has ruled for a criminal sentence and other than Switzerland, Luxembourg and Spain, no country has laws which foresees the punishing of denial of genocide. For the Turkish Government all these data demonstrate that there is no mandatory social need for incrimination. According to the Turkish Government the Perinçek ruling of Switzerland is not proportionate with the pursued aim; because Perinçek's statements are not embracing violence and hatred. Hence, according to the Turkish Government, there is no contradiction with Perinçek's statements and the tenth article of the ECHR.

The evaluation of the European Court of Human Rights after hearing the comments of all sides is summarized as follows:

According to the ECHR, on the implementation of the general principles in order to elaborate the need of restraining freedom of expression, the Stroll Case[6] has been summarized, repeated by the Mouvement raélien Suisse case[7] and the Animal Defenders International Case[8]. In a nutshell, firstly, freedom of expression is one of the foundations of a democratic society and the Convention's tenth Article paragraph 2 creates exceptions and it is valid not only the non-violent or unimportant information and comments but also hurtful, shocking or disturbing information and comments. In this framework the exceptions should be narrowly interpreted. Secondly, the application of the exceptions should rely on a "pressing social need". In this framework the European Court of Human Rights checks whether the restrictions brought by Article 10 are in accordance with the freedom of expression. Thirdly, the ECHR, does not replace the national courts during this duty of supervision, it only investigates their rulings within the framework of Article 10 and evaluates whether the measures are taken "in accordance with legitimate purposes".

According to the ECHR, the aforementioned within the framework of the basic principles while investigating historical problems, within the

6 No. 69698/01, ECHR, 2007-V, parag. 101

7 No. 16354/06, ECHR, 2007-V, parag. 48

8 No. 48876/08, 22 April 2013, parag. 100

investigation of the historical fact as a part of the freedom of expression, the Court cannot arbitrate in the debates between historians, it can only evaluate whether the precautions are taken in accordance with the pursued goal. The ECHR reminds that in this framework; statements of political or of general interest are not to be subjected to restriction of freedom of expression. Again, according to the ECHR, the tenth article protects data and statements on the "grey areas" in historical debates. For the Court, it has been seen that historical events are not evaluated with the same sternness after years pass by.

The ECHR later demonstrates that in its precedence concerning the applications brought against Turkey on the issues of hate speech, praising of violence and the Armenian question. In this framework the ECHR refers to the Erdoğdu and İnce Case[9] the ruling of the Istanbul Court on the basis of separatist propaganda in Kurdish issue has been found against the principle of freedom of speech since it is of non-violent nature and the statements have an analytic nature. The second case referred to by the ECHR is the Gündüz Case[10]. The ruling in this case has also been found against the Convention because of the Turkish court convicting the defendant because of its non-violent assembly. The third case the European Court of Human Rights refers to is the Erbakan Case[11]. Erbakan's being put on trial on the grounds that he calls for hate and religious intolerance has been found against the Convention because even though the ECHR calls for the politicians to refrain from using intolerant statements, the intervention to freedom of speech is found not sufficient with regard to "necessary in a democratic society". The fourth case the European Court of Human Rights refers to is the Dink Case[12]. The statements of Turkish citizen of Armenian descent Hrant Dink - who has been found guilty of denigrating Turkishness by Turkish courts with his statement that "the Armenian's perception of the Turk is a "poison" and Armenians constantly refer to themselves as the "victim" and constantly pushing the Turks to recognize the events of 1915 as genocide is an obstacle on the way to form an identity on healthy foundations" - has been found by the ECHR as bearing no hate speech and therefore is not against the Convention. The ECHR in this case could not detect an aim to degrade Turkishness and also ruled that his conviction is not the outcome of "pressing social need". The fifth case the ECHR refers to is the Cox Case[13]. While he was teaching in Turkish Universities, Cox, who has been deported from Turkey because of his statements "Turks have assimilated the Kurds" and "Deported the

9 No. 48876/08 and No. 25068/94, ECHR, 199-IV

10 No. 35071/97, ECHR, 2003-IX

11 No. 59405, 6 July 2006

12 Nos: 2668/07, 6102/08, 30079/08, 7072/09, 7124/09, 14 September 2010

13 No. 2933/20 May 2010

Armenians from the country and massacred them" has applied to Turkish courts but his case was dismissed. The ECHR has ruled that there is no way to determine that Cox's statements are against the national security of Turkey and the restriction of Cox's freedom of expression is not adequately supported.

On the application of the principles that it has accepted in its precedence including the applications brought against Turkey, the ECHR firstly declares cannot rule on whether the manslaughter and deportations of 1915 could be legally defined as genocide within the framework of Swiss Criminal Code Article 261bis paragraph 4. The ECHR, hereby, reminds that the enforcement of national law first is the duty of the national offices and especially to the courts and the duty of the ECHR is only to control the rulings of the courts in accordance with Article 10 of the Convention. Control of the rulings of the national courts to that end too is of the opinion that Perinçek's conviction is emerged out of a "pressing social need". The ECHR, with this aim points out that the balance between defending of the victims' families and relatives' honors and the freedom of expression of the applicant must be preserved. Within this framework, for the ECHR, especially the rate of accordance of the intervention and the reasons for the punishment the national offices foresee should be examined.

While the Swiss Federal Court accepts that there is no consensus within the public on the legal evaluation of the events and Perinçek and the Turkish Government's assessment that a "consensus" cannot be mentioned, the ECHR shares this opinion. This is so because according to the ECHR there is no consensus neither in Switzerland nor in the World

The ECHR, in the light of these mentioned principles, underlines that the characterization of the events of 1915 as "genocide" stirs great attention from the public with no obligations and hinted that Perinçek has acted within this scope and by keeping in mind Perinçek's credentials as a lawyer and a politician and the topics of the meetings that the statements were issued (1923 Treaty of Lausanne), evaluates that his statements are of a historical, juridical and political in their nature. Within this framework, especially because of the attention the topic gets from the public, the ECHR ruled that the margin of assessment of the national courts on Perinçek's statements is narrow.

Later on, concerning the Swiss courts' basic justification that there is a consensus within the public and especially within the scientific community on the evaluation of the events, the European Court of Human Rights, while

accepting that the primary assessment has been made by national courts, declared that the notion of "consensus" should be evaluated. While the Swiss Federal Court accepts that there is no consensus within the public on the legal evaluation of the events and Perinçek and the Turkish Government's assessment that a "consensus" cannot be mentioned, the ECHR shares this opinion. This is so because according to the ECHR there is no consensus neither in Switzerland nor in the World (recalling that out of 190 states only 20 states share the opinion that there was a genocide).

In its assessment the ECHR informs that "genocide" is a well-defined term, and (in accordance with Article 2 of the 1948 Convention) and that states and persons (especially in accordance with Article 5 of the Rome Convention) are held responsible. The Court recognizes that the Court practices of the ICJ and International Criminal Tribunal of Rwanda that are seeking the intent of extermination (*dolus specialis*) for the crime of genocide to be realized and that this is very hard to prove. For the European Court of Human Rights is of the opinion that the justification of the presence of a "general consensus" by the Swiss courts for Perinçek's verdict of conviction is not fully realized.

On the other hand the ECHR also carries the opinion that the presence of a "general consensus" about the events is also doubtful. For the Court, as could be understood from the Spanish Constitutional Court's decision in 2007, the historic studies are debatable and cannot reach clear and objective facts. For the ECHR the issue of the Armenian Genocide demonstrates differences from the denial of the Holocaust; the Jewish genocide. For example, as can be seen from the Robert Faurisson case, according to the United Nations Human Rights Committee resolution on 8 November 1996 there are three differences. Firstly, on the Holocaust, while there is no legal characterization denial, the factuality of the events was not also denied. Secondly, the conviction of the Nazis was relied on the Status of the Nuremberg International Military Tribunal. Thirdly, historical events were assessed by an international court. However, in the Perinçek case, such data cannot be encountered and thus the European Court of Human Rights evaluates with doubt the procedure followed by the Swiss national courts.

Again the ECHR declares that it shares the Turkish Government's assessment that Holocaust denial is the driving force of anti-Semitism (hatred of Jews) and Perinçek's statements do not carry a characteristic of instigating hate or violence. Thus in the eyes of the ECHR the denial of the characterization of the events of 1915 as genocide does not share the same reflections with the denial of the Holocaust. The ECHR also acknowledges that among 16 European states none other than Luxembourg and Spain punish the crime of genocide without limiting themselves to the crimes of the Nazies. For the

ECHR this shows that there is a greater need of consensus compared to these other countries, which was not accomplished. The ECHR again quotes the ruling of the Spanish Constitutional Court's ruling of a simple denial of genocide cannot be counted towards prompting of violence and that the conclusions given free from standard of judgment on the existence of the event can be included in the scientific freedom of the publication. The ECHR reminds that the French Constitutional Council's stance that it would be against the freedom of expression and freedom of opinion to punish the denial of genocide by law, and this is especially against the freedom of speech and freedom of opinion in democracies. For the ECHR, as the decision of the French Constitutional Council demonstrates, there is no contradiction between the formal recognition of some events as genocide and the punishing of people who do not accept this formal opinion. Because, the majority of the states recognizing the Armenian genocide did not find it necessary to implement a penal law in accordance with the aim of preserving the freedom of expression of minorities on issues which cannot be fully proven. On the other hand, the ECHR reminds Resolution 34 of the United Nations Human Rights Committee dated 2011 and that the Civil and Political Rights Convention did not sanction the penalization of opinions on historical events. In addition, the ECHR reminds that the Perinçek ruling is the first ruling to punish on the issue of the Armenian genocide and in 2001 the Berne-Laupen Court has ruled that the accused did not carry the intention of discrimination. In the light of these data, the ECHR states that it finds it doubtful that the verdict of conviction of Perinçek has emerged from a "pressing need".

The European Court of Human Rights lastly rules that the weight and the character of the sanctions should be examined with reference to the proportionality of the intervention. The Court points out that within this framework these kinds of sanctions could be dissuasive without adding to the problems of public debates on the interests of the community.

In the light of all these aforementioned data, the European Court of Human Rights concludes that all the reasons put forth by the Swiss authorities are pertinent and they are generally not sufficient. The Court especially stresses that the conviction of Perinçek cannot be demonstrated as satisfying an obligatory need of a democratic society and that the Swiss judiciary which possessed a narrow margin of appreciation has overstepped its boundaries thus violated Article 10 of the ECHR. The competent Chamber of the European Court of Human Rights in its judgment, rules by five to two votes that Article 10 of the ECHR has been violated on the cause of action.

Italian judge Raimondi's and Hungarian judge Sajo's personal opinions were suffixed to the ruling of the European Court of Human Rights as consenting

opinion, which in international judicial law is allowed to be added by judges that agree with the final outcome of the ruling but not agreeing with all the justifications. The "partially" common opposing views of Montenegrin judge Vucinic and Portuguese judge Pinto, who have voted against the decision of the European Court of Human Rights, have also been added to the resolution text as "opposing views" as is called in international juridical law.

Judges Raimondi and Sajo, in their common personal opinions[14], briefly, indicated that they are morally in need of making a statement. The aforementioned judges underlined that the wounds opened by Meds Yeghern ("the great calamity", in Armenian) should not be forgotten and recognize that its effects are still felt by fifth generation Armenians. However the aforementioned judges, in sum, stated that genocide must be properly determined with regard to legal certainty on the issue of freedom of expression, and that Switzerland has not done so for the Armenian Genocide. Hence, the judges concluded that the Swiss Federal Court has acted too broadly on this issue, thus by acting this way, the Swiss law does not recognize any exceptions or pardons for scientific studies or artistic activities. So, this shows that statements by Perinçek, who believes that there are some exceptions, cannot be punished in this case. As a matter of fact, in a similar case the suspects were set free. The judges, in consideration of the Perinçek verdict, has taken it positively that the verdict was set forth by a law, however, they stated that it was not sufficient that the Court took this as a benchmark, and that perhaps respecting the memory of the dead is not more important than the statements made in context of historical research by a living person. In other words, the judges point out that it would be appropriate to include the intendment of the law in the assessment. The aforementioned judges also find it surprising that the Swiss Court stated that the justification of protecting the honor of the Armenian society was an attack on some people's personalities and inform that this is a matter of debate. The judges indicate that disrespectful and even pushing remarks cannot belittle a group of people and such remarks cannot be punishable unless they encourage people for hatred and violence; and none of these components are present in this case.

The judges indicate that disrespectful and even pushing remarks cannot belittle a group of people and such remarks cannot be punishable unless they encourage people for hatred and violence; and none of these components are present in this case.

On the other hand, the judges demonstrate that on the Perinçek case, the Swiss courts have taken racial discrimination as the basis that denial of the legal

14 See. Ruling Appendix, pp. 55-61

characterization of an act undertaken against a community is considered as racist or racial discriminative and such an unconditional accusation disables the consideration of freedom of expression in law. The judges, in the last instance, conclude that the punishment given to Perinçek's statements is disproportionate.

With regard to Judge Vucinic and Judge Pinto's "partially" dissenting-views[15]; these judges indicate that Perinçek case has brought two fundamental judicial problems that the European Court of Human Rights has never handled before. These two problems are; i) international recognition of the Armenian Genocide; ii) punishment of the denial of this genocide. For the aforementioned judges, problems as large as this require the judgment of the Grand Chamber. But within the scope of the undertaken Small Chamber decision, the judges find that there is no contradiction with Article 10 of the Convention.

According to judges Vucinic and Pinto, Switzerland is not alone in the international recognition of the Armenian genocide. According to them, the Armenian genocide has been recognized by the Turkish state itself, modern important people, institutions, governments, international organizations, national or regional authorities and national courts from all corners of the world.

According to the aforementioned judges, the Turkish state, shortly after the massacres, put the ministers and notables of the Committee of Union and Progress including Talat Pasha, Enver Pasha, Cemal Pasha, and Mr. Nazım on trial in accordance with the Ottoman penal code. The court sentenced many people to death on 5 July 1919 for crimes including the "massacre" of Armenians and stated that the "Massacres and ravaging of Armenians has originated from the decision of the Central Committee of the CUP" (16). The judges state that the trials and punishing of the perpetrators of the actions against the Armenians in Yozgat, Trabzon, Büyük Dere, Urfa, Erzincan and alike between 1919 and 1920 presents the second group of national court rulings which, in their view, demonstrates that the Turkish state recognizes the Armenian genocide. The aforementioned judges also indicate that with regard to the Joint Declaration of France, England and Russia on 15 May 1915, the Joint Declaration of the American Senate and the House of Representatives dated 9 February 1916 and the overturned Treaty of Sevres dated 10 August 1920, that the practice law has accepted that the committing of an illegal act requires the criminal liability of persons. The judges also indicate that although in the Treaty of Lausanne the criminal liability of

15 See Ruling Appendix, pp. 62-80

persons was not accepted, the signatories of the Treaty of Sevres—in accordance with the Joint Declaration of France, England and Russia dated 15 May 1915- has accepted that these massacres were committed in line with the state policy of the Ottoman Empire. The Judges indicate that Article 230 of the Treaty of Sevres is the precursor of the status of the Nuremberg and Tokyo tribunals on the issue of "crimes against humanity". On the other hand, the aforementioned judges, approach the Declaration and Protocol of Amnesty, which is a part of the Treaty of Lausanne, as a declaration of amnesty by the Turkish and Greek governments on crimes which are tied to the political events between 1 August 1914 and 20 November 1922 and interpret the event as such. According to them, Article III of the Declaration does not cover the Armenian "massacre" financially or materially. According to the Judges, under any circumstances, the "crimes against humanity and civilization", as indicated by the Joint Declaration of 15 May 1915, cannot be forgiven while taking into account the binding and inarguable nature of genocide and crimes against humanity in precedent law and treaty law. The judges as its legal basis show the 1998 International Criminal Tribunal's Article 29, 1974 European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes and the UN General Assembly resolution dated 16 December 2005 "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law" paragraph 6.

The aforementioned judges, again, indicate that the Armenian genocide has been recognized by many international organizations but lists them without making a distinction between intergovernmental organizations and non-governmental organizations. The rulings of the intergovernmental international organizations which recognize the Armenian genocide are as follows: Parliamentary Assembly of the Council of Europe (personal participation of a number of parliamentarians: 24 April 1998-51 people-, 24 April 2001 -63 people-, 24 April 2013 -26 people); European Parliament (18 June 1987, 15 November 2000, 28 February 2002, 28 September 2005); Latin American States Organization (Southern Common Market) MERCOSUR Parliamentary decision (14 November 2007). In addition, NGOs which recognize the Armenian genocide are as follows: International Center for Transitional Justice, Young Men's Christian Association-EU; Human Rights League; Association of Genocide Scholars; Kurdish Parliament in Exile; Union of American Hebrew Congregations; Churches Ecumenical Councils. In addition, the aforementioned Judges have added the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities report dated 2 July 1985 and UN War Crimes Commission report dated 28 May 1948. The dissenting judges also state that the Armenian genocide has

been recognized by many national courts in many countries. The judges, in this framework, indicate that some American courts have ruled that there is no US federal policy against the use of "Armenian Genocide", provided the examples of a Paris court that have convicted Prof. Bernard Lewis on 1 June 1995 and a Berlin tribunal that has set Armenian Soghomon Tehlirian, an Armenian who killed Talat Pasha on 3 June 1921, free on the basis of "temporary madness due to trauma of massacre".

The dissenting judges indicate that the Armenian genocide is recognized by many states. The judges state these states as follows: Germany (15 June 2005 Parliament decision); Argentina (18 March 2004 and 15 January 2007 laws); Belgium (26 March 1998 Senate decision); Canada (13 June 2002 Senate, 23 April 1996 and 21 April 2004 House of Commons Decisions); Chile (5 June 2007 Senate decision); "Cyprus" (24 April 1975, 29 April 1982 and 19 April 1990 House of Representatives decisions); USA (9 April 1975, 12 September 1984 and 11 June 1996 House of Representatives decisions); France (29 January 2001 law); Greece (25 April 1996 Parliament decision); Italy (16 November 2000 Chamber of Deputies decision); Lebanon (11 May 2000 Parliament decision and 3 April 1997 Chamber of Deputies decision); Lithuania (15 December 2005 Parliament decision); The Netherlands (21 December 2004 Parliamentary decision); Poland (19 April 2005 Parliamentary decision); Russia (14 April 1995 Duma decision); Slovakia (30 November 2004 decision); Sweden (11 March 2010 Parliament decision); Uruguay (20 April 1965 Senate and House of Representatives decision and 26 March 2004 law); The Vatican (10 January 2000, common declaration of the Pope and Catholicos Karekin II); Venezuela (14 July 2005 National Assembly decision). The aforementioned judges state the following as regional governments and autonomous communities which recognize the Armenian genocide: 43 States of USA, the Basque Country, Catalonia, Balearic Islands, Wales, Scotland, Northern Ireland, New South Wales (Australia).[16]

In the presence of the aforementioned data, the dissenting judges underline that the Armenian genocide is recognized by the international community and the Turkish state, and are convinced that the intervention by Switzerland with regard to Perinçek's freedom of expression, an issue of which the existence has been proved sufficiently, is in accordance with the law. According to the Judges, Article 261bis, paragraph 4 of Swiss Criminal Code is in accordance with the principle of lawfulness as the expression "genocide and crimes against humanity" is referring to crimes defined both in Swiss Criminal Code and international law especially in the Genocide Convention and International Criminal Tribunal Status. For the Judges, Article 261bis paragraph 4 limits

16 On this referal, the aforemnetioned judges inform that what must be conculted are the documents collected by Vahakn Dadrian.

the definition of the punishable act by attributing intentions of racial discrimination.

The aforementioned judges, inform that the criminalization of denial of genocide is in accordance with the principle of proportionality. In fact, besides the intervention to freedom of expression to be legal, the judges recall that two standards need to be met; one of these standards is the necessity of intervention and the other is the intervention being in accordance with the aim. The European Court of Justice seeks the applicability of these standards separately; for the first standard the appropriateness and sufficiency of the precaution need to be met, whereas for the second standard the need for meeting a communal necessity is sought. The aforementioned judges, believe, with regard to the issue of the narrow margin of appreciation of the state, that the margin of appreciation of the state should be larger regarding the tragic events of human history. As a matter of fact, in their view, criminalization of denial of genocide is compatible with freedom of speech and is favorable for by the European order of protecting human rights. They believe that the signatory states of the Convention must prohibit racism, xenophobia and the lack of ethnic tolerance. This is a requirement of practice law and no national or international law would be able oppose it. The judges can only provide the Convention on Cybercrime, which has entered into force within the European Council but has not yet been ratified by Turkey, as the basis for their argument. The Judges further provide the European Council Framework decision on combating racism and xenophobia numbered 2008/913/JHA which bans praising of genocide and crimes against humanity, denial of genocide and banalizing of genocide to their case. According to the aforementioned judges, the European order criminalizes the denial of genocide with regard to protecting human rights on these accounts: i) The International Military Tribunal formed by the 1945 London Charter decision; ii) Any international court decision; iii) The decision of the state tribunals where genocide is realized or denied; iv) recognition of genocide by constitutional bodies like President, Parliament or Government. The judges further add number v being any state where there is a public consensus on that genocide was committed.

According to the aforementioned judges, the distinction between denial of genocide which is recognized by the Spanish Constitutional and belittling of genocide, which is against the constitution, or its justification cannot be accepted since it is against the Convention of Cybercrimes Additional Protocol and the Council of the European Union's 2008/913/JHA Framework decision. Hence, denial or justification of genocide harms the families of the victims the same way. Such an act being covered behind the mask of scientific research or briefing would prompt ill-intentioned people to take advantage of these.

The dissenting judges later on handle the issue of the need of criminalizing genocide denial and they object to the view that existence of a law is needed in order to define the crime of genocide. According to them, within the framework of this view, these laws would have no effect in the presence of the fact that historical events should be left to historians. Due to all these reasons, for the aforementioned judges, denial of genocide brings the need of a state policy and the states must do what is necessary in accordance with the first article of the Genocide Convention and the 26 January 2007 dated resolution of the United Nations General Assembly.

The aforementioned judges, as stated in the European Court of Human Rights's Garaudy Case, accept that accusing the victims of distortion of history is "the strictest form of racial belittling for them and it is an incentive to hatred" and they take this in context of disturbing public peace. According to the judges, this is true not only for Jews but also for Armenians.

Lastly, the dissenting judges point to the application of European norms in the developments of the case and they believe that the presence of *actus reus* and *mens rea* are proven. In this framework, the judges put emphasis on Perinçek's statement that the Armenian genocide is an "international lie" and that he adopts the views of Talat Pasha; and acknowledge that these statements point to the lack of tolerance against "an easily hurt minority" and severely encourage hatred. Concerning the second component, the judges demonstrate that the Swiss courts have determined that Perinçek has acted with racist and nationalist aims. The judges hereby put forth that determining of the aim of the accused is a fact and this can only be determined in a domestic court.

In light of all these, according to the dissenting judges, in the Perinçek Case, the verdict fits the limitation foreseen by Article 10 paragraph 2 of the ECHR within the framework of authenticity of the events determined by Swiss courts, the legality of the laws regulating the denial of genocide and its proportionality to the aim, and according to the principles accepted in Europe firstly by the Council of Europe and the European Union. The judges conclude that Perinçek's conviction is not against Article 10 of the ECHR and that they have not forgotten the Armenian genocide which is evaluated as "forgotten genocide" of the early 20th century.

SECTION III: POSSIBLE DEVELOPMENTS OF THE PERİNÇEK CASE

In accordance with Article 43 paragraph 1 of the Convention, Switzerland asked the Perinçek case to be referred to the Grand Chamber. In this

framework, primarily the question is whether the Grand Chamber would examine the case. Hence, in Article 43 paragraph 1, request of referral of the case to the Grand Chamber by either side can only be done in "exceptional cases".

In such a case, in accordance with Article 43 paragraph 2, whether an "exceptional case" is present or not would be determined by a five judge panel formed within the Grand Chamber. The aforementioned panel, again in accordance with Article 43 paragraph 2, would accept the case to be sent to the Grand Chamber "if 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".

Before examining whether or not the Perinçek Case will be sent to the Grand Chamber by the five judges, we will present general information on how this panel of judges operates and the number of cases sent to the Grand Chamber as it would shed light to our assessment of examining the case at hand. ;

Firstly, the five judge panel is formed among the 17 judges who are elected to the Grand Chamber. The aforementioned panel is not continuously in session, but they gather with 8-9 week periods and investigate 45 to 60 requests each time[17]. The panel does not gather for more than 6 times a year[18]. Thus, it would take a few months for the panel to gather and come to a decision on the Perinçek case.

When the rate of cases sent to the Grand Chamber by the five judge panel is investigated, from the when Protocol 11 came into force on 1 November 1998, within the framework of the method that is followed, the aforementioned panel has investigated 2129 requests until October 2011; and from these, only 110 requests had been sent to the Grand Chamber[19]. This ratio constitutes 5.16 percent of the total requests[20]. This data shows that the panel indeed refers the cases to the Grand Chamber only on "exceptional cases" as stated in the Article 43 of the Convention.

In order to determine whether the Perinçek Case would be sent to the Grand Chamber, the situation must be investigated in accordance within the framework of the conditions set by Article 43 paragraph 2 of the Convention. According to a European Court of Human Rights document, which

17 ECHR, The general practice followed by the Panel of the Granc Chamber when Decideng on request for referral in accordance with article 43 of the Convention, October 2011, p.13

18 Ibid.

19 Ibid.

20 Ibid.

investigates the practices in the name of the European Court of Human Rights and the aforementioned panel, the cases which have been sent to the Grand Chamber are as follows; i) Cases affecting or changing the established court practices; ii) Cases suitable for enhancing court practices; iii) Cases where the principles of the established court practices need to be clarified; iv) Cases where the enhancing of the court practices decided by the panel to be reassessed by the Grand Chamber; v) Cases related with "new" issues; vi) Cases which put forward "a serious problem of general importance"; vii) "High profile" cases which includes serious problems for the states[21]. Out of the types of cases which are sent to the Grand Chamber by the panel, the first five are about the cases that "raise a serious question affecting the interpretation or application of the Convention or the Protocols" specified in Article 43. On the other hand the last two types of cases are about cases with "serious issue of general importance".

In the light of the practices of the five judge panel, referring of the Perinçek Case to the Grand Chamber should be investigated along the lines of the first five types of cases. While the final decision on this issue belongs to the panel, it doesn't seem possible that the seven judge chamber decision on the Perinçek case is of the nature that would raise a serious question affecting the interpretation or application of the Convention or the Protocols. Because the Chamber of the European Court of Human Rights have controlled their decision firmly and primarily, even though the Swiss Government did not request it, it evaluated Perinçek's appeal in accordance with article 17 of the ECHR on whether it possesses an abuse of right (abus de droit). The relevant Chamber of the European Court of Human Rights have seriously evaluated Perinçek's statements comparatively with the Lawless Case, Garaudy Case, Norwood Case, Ivanov case and the Jersild Case in order to determine whether they possess an abuse of right and it decided that it is not the case. Here, the European Court of Human Rights has acted within the framework of its established court practices.

Regarding the assessment of the relevant Chamber of the European Court of Human Rights on the cause of action, the Court handles the case within the framework of its established court practices. In fact, the relevant Chamber indicates that the conditions set in Article 10 paragraph 2 of the Convention must be met in order for the conviction of Perinçek by Switzerland not to contradict freedom of expression. The relevant Chamber, within this framework, resorted to investigate Swiss Criminal Code Article 261bis, paragraph 4 in order to determine whether this fulfills the condition that indicates for the states constitute a crime and punish the crime must be

21 Ibid, pp. 6-11

foreseen by law. Even though the aforementioned ruling of the Swiss Criminal Code does not openly mention the Armenian genocide, the Court found that Switzerland had fulfilled this condition on the *prévisibilité* of punishment.

The second condition for the exception investigated by the relevant Chamber of the European Court of Human Rights is about determining whether the Swiss courts have given the verdict on legitimate purposes. On this issue, the Swiss Government indicated in its defense that the national courts pursue the legitimate aim of protecting another's rights and reputation. The Swiss Government especially stresses that Perinçek's characterization of the Armenians as pawn of the imperialist powers dishonors the Armenians and thus threatens to heavily disrupt the public order. The European Court of Human Rights accepts on investigation of this issue that the Swiss Courts have acted in order to protect the honor of the Armenians, however, rules that Switzerland has not adequately demonstrated that Perinçek's statements pose a great threat to public order.

The third condition of exception investigated by the relevant Chamber of the European Court of Human Rights with regard to the cause of action is on the point of determining whether the punishing of Perinçek by Swiss Courts is a "necessity in a democratic society". In the presence of the Swiss Government's claims that its national courts have found Perinçek guilty because of his denial or belittling of the events of 1915-1917, and that, however, the presence of a wide scientific consensus on the issue has been determined, together with the claims that Perinçek has acted on racist and nationalist motives, the European Court of Human Rights have evaluated the issue again in accordance with its established court practices. In this framework, the European Court of Human Rights consults to the principles accepted on the issue of using freedom of speech primarily in the Stroll Case decision, Mouvement raélien Suisse Case and Animal Defender International Case. According to the court practices of the European Court of Human Rights, freedom of expression is a foundation of the democratic society and this principle is also valid for hurtful, shocking or concerning information or statements. Also, for the European Court of Human Rights, the decision must rely on "a pressing social need". In this framework, according to the European Court of Human Rights, it does not replace national courts, it only investigates whether the decision of the national courts are in accordance with the tenth article of the Convention. During its supervision duty, the Court evaluates whether the given punishments by national courts are "proportionate with the legitimate purpose followed". The relevant Chamber of the European Court of Human Rights, within the framework of these general principles, recalls that it does not arbitrate between historians while investigating historical problems, and that statements of political or general interest nature are not

included in the scope of the tenth article which regulates restrictions on freedom of expression.

The relevant Chamber of the European Court of Human Rights revealed that on the Perinçek Case, the freedom of expression does not include hate speech or praising of violence, and have explained its court practices in these issues by giving examples of cases filed against Turkey.

In this framework, with regard to **the Erdoğdu and Ince Case, the Gündüz Case, the Erbakan Case, the Dink Case** and **the Cox Case**; the relevant Chamber of the European Court of Human Rights did not approve the restriction of these peoples' freedom of expression on the basis that these cases do not call for violence, that freedom of expression is "essential in a democratic society" and that conviction is not "a pressing social need".

The relevant Chamber of the European Court of Human Rights indicates that in the application of its principles accepted in the aforementioned court practices in the Perinçek Case, its mission is neither to determine the trueness of the 1915 manslaughter and deportation events nor to find out whether these events are legally characterized as "genocide" in accordance with the Swiss Criminal Code. The Court indicates that its duty is to oversee the case in accordance with Article 10 of the Convention, and that Perinçek's statements, when investigated in its whole context, has the attributes of being historical, judicial and political. With regard to the debate on the existence of a consensus in the scientific society as to define the events of 1915 as genocide, the Court argues that there is no consensus in the world on this issue as only 20 out of 190 states including Switzerland, officially recognized the "genocide". In addition, the Court stresses that genocide is a well-defined term and for the existence of the crime, *dolus specialis* of exterminating a community is needed, and concludes that Switzerland's reliance of Perinçek's conviction to general consensus do not fulfill this examination. On the other hand, the Court indicates that the Armenian genocide cannot be compared to the Holocaust; because in the case of the Holocaust neither the events nor the judicial qualities of the events were rejected. Yet, the Holocaust is based on the Status of the Nuremberg International Military Tribunal and this international tribunal assessed the situation. However, the same parameters cannot be observed in the Perinçek Case. Meanwhile, recalling that since the Berne-Laupen Court had ruled that there was no racial discrimination on a similar case on the issue of the Armenian Genocide in 2001, the relevant Chamber of the European Court of Human Rights has stated that it is doubtful that the conviction of Perinçek by Swiss courts is a "pressing social need". The relevant chamber of the European Court of Human Rights found the sanctions heavy and the intervention disproportionate. Stating that Perinçek's conviction

does not satisfy a "pressing social need", the Court points out that Article 10 of the Convention is violated. The Perinçek ruling of the relevant Chamber of the European Court of Human Rights, when investigated in the framework of the aforementioned summarized basic principles and of the approach of the Court, it appears that the European Court of Human Rights have followed the established court practices and that it is not probable that the five judge panel will refer the case to the Grand Chamber with the justification that it effected or changed the established court practices.

The possibility of the Perinçek ruling being referred to the Grand Chamber in order to enhance court practices seems weak. This is because the Chamber has thoroughly evaluated the court practices of the European Court of Human Rights.

The possibility of the Perinçek ruling being referred to the Grand Chamber in order to enhance court practices seems weak. This is because the Chamber has thoroughly evaluated the court practices of the European Court of Human Rights. It has tied the issue of punishment on the issue of freedom of expression to the "necessary in a democratic society" condition, and by searching for the inclusion of racism and discrimination in the statement; it has indicated that statements historical, juridical and political in nature cannot be automatically evaluated within this characteristic. As such, this ruling does not present a reform in the issue of freedom of speech.

The possibility of the Perinçek ruling being referred to the Grand Chamber in order to clarify the principles of established court practices also seems weak. This is because these kinds of referrals depend on the assumption that some fundamental principles are not clear. Conversely, regarding the Perinçek Case, the referent principles of the relevant Chamber of the ECHR have been repeatedly evaluated and it seems that no further elaboration is needed.

The possibility of the Perinçek ruling of the being referred to the Grand Chamber by the panel of five judges for reevaluation seems in essence to be nonexistent. This is because, in order for such a referral to occur, firstly the seven judges Chamber must be able to improve court practices of the ECHR or come up with some kind of juridical innovation. However, the Perinçek ruling of the relevant Chamber, as reported in the summary of the ruling, have been reached by applying the principles of the established court principles and no improvements have been made.

The possibility of the Perinçek ruling being referred to the Grand Chamber by the panel of five judges due to it being a "new" problem does not, again, seem like a real possibility. This is because, even if the newness component

is deemed to be the introduction of the issue of the "Armenian genocide" to the ECHR, in essence the presence of the Court rulings on the issue of the Holocaust makes it in its essence not new. Furthermore, since the essence of the Perinçek Case is about freedom of expression, the "Armenian genocide" problem does not seem to add a new feature to established court practices.

With regard to the Perinçek ruling being referred to the Grand Chamber by the panel of five judges due to the case putting forth "a serious issue of general importance" (as is mentioned in Article 43 paragraph 2 of the Convention); however, the ECHR practices, as mentioned before, put forth that this could be a relevant point for cases that either put forward "a serious problem of general importance" or include "high profile" issues for the states.

The possibility of the Perinçek ruling being referred to the Grand Chamber by the panel of five judges on the basis of the case putting forward "a serious issue of general importance" does not seem like a weak possibility. This is because even though only Luxembourg and Spain foresee the sanctioning of general denial of genocide, recognition of the "Armenian genocide" by some European states would result in important juridical and political effect to the ruling of the ECHR. In fact, the note presented by the French Association of Armenian Lawyers and Jurists (AFAJA-L'association Française des Avocats et Juristes Arméniens) to the Swiss Ambassador on 21 January 2014 points out that the Perinçek Case is the concern of the international society, the member states of the Council of Europe, and the European civil society, and that Switzerland must ask for the referral of the case to the Grand Chamber. The aforementioned association holds the opinion that the essence of the problem is relevant with the principle and the scope of the punishment genocide denial and crimes against humanity. Along with the allegations of the aforementioned association, there is no doubt that some institutions of the Armenian Diaspora would carry similar opinions and proposals to the five judge panel. Other than the Armenian institutions, according to Montenegrin judge Vucinic and the Portuguese judge Pinto who have added their dissenting opinions to the ruling, the case would require the decision of the Grand Chamber. The aforementioned judges indicate that the Perinçek case has brought forward two issues that the European Court of Human Rights have never handled; the first being the international recognition of the Armenian genocide and the second being the punishing of the denial of this genocide.

The possibility of the Perinçek ruling being referred to the Grand Chamber by the panel of five judges on the basis of the case involving "high profile" problems, again, does not seem like a weak possibility. It is noteworthy that the ECHR document of practices indicates that cases of this nature are related to historical, geopolitical or religious problems or are related to events or

crimes which get media attention[22]. If the five judge panel acts on this understanding, there is a possibility that the Perinçek Case will be referred to the Grand Chamber.

Within the framework of the assessment on the possibilities of the Perinçek Case being referred to the Grand Chamber; while the case being referred on grounds of posing "a serious problem to the interpretation and the implementation of the Convention and Protocols" (as indicated in Article 43 paragraph 2) is a low possibility, the same cannot be said for the case being referred in accordance with the principle of "a serious problem of general importance". Therefore, in accordance with the court practices of the ECHR, the Turkish side must be ready for every possibility. Within this framework, the Turkish side must hastily prepare their legal arguments against referral of the case to the Grand Chamber and make the five judge panel aware of their opinions.

A new judicial proceeding would begin if the panel of five judges decides to refer the Perinçek Case to the Grand Chamber. The Grand Chamber is bound neither by the ruling of the Chamber of seven judges nor by the referral of the panel of five judges. In accordance with the wording and the essence of Article 43, the Grand Chamber has the authority to reevaluate the entirety of the case without being bound by the ruling of the previous Chamber. Within this framework, the Grand Chamber has the authority to handle the case not only in terms of its essence but also in terms of its admissibility (recevabilité)[23]. Thus the Grand Chamber holds the right to reassess all new data on the case and consider any evaluation not found worthy by the previous chamber, and if deems suitable has the right to delete the case from the register or determine a friendly settlement[24].

The Grand Chamber, in accordance with its aforementioned authority, may also investigate the problem of admissibility[25]. On this issue, in accordance with Article 35 paragraph 4 of the Convention which states that "the Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings" the doctrine holds no doubt of the authority of the Grand Chamber[26]. Within this Framework, if the Grand Chamber rehandles the case, the Turkish side has to keep into account and must be ready for the discussion of admissibility of Perinçek's appeal to the ECHR Rights and it would be in order to prepare for the case from this angle as well.

22 See, Ibid, p. 10-11

23 See. Frederic Sudre, *Droit europeen et international des droits de l'homme*, Paris, PUF, 9 eme ed., 2008, p. 721

24 Ibid. Pp. 721-722

25 Ibid, pp. 701

26 Ibid.

On the other hand, in accordance with Article 35 of the Convention, the evaluation of admissibility of personal appeals are regulated; with regard to state appeals; Article 32 paragraph 2 of the Convention states "In the event of dispute as to whether the Court has jurisdiction, the Court shall decide", therefore objecting to the authority of the Court also seems possible. Keeping in mind that Switzerland's appeal of referring the Perinçek Case to the Grand Chamber is in accordance with asking for guidance on how the terms of the Swiss Criminal Code 261bis paragraph 4 are to be applied, the Turkish side may argue that Switzerland's application only calls for delivering an opinion rather than reevaluating the whole case. Such an appeal for delivering an opinion belongs to the Committee of Ministers in accordance with the Article 47 of the Convention, furthermore it cannot even be asked by the Committee of Ministers on topics like freedom of expression which is a part of the first section of the Convention. The cause of action of the Perinçek Case is about Perinçek's conviction by Swiss courts, the Grand Chamber only has the authority on deciding whether Perinçek's conviction by Swiss courts is in accordance with the Convention with regard to its essence and does not hold the duty or authority to decide on how Switzerland is going to apply any Article of law. Therefore, asking for the rejection Switzerland's application in accordance with the non-competence of the Court is not against reason. It would be in order for the Turkish side to thoroughly analyze this point as well.

One other problem we encounter while the Perinçek Case is heard in the Grand Chamber is the intervention of third persons to the case. In accordance with Article 36 paragraph 1, in all cases before a Chamber or the Grand Chamber, a High Contracting Party one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings. Hence, just like Turkey intervened to Perinçek Case before the seven judge Chamber; it declared that it would intervene before the Grand Chamber. It seems imperative for Turkey to continue this stance when taking the issues of the Armenian question and their scope in mind.

However, the Turkish side may encounter a new problem if it intervened before the Grand Chamber. Because Article 36 paragraph 2 of the Convention that regulates the intervention to cases, the President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings. This invitation can be realized as presenting opinion in writing or the option of becoming a party in the hearings. Such an opportunity may prompt the interest of the Convention signatory states -primarily Armenia- who recognize, condemn and sanction the Armenian genocide.

Hence, the call for intervention and authority in this case belongs to the President of the Grand Chamber, the Turkish side must formulate a policy on this issue. If the President calls for intervention by third states, the Turkish Government would legally be against a "front expansion", while having to firmly formulate its political strategy. Because, it is certain that if the case is referred to the Grand Chamber, Turkey would face a grand propaganda of "Armenian Genocide". Therefore the Turkish Government, if it may, predetermines its stance on whether the hearing would proceed and also must take precautions against the Armenian propaganda before or outside of the European Court of Human Rights.

The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings. This invitation can be realized as presenting opinion in writing or the option of becoming a party in the hearings. Such an opportunity may prompt the interest of the Convention signatory states -primarily Armenia- who recognize, condemn and sanction the Armenian genocide.

In the case of the Grand Chamber moves to the merits of the Perinçek Case, the arguments used before the seven judges Chamber are, naturally, going to be used before the Grand Chamber by the sides. However differences brought by one side would also bring differences to the arguments of the other sides. By this way, the third states who adopt the thesis of "Armenian genocide" are called upon to intervene by the President of the Grand Chamber, the case may be pulled to the discussion of the Armenian question rather than the question of freedom of speech. As a matter of fact, such an intention can be observed in the opinions of the dissenting judges in the first Chamber ruling. The two problems given by the aforementioned two judges that have never been discussed before in the ECHR -the international recognition of Armenian genocide and the punishing of genocide denial- could be enhanced before the Grand Chamber.

One of the arguments presented by the dissenting judges; that the Armenian Genocide is recognized by the Turkish state itself is most probably going to be more enhanced and brought before the Grand Chamber. The aforementioned judges claim that the Ottoman State courts have punished some Turkish authorities and alleged criminals (by sentencing that range all the way to death penalty in terms of severity) means that the Turkish state recognizes the Armenian genocide. This claim can be easily countered on both factual and legal grounds. This is because, first of all, the Ottoman courts did not put the alleged criminals on trial in accordance with "genocide" but in

accordance with crimes like massacres or murder or other crimes. This is so because the term genocide, which was first used by Lemkin in 1944, is absent from law during 1915 and the 1920's. However, one general principle of law is that "there is no crime or punishment without law". Consequently, the crime of genocide which was accepted during the 1940's did not exist at that time. The second legal flaw in the claim of the dissenting judges is that the aforementioned actions against law has been committed within the context of the Ottoman State and does not bind the Turkish Republic State which is the successor to the Ottoman State. Likewise, as Prof. Charles Rousseu puts it on the issue of states being successors, even though many states are successors to the predecessor state, international law does not accept acts and procedures against law *(actes illicites)* committed by the predecessor state being attributed to the successor state[27].

The dissenting judges on Perinçek Case, by also referring to the Joint Declaration of France, Britain and Russia dated 15 May 1915 that condemns the actions against Armenians, to the US Senate and House of Representatives Joint Declaration dated 9 February 1916 and most interestingly to the Treaty of Sevres dated 10 August 1920 that has never entered into force, allege that these legally bind the international law on the issue of genocide. Without going into details, it is sufficient to indicate that Turkey is in no way legally bound by these aforementioned actions because they are not legally binding. According to the aforementioned judges, even the clauses of the Treaty of Lausanne which have been previously summarized and which will not be elaborated again, drag Turkey to into a responsibility on the Armenian question. These kinds of arguments must be seriously answered by the Turkish side.

The dissenting judges, again, advocate for the validity of the Armenian genocide through the "Armenian Genocide" decisions of various international organizations, which also have been previously summarized. On the other hand, the judges advocate that the national juridical bodies or the parliaments of states mentioned in the dissenting view summary have recognized the "Armenian Genocide" and that some punish its denial, and as such they advocate that international society recognizes this genocide. With regard to freedom of expression, therefore, the dissenting judges argue that Switzerland's move to punish Perinçek is not against the law. When appearing before the Grand Chamber, the Turkish side must prepare accordingly with all these possibilities in mind and must prearrange its appropriate arguments.

27 Rousseau, Charles. *Droit international public*. Tome III, Paris: Sirey, 1977, pp. 504-511

CONCLUSION:

The Perinçek case, which could only be handled from one perspective within the scope of one article, and its possible developments will result in the discussion of the Armenian Genocide from all angles both before the European Court of Human Rights and the international society. On this opportunity, it is imperative that, primarily the Turkish Foreign Ministry and all Turkish authorities need to be prepared on the issue of the Armenian genocide from historical, legal, political perspectives, and must be aware of the procedures to be followed. It should be kept in mind that there is a great possibility that the Perinçek Case hearing could take place in the Grand Chamber in 2015, which is the centennial of the events of 1915.

BIBLIOGRAPHY:

Case of Animal Defenders International v. The United Kingdom, Application No: 48876/08 (2013, 22 April). European Court of Human Rights.

Case of Erdoğdu and İnce v. Turkey, Application No: 25067/94 and 25068/94, (1999, 8 July). European Court of Human Rights.

Case of Gündüz v. Turkey, Application No: 35071/97 (2004, 14 June). European Court of Human Rights.

Case of Lawless v. Ireland (no.3), Application No: 332/57, (1961, 1 July). European Court of Human Rights, Strasbourg

Cox v. Turkey, Application No: 2933/03 (2010, May). European Court of Human Rights.

Dink v. Turkey, Applications No: 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, (2010, 14 September). Press Release Issued by the Registrar. European Court of Human Rights.

Erbakan v. Turkey, Application No: 59405/00, (2006, 6 July). Press Release Issued by the Registrar. European Court of Human Rights.

Graudy v. France, Application No: 65831/01, (2003, 7 July). European Court of Human Rights

Jercild v. Denmark, Application No: 15890/89, (1994, September 23). Netherlands Institute of Human Rights.

Mouvement raelien Suisse v. Switzerland (GC), Application No: 16354/06 (2012), European Court of Human Rights.

Pavel Ivanov v. Russia, Application No: 35222/04, (2007, 20 February). European Court of Human Rights

Rousseau, Charles. *Droit international public*. Tome III, Paris: Sirey, 1977.

Second Section Decision as to the Admissibility of, Application No: 23131/03, by Mark *Anthony Norwood against the United Kingdom*, (2004, 16 November). European Court of Human Rights

Stroll v. Switzerland (GC), Application No: 69698/01 (2007), European Court of Human Rights.

Sudre, Frederic. *Droit européen et international des droits de l'homme*. Paris, PUF, 9, (2008).

THE ARMENIAN 'RELOCATION': THE CASE FOR 'MILITARY NECESSITY'

(ERMENİ TEHCİRİ:
'ASKERİ MECBURİYET' GEREKÇESİ)

Assoc. Prof. Dr. Jeremy SALT
Bilkent University

Ottomans and Armenians. A Study in Counterinsurgency.
Author: Edward J. Erickson, (New York: Palgrave Macmillan, 2013), 299 pages.

Abstract: *This article focuses on the questions of insurgency and 'military necessity' as a reason for moving the bulk of the Armenian population from the eastern provinces of the Ottoman Empire in the second half of 1915. It looks at precedent and parallel cases of 'relocations' in military history and follows the course of the war as it was fought by the Ottoman government from late 1914, on the battle front and behind the lines, until the Van uprising of April, 1915, precipitated the decision to 'relocate' the Armenian civilian population.*

Keywords: *Ottoman Empire, World War I, Committee for Union and Progress, Russia, Britain, Sarıkamış, Van, Caucasus, Syria, Armenians, Kurds, Assyrians, relocation, insurgency, Teşkilat i-Mahsusa, druzhiny, wartime trials.*

Özet: *Bu makale 1915'in ikinci yarısında Ermeni nüfusunun çoğunluğunun Osmanlı İmparatorluğu'nun doğu vilayetlerinden taşınmasına dayanak oluşturması açısından ayaklanma ve 'askeri mecburiyet' sorunlarını incelemektedir. Makale askeri tarihte emsal oluşturan ve paralellik taşıyan örnekleri irdelemekte ve hem cephede hem de cephe gerisinde Osmanlı hükümeti tarafından 1914'ün sonlarından 1915 Nisan ayında sivil Ermeni nüfusunun yer değiştirmesi kararının alınmasını hızlandıran Van ayaklanmasına kadar savaşın izlediği seyri incelemektedir.*

Anahtar kelimeler: *Osmanlı İmparatorluğu, Birinci Dünya Savaşı, İttihat ve Terakki, Rusya, İngiltere, Sarıkamış, Van, Kafkasya, Suriye, Ermeniler, Kürtler, Asuriler, Tehcir, Ayaklanma, Teşkilat-ı Mahsusa, druzhiny, savaş dönemi yargılamaları.*

No scholar outside Turkey has done as much work on the Ottoman military as Edward Erickson. His books on the Balkans War (1912-13) and the First World War are standard reference works. For the first time a scholar was turning his attention to these wars from the perspective of the Ottoman military command rather than the viewpoint of countries attacking the Ottoman Empire. His basic source material is the records of the Ottoman military. He is a seriously good scholar and thus when he writes on such a controversial issue as the fate of Armenians during the war, even those who are reflexively compelled to knock him down are going to have a hard time doing it. In this latest work, Dr Erickson presents a powerful case for military necessity being the only motive behind the decision to 'relocate' the bulk of the Armenian population from the empire's eastern provinces and eventually somewhat further afield, in 1915.

'Relocations' are an ugly aspect of war. They often have disastrous consequences for the people being moved but they are not unique in the history of warfare.

'Relocations' are an ugly aspect of war. They often have disastrous consequences for the people being moved but they are not unique in the history of warfare. In modern history, Erickson refers to some examples: the Spanish repression of a Cuban uprising in 1895-96 involving the emptying of rebellious provinces of between 400,000 and 600,000 people and their removal to camps under a program called *la recontracia*; the relocation of civilians to US 'zones of protection' in the Philippines during the Spanish-American war of 1898; the removal of about 100,000 Boers and another 100,000 African civilians to concentration camps during the Boer War (1899-1902); the removal by the Russian government of up to half a million Germans from southern Russia and the Caucasus to Siberia in 1914; the removal of Japanese to US detention camps during the Second World War; the relocation of up to 500,000 ethnic Chinese to 'new villages' by the British during their postwar occupation of Malaya; the removal by the French of up to 800,000 Algerians to 'regroupment centres' in the 1950s; and the relocation by the US by force, persuasion and intimidation of more than 8.5 million civilians to 'protected' or 'strategic' hamlets' during the Vietnam war in the 1960s. The chief adviser to the US military command for this operation was Robert Thomson, the architect of the forcible relocation of ethnic Chinese in post-war Malaya. The relocation of Vietnamese by the US military command followed the relocation by the French of some three million Vietnamese to 'protected villages' (*agrovilles*) during 1952-54.

In all of these cases the rationale was the same – the clearing away of a civilian population to deny insurgents any and all forms of support. The suffering of civilians during these shifts was also similar, varying only in intensity and

degree. Having reviewed some of the parallel cases, Dr Erickson looks at the detail in the Ottoman Empire as a Russian-backed Armenian insurgency took root in 1914 and swelled into a general movement across the eastern provinces in 1915. Both the British and the Russians wooed ethno-religious Ottoman groups – Armenians, Assyrians, Kurds and Arabs - as part of their war effort. Michael Reynolds has told some of the story from the Russian side.[1]Even before the Ottoman government joined the war, the Tsarist government approved the arming of Ottoman Armenians and the provocation of an uprising at an opportune moment. As early as August, 1914, General Yudenich, chief of staff of the Russian army in the Caucasus, advocated the establishment of an Armenian fifth column inside Ottoman lands and the smuggling of arms across the border.[2] The Tsar told the Armenian Catholicos, Kevork, to 'tell your flock, Holy Father, that a most brilliant future awaits the Armenians'.[3]

Both the Armenians and the Assyrians were used up by their erstwhile supporters. The Armenians had been through this before, in the late 19th century, when the British meddled in their affairs under the guise of humanitarian concern. Their real purpose was to establish a British presence in eastern Anatolia to block the machinations of the Russians. The British government's plan for 'reforms' – an 'ethnographical' reorganization of the eastern provinces based on the separation of Armenians from Kurds - foundered not just on the opposition of the sultan and his government but on the lack of competent officials to oversee this plan and the lack of money to pay for it. The British government was not prepared to foot the bill and the Ottoman government, bankrupt by 1876, forced to submit to foreign control of its revenues in 1881 and hostile to these 'reforms' anyway, could not. Blundering on, the British government antagonized the Kurds by referring to a region in which Muslims – predominantly Kurdish – were more than 80 per cent of the population as 'Armenia'. When the crisis broke in the 1890s, with the eastern provinces collapsing into large-scale violence, the British threw up their hands in horror, retreated, blamed someone else (the wicked sultan) and left the Armenians to fend for themselves as best as they could.

This was the template for the fate of Armenians and the Assyrians in 1914-18. Russia was out of the war by 1917 but the British treated the Armenians and Assyrians as an expendable raw material from beginning to end. They lured these vulnerable minorities into the war with assurances of support for

1 Michael A. Reynolds, *Shattering Empires. The Clash and Collapse of the Ottoman and Russian Empires 1908-1918* (New York: Cambridge University Press, 2011).

2 Erickson, p.144

3 Reynolds, p.143

autonomy or independence if they would only just join the entente cause. They then used their suffering for propaganda purposes and when the war was over - when they had no further use for them - they abandoned them. The Bolsheviks gave the Armenians their autonomous republic but the Assyrians ended up with nothing. They were urged by the British to keep fighting from northwestern Persia. Overwhelmed by Ottoman and Kurdish tribal forces they fled into Iraq. Their trek led them into refugee camps where they waited in vain for the British to redeem their promises of a homeland. Their ancestors in Iraq are now suffering the malign consequences for them and their churches of a more recent intervention in their lands, the US-led invasion of Iraq in 2003. The destruction of Iraq as a unitary state and the deliberate creation of a weak central government against a strong government on the periphery (the Kurdish north) has paved the way for the rise of Islamic jihadist groups unknown in Saddam's time. Their concept of an Islamic emirate stretching across the central lands of the Middle East has involved the destruction and desecration of the ancient Christian churches of the east in both Iraq and Syria. Again, because their prime concern is to bring down the government in Damascus, the US, French and British governments have turned a blind eye to the collateral damage being suffered by these eastern Christians.

British lured these vulnerable minorities into the war with assurances of support for autonomy or independence if they would only just join the entente cause.

By late 1914 the Russian and Ottoman government were already engaged in an 'undeclared but active' state of war in the Black Sea provinces of their empires[4], with the Ottoman government using the Teşkilat i-Mahsusa (Special Organization), a propaganda and black operations body fighting the Russians and Armenian insurgents and carrying weapons to local Muslim people. Erickson dates the formation of this organization back to late November, 1913, and ascribes its origins to the need for a force to generate Muslim resistance to the victorious Christian powers in the Balkans.[5] Stanford Shaw, on the other hand, regarded the organization as the outgrowth of Ottoman intelligence groups established during the 19th century, notably Sultan Abdulhamit's Yildiz Palace intelligence service (Yildiz Istihbarat Teşkilati).[6]

The key military event as 1914 turned into 1915 was the Ottoman assault on Sarıkamış, starting brilliantly but ending catastrophically, with frightful weather and dogged Russian leadership combining to turn the tables on the

4 Erickson, p.147

5 Erickson, p.112.

6 Stanford J.Shaw, *The Ottoman Empire in World War 1* (Ankara: Türk Tarih Kurumu, 2006), Vol 1, p.355. Erickson (p.111) rejects outright the claim that the Teşkilat i-Mahsusa was set up for the prime purpose of liquidating the Armenian civilian population.

Ottomans. Caught in a blizzard without winter clothing, many Ottoman soldiers simply froze to death. Erickson puts the Ottoman casualties at 33,000 dead and 10,000 wounded[7], with a further 7000 men being taken captive. Writing of the consequences, Michael Reynolds concludes that 'not until 1918 and the disintegration of the Russian army would the Ottomans again be able to go on the strategic offensive on the Caucasian front.'[8]

By early 1915, Armenian uprisings in the east had crystallized into a general insurgency being launched across the region. That, at least, is how it appeared to the Ottoman military command. It was well aware of Armenian activities. From late 1914 into the first half of 1915, reports poured in of clashes with insurgents and the disruption of lines of supply and communication. These lines, supporting action against the Russians in the Caucasus and the British in Mesopotamia and Palestine 'ran directly through the rear areas of the Ottoman armies in eastern Anatolia that were heavily populated by Armenian communities and, by extension, by the heavily armed Armenian revolutionary committees'.[9] None of the Ottoman armies on the Caucasian, Mesopotamian or Palestinian fronts were self-sufficient in food, fodder, stock animals, ammunition and medicine but had to rely on continuous supplies from the west. [10] In the eastern Anatolian provinces, front line units could be 900 kilometers from the nearest railhead.[11] Over a vast area, most supplies had to be moved by wagon across long stretches of undefended dirt tracks. In isolated areas, with few men available as guards, these lines of communication were especially vulnerable to insurgent disruption.

By the middle of 1915 thousands of Ottoman Armenians were fighting behind the lines, in addition to the thousands enlisted in the Russian Armenian volunteer units known as druzhiny, which were tasked with 'liberating' Ottoman provinces in which the Armenians were in a small minority.

By the middle of 1915 thousands of Ottoman Armenians were fighting behind the lines, in addition to the thousands enlisted in the Russian Armenian volunteer units known as *druzhiny*, which were tasked with 'liberating' Ottoman provinces in which the Armenians were in a small minority and scattered across the region anyway. The hotspots were the regions around Van, Erzurum, Erzincan, Bitlis, Muş, Elazig (Harput), Sivas and Malatya, with reports from the southeast around Dörtyol indicating that the British were

7 Erickson, p.155

8 Reynolds, p.125

9 Erickson, pp.161-62

10 Erickson, p.162

11 Erickson, p.174

contemplating the opening of a new front in the eastern Mediterranean with the support of local Armenians.

All of this has to be seen as Ottoman commanders would have seen it. By the middle of 1915, Ottoman armies were fighting on three fronts, Gallipoli, the Caucasus and Mesopotamia. Already severely weakened by the Balkans war, and the more immediate catastrophe of Sarıkamış, the Ottoman army was in no position to fight a multi-front war and, as well, fend off thousands of insurgents sabotaging the war effort from behind the lines. The military command had no plans to deal with such an insurgency and no strategic reserve in the interior to protect lines of communication. The manpower available consisted mainly of elderly reservists and jandarma. Under stress on several fronts, the military command was draining the interior of such soldiers as it did have there and sending them to the front. Cities, towns and villages as well as the lines of communication were vulnerable to attack. Many communities were basically on their own.

This deteriorating situation reached a peak with the Van uprising in April, 1915, launched as the British were about to land troops at Gallipoli and the Russians were about to engage with an Ottoman force around Dilman in northwestern Persia. Thousands of well-armed Armenians took part. The fighting continued into May, with tens of thousands of Muslims fleeing the region in what became known as the *büyük kaçgın* (great flight). The governor of Van finally fled on May 16, by which time much of the city had been destroyed and many of its Muslim inhabitants killed. The Armenians consolidated their victory with murderous attacks on Muslim villages around the nearby lake which today would be called ethnic cleansing. The village of Zeve, crowded with refugees from other regions, was, in particular, the site of terrible atrocities. Van was declared an Armenian republic before being incorporated into the Caucasian committee of the All Russian Union of Towns (Sogor), which appointed an Armenian as chief administrator. The main street was renamed Sogorskii Prospekt.[12]

With the exception of brief withdrawals as Ottoman forces approached in late July, 1915, and again in July, 1916, Russian and Armenian forces held Van until April, 1918.The contemporary debate over whether the Van uprising was defensive in nature, as Armenians would claim, or whether it was a well-planned offensive, is completely immaterial to the thinking of the Ottoman high command. All it saw was that an important regional city had fallen to Armenians and Russians, and that unless drastic measures were taken, other vulnerable cities were likely to follow. The extent to which the Van uprising

12 Halit Dundar Akarca, 'The Russian Administration of the Occupied Ottoman Territories During the First World War 1915-1917', MA thesis, Department of International Relations, Bilkent University, February, 2002.

may have been coordinated with the Russian and British military high commands remains an open question.

Unable to stem the spreading insurgency, the Ottoman government responded quickly after Van. On April 24, about a week after the launching of the uprising, it closed down the Armenian national/revolutionary committees in Istanbul and arrested hundreds of their members or Armenians believed to be sympathetic to their aims. Most were sent to Cankırı and Ayaş in the Anatolian interior around Ankara. Towards the end of May – on the recommendation of the military – the government ordered the 'relocation' of the bulk of the Armenian population in the war zones to Syria and Iraq. By early 1916, when the government ordered a stop to the 'relocations', about half a million Armenians had been wrenched from their homes and sent southwards. The 'relocations' were slowed down in tandem with the success of counter-insurgency operations in the second half of 1915. Orders went out to various cities in October to halt the 'relocation' and by January, 1916, it was officially ended although many Armenians were still on the move.[13]

'In fact there was a direct threat by the insurgent revolutionary committees to the lines of communication upon which the logistics of the Ottoman armies on three fronts depended. The consequence of failing to supply adequately its armies in contact with the Russians, in particular, must have led to the defeat of the Ottoman Empire. The Ottoman high command could not take that chance'.

Without the manpower available to crush the insurgents, Erickson believes that the decision to deprive them of their support base by removing the civilian population was a 'strategy of poverty'.[14] Was such a measure justified on the grounds of military necessity, as cruel and as harsh as the consequences were? Erickson answers the question thus: 'From the perspective of what the Ottoman government believed what was happening the answer is yes. In fact there was a direct threat by the insurgent revolutionary committees to the lines of communication upon which the logistics of the Ottoman armies on three fronts depended. The consequence of failing to supply adequately its armies in contact with the Russians, in particular, must have led to the defeat of the Ottoman Empire. The Ottoman high command could not take that chance'.[15]

From the military perspective, did the removal of the Armenian civilian task achieve the objective of clearing the ground so that the insurgent threat could

13 Erickson, pp. 210-11

14 Erickson, p. 183

15 Erickson, pp.213-14

be finished off? Erickson believes that it did. 'The relocation of the Armenian population and the associated destruction of the Armenian revolutionary committees ended what the Ottoman government believed was an existential threat to the Ottoman state and the empire survived to fight on until late 1918.'[16] The tactics used during counter-insurgency operation in the second half of 1915 included search and destroy missions in the countryside and the use of artillery against insurgents entrenched in towns. In the meantime, Armenians being moved southwards were attacked by Kurdish and Arab tribes out for plunder or revenge for the killing of Muslims (often Kurds) by Armenian bands.

The fate of the Armenians cannot be understood without following the military path to its logical conclusion, as Erickson does and as a host of writers in the Armenian information and propaganda network do not. There is consistency in the Erickson approach and complete inconsistency in the alternative. There is no evidence to back up Taner Akçam's claim that 'key decisions concerning the massacre' were 'very likely' to have been made within the CUP (Committee of Union and Progress) government in March, 1915. Within three pages these 'key decisions' slide into 'the decision for genocide'.[17] Akçam's suppositions and conjecture amount to no more than a conspiracy theory and the praise for his work as 'brilliant and definitive' and 'meticulous' is ludicrous.[18] The inability of peer and general reviewers to see the holes in his work and hold him to account and the referral by other historians to his conclusions as if they were fact[19] underscores the whole shabby state of 'scholarship' on this issue in the 'western' cultural mainstream.

The actions taken by the Ottoman government in the spring of 1915 are consistent with the view that the sole intention in ordering the 'relocation' was to deprive the Armenian insurgents of civilian support. As reports flowed in of attacks on Armenian convoys, orders were sent out to provincial officials given the task organizing the 'relocation' to catch the perpetrators and provide the convoys with more effective protection. The government finally set up an investigative council involving the ministries of justice, interior and war, with the finance ministry instructed to fund its activities. Three commissions of inquiry were sent out across the eastern provinces with the authority to investigate the conduct of jandarma, police and civil servants, including senior administrators. Hearings were held across the eastern provinces, resulting in

16 Erickson, p.214

17 Taner Akçam, *A Shameful Act. The Armenian Genocide and the Question of Turkish Responsibility (*London: Constable, 2007), pp.162-164

18 See the praise on the front cover of the book by Orhan Pamuk and on the back by the late Christopher Hitchens.

19 See Alan Kramer, *Dynamic of Destruction. Culture and Mass Killing in the First World War* (Oxford: Oxford University Press, 2007. Professor Kramer's completely twisted version of events (pp.147-150) reaches its pinnacle with the repetition of Akçam's claim of a March meeting.

the court-martial of 1673 people for 'unlawful conduct' during the relocation. Of this number 528 were from the police, the military or the special intelligence organization (the Teşkilat) and 170 were public servants, including tax collectors, mayors and officials directly responsible for arranging the 'relocation'.

The remainder were ordinary people or members of bandit gangs which had taken part in acts of plunder and murder. Of the number put on trial, 67 were sentenced to death (with uncertainty as to whether the sentences were carried out) and 524 sentenced to prison terms of varying lengths of time. The charges against others were dismissed because they were minors.[20] These trials were far more important than the charges heard in the kangaroo court set up by the British during their occupation of Istanbul, to which Taner Akçam gives such importance. The suspect source material he utilizes includes what he says are handwritten copies of court proceedings held in the Armenian patriarchate in Jerusalem.[21] There is no proof, however, that they are copies of the originals and no indication of who wrote them or when they were written.

The Armenians suffered terribly and great crimes were committed against them. There might be disagreement about numbers and detail but there is no dispute about the core accusation of criminality and mistreatment. The Ottoman government has to be held responsible for the consequences of the decision it took, even if it did not realize what those consequences would be. This, of course, is a key issue: it certainly must have known that it was going to be very difficult to move such a large number of people at a time of war, at such short notice, but did it realize just how difficult?

Here the factors leading up to catastrophe that must be taken into account include the lack of manpower to adequately protect the Armenians; logistical problems involved in shifting large numbers of people across a region hardly touched by modern development; the incompetence of provincial authorities even allowing for the enormity of the task they had been assigned; shortages of food and medicine because all resources were being channeled to the front; revenge by Kurdish and Arab tribes for the killing of Muslims by Armenian bands; the effects on civilian life of the British naval blockade of the east Mediterranean coast, with all Syrians suffering as well as the 'relocated' Armenians; and the locust plague of summer 1915 which devastated crops and worsened an increasingly desperate food situation. Even in towns and relatively well watered and fertile regions of Syria, civilians were dropping dead in the streets from starvation. It is doubtful whether the Ottoman government could have known or predicted all this in advance.

20 Yusuf Sarinay, 'The Relocations (Tehcir) of Armenians and the Trials of 1915-16', *Middle East Critique*, vol.20, no.3, Fall 2011: pp. 299-315.

21 Akçam, p.xiii

This seems to have been a zero sum game. There was going to be loss whatever the government decided, but in the view of the military, the bulk of the civilian Armenian population had to be moved if the insurgency was to be quashed. The failure to suppress the insurgents would threaten not just the war effort but the survival of the empire itself. That was the view of the military command. Hindsight is a wonderful thing but it was the judgment formed by military men in the heat of a fight to the death being waged on several fronts by armies and from behind the lines by thousands of insurgents.

There was going to be loss whatever the government decided, but in the view of the military, the bulk of the civilian Armenian population had to be moved if the insurgency was to be quashed. The failure to suppress the insurgents would threaten not just the war effort but the survival of the empire itself. That was the view of the military command.

The other side of this coin is the terrible suffering of the Muslim population, especially during the Russian-Armenian occupation of northeastern Anatolia. About 500,000 Ottoman civilian Muslims were massacred during the course of the war. The atrocities committed by Armenians were recorded in Ottoman documents written not for propaganda purposes, like the 1916 'Blue Book' of James Bryce and Arnold Toynbee, but for the information of the central government when Ottoman armies were able to return to the occupied eastern provinces. The suffering of one group does not cancel out nor should it be allowed to minimize the suffering of another but the suffering of all surely has to be taken into account if a balanced account of this terrible period of history is to be written. There were not perpetrators on one side and victims on the other in this conflict: there were perpetrators and victims on all sides. Somewhere between two and 2.5 million Ottoman Muslim civilians died in this war from exactly the same causes as Armenians, massacre, combat, disease, malnutrition and exposure. They are the invisible element in this history.

Edward Erickson has done a fine job in hacking a path through the jungle of propaganda in which the 'Armenian question' has been buried for the past century. Drawing on Ottoman military sources he makes a powerful case for the view that the 'relocation' of the Armenians was dictated by military necessity and nothing else.

BIBLIOGRAPHY

Akarca, H. D. (2002, February). *'The Russian Administration of the Occupied Ottoman Territories During the First World War 1915-1917'*, (Unpublished MA Thesis), Department of International Relations, Bilkent University.

Akçam, T. (2007). *A Shameful Act. The Armenian Genocide and the Question of Turkish Responsibility.* London: Constable.

Erickson, Edward J. (2013). *Ottomans and Armenians. A Study in Counterinsurgency,* New York: Palgrave Macmillan.

Kramer, A. (2007). *Dynamic of Destruction. Culture and Mass Killing in the First World War* Oxford: Oxford University Press.

Reynolds, Michael A. (2011). *Shattering Empires. The Clash and Collapse of the Ottoman and Russian Empires 1908-1918*. New York: Cambridge University Press.

Sarinay, Y. (2011, Fall). 'The Relocations (Tehcir) of Armenians and the Trials of 1915-16', *Middle East Critique*, Vol. 20, No: 3.

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

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

Pulat TACAR
Retired Ambassador

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]

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*). The ECtHR also emphasized the fact that a "genocide is difficult to prove" because the Convention and ICJ have set the standard of proof of the special intent very high; and ***beyond any doubt.***

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.**

The verdict of the Second Chamber points out that the denial of the qualification of genocide-as such- is not an actof racial discrimination.

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.

ARMENIAN "GENOCIDE": NOT A HISTORICAL FACT, RATHER POLITICAL MYTH

(ERMENİ "SOYKIRIMI": TARİHSEL BİR GERÇEK DEĞİL, SİYASİ BİR MASAL)

Dr. Farhad MAMMADOV
Director
Center for Strategic Studies under the
President of the Republic of Azerbaijan

Abstract: *The recognition of so-called Armenian "genocide" as a political campaign of Armenian Diaspora have went to great lengths to try and convince the world that there is a possibility to recognize historical facts and legal notions through the political "legalization" if one shall try hard enough. Indeed some of the recognitions made by the state institutions of different countries around the world have raised a question of the legality and implications of such actions. This article will look at the issue from the perspective of the case Perincek vs Switzerland and argue that the Armenian "genocide" cannot be considered a historical fact but a political mythology through the analysis of international law.*

Keywords: *genocide, legality, recognition, law, crimes, ECHR, Armenia, Azerbaijan, Switzerland, Turkey*

Öz: *Ermeni Diasporası tarafından bir siyasi kampanya olarak yürütülen sözde Ermeni soykırımının tanınması yolundaki gayretler, dünyayı tarihsel gerçeklerin ve hukuksal kavramların siyasi "meşrulaştırma" yoluyla tanınabileceği hususunda ikna etmek için her yola başvurmuştur. Nitekim, dünyadaki farklı devletlerin kurumları tarafından yapılan tanımalar bu tür hareketlerin meşruiyeti ve bunların ne gibi sonuçları olabileceği sorularını gündeme getirmiştir. Bu makale, konuyu Perinçek-İsviçre davası üzerinden değerlendirecek ve sözde Ermeni soykırımının tarihsel bir gerçeklik değil, ancak siyasi bir masal olarak kabul edilebileceği tezini uluslararası hukuk analizi çerçevesinde savunacaktır.*

Anahtar Kelimeler: *Soykırım, Tanıma, Hukuk, Suç, AİHM, Ermenistan, Azerbaycan, İsviçre, Türkiye*

Throughout the history mankind have sought to combat situations that could possibly lead to the ultimate annihilation of humanity and destruction of moral and humane values. Unfortunately history have seen such crimes as genocide, mass ethnic cleansings and other such horrific instances of human destruction that cast a shadow on the innate humane nature of peoples around the world.

Nonetheless, science and academia for the purposes of prevention and persecution of such horrific crimes as genocide, crimes against humanity, war crimes, mass murder, aggression, etc. have created a classifications and mechanisms that are supposed to bring justice to the situations and perpetrators. For example, establishment of the International Criminal Court in 2002 with entry into force of Rome Statute of 1998[1], have moved humanity to the new stage of development in this area. It have to be pointed out that international community as a whole is very and keenly interested in this process and its continuation.

Thus, as international community believes (which is evident from the structures that it has created, such as mentioned International Criminal Court (ICC) or European Court of Human Rights (ECHR) in the judicial classification and study of the international crimes, it is logical to assume that all of the classifications of the events and matters that are connected to atrocities and mass murders should get their reviews in the frameworks of existing or specially created (ad hoc) legal structures.

Unfortunately such is not always the case and affected groups and even communities, diasporas and arguably peoples themselves, strive towards the politicization of such situations to achieve leverage in the current state of international relations, seeking the answers not in the international courts and tribunals, but rather in political bodies of different states, that in truth cannot be competent to give neither legal, nor historical review of the atrocities believed to be falling under the classification of international crimes.

Such situation arose with the infamous case of Armenian "genocide" to which Armenian people and the widespread Armenian Diaspora of the world refers to as the "first genocide of XX century".[2] For many years Armenians sought to recognize the atrocious events that took place in 1915 in Ottoman Empire as "genocide" in different political structures of many states around the world (parliaments, executive structures, municipalities, etc.) to gain the political leverage and to pressure the successor of Ottoman Empire – Republic of Turkey for reparations and official apologies. In some instances they were able

1 Matthew C. Weed, "International Criminal Court and the Rome Statute: 2010 Review Conference", 10 March, 2011, CRS Report for Congress, http://www.fas.org/sgp/crs/row/R41682.pdf

2 For example, Armenian Church, "The Armenian Genocide 1915-1923", http://www.armenianchurch-ed.net/armenian-heritage/armenian-genocide/remembering/

to succeed in formal political recognitions by some states in forms of resolution. In other cases certain provisions were introduced into legislation of such states as for example France, where the denial of Armenian "genocide" briefly became crime punishable by law (January 2012).[3] But in many occasions they simply failed.

This article will show the hypocrisy and weakness of such approach and prove that despite all the attempts of Armenians to force the recognition of the 1915 events as genocide upon the states in the world it is clear that despite all their claims it remains neither historical nor legal fact, but simply a political myth.

For many years Armenians sought to recognize the atrocious events that took place in 1915 in Ottoman Empire as "genocide" in different political structures of many states around the world (parliaments, executive structures, municipalities, etc.) to gain the political leverage and to pressure the successor of Ottoman Empire – Republic of Turkey for reparations and official apologies.

Only recently the ECHR have made a decision that has become a precedent that nullifies any of the arguments of Armenians concerning what their call "historical facts and reality". On 17 December 2013 in Strasbourg the Court made a ruling in the case of Perincek v. Switzerland.[4] Decision on that particular case has been expected by many around the world as some on the experts pointed out that it was crucial for the discourse that is present in all the matters of relations between Turkey and Armenia. Thus it was as important for lawyers in their jurisprudence as well as to the international relations scholars and analysts.

The case starting point relates to the March 9, 2007 when Dogu Perincek was found guilty and fined by the court of Swiss Lausanne in the case instigated against him by the "Switzerland-Armenia" Association and accused with that he had participated in three instances in conferences in Switzerland in 2005 where he denied that Ottoman Empire have conducted the genocide against Armenians in 1915. The idea of Armenian "genocide" itself he called an "international lie". When making judgment court of Lausanne held the accused guilty in racial discrimination in line with definition of the Criminal Code of Switzerland, due to the fact that his motives held racial tendencies and was negative for the historical discussion of the question. With that basically depriving Perincek from freely expressing his opinions.

3 "French Council Finds Bill Penalizing Denial Unconstitutional", *Armenian Weekly Staff,* 28 February, 2012, http://bit.ly/1ieA6kX

4 "Criminal conviction for denial that the atrocities perpetrated against the Armenian people in 1915 and years after constituted genocide was unjustified", *ECHR Registrar,* Press Release, 17.12.2013, http://hudoc.echr.coe.int/webservices/content/pdf/003-4613832-5581451.

Perincek appealed the decision of court of Lausanne to the higher court, but was not successful. On 19 June 2007 the court of appeals of francophone canton of Vaud ruled that the Armenian "genocide", just like Holocaust, was a proved "historical fact"[5] recognized by the Swiss legislative body falling under the provisions of the article 261bis of Criminal Code of Switzerland. The problem with the ruling is first of all that court of appeals of Vaud have referred in its decision not to any kind of international court or tribunal that reviewed the matter previously (due to the fact that such a body never existed and review never happened), but to the resolution of the lower chamber of Swiss parliament. Despite the fact that such resolution is non-legally binding document of political nature (not a law) and it was not adopted by the whole Swiss legislative body, but merely its lower chamber, the court of appeals ruled that the historical expertise should not be used during the trial as unnecessary. Nonetheless that court acknowledged that Perincek did not deny the fact of mass murder and deportations of Armenians, but merely the definition of such actions as "genocide".

That ruling led to the decision by the Perincek to exhaust all of the instances of legal defense as there clearly was a very weak legal ground in the decision of the court of appeals of Vaud. If we would take a look at the article 261bis of the Criminal Code of Switzerland it is evident that it is a general article that prohibits racial discrimination and in particular states that: "…any person who publicly denigrates or discriminates against another or a group of persons on the grounds of their race, ethnic origin or religion in a manner that violates human dignity, whether verbally, in writing or pictorially, by using gestures, through acts of aggression or by other means, or any person who on any of these grounds denies, trivializes or seeks justification for genocide or other crimes against humanity… is liable to a custodial sentence not exceeding three years or to a monetary penalty".[6] So the article does not refer to any particular group or ethnic identity. That is why to use such an article the court needs an appropriate justification, which it found in the form of aforementioned resolution. Unfortunately, the court freely used a political resolution on the Armenian "genocide" of one of the chambers of legislative body that does not carry the legal authority of the law to enact the article 261bis into action. Even on the scratch that looks like the court overstepped its authority in that matter.

Moreover drawing an equality sign between the Holocaust and Armenian "genocide" based only on some resolution of one of the chambers of Swiss parliament is it its turn a very shaky ground as the tragic event of Holocaust have been proved in the international criminal tribunal with the decision of

5 Ray Smith, "European Ruling Ignites Freedom Debate", *IPS,* February 15, 2014, Switzerland, http://www.ipsnews.net/2014/02/european-ruling-ignites-freedom-debate/

6 *Criminal Code of Switzerland,* article 216bis, http://www.admin.ch/ch/e/rs/311_0/a261bis.html

such a tribunal being a basis of the whole modern concept of international criminal law. The tragic events in Ottoman Empire of 1915 have never been reviewed by the international judicial body and to this day cannot be compared to the Jewish genocide confirmed in the international law itself.

It was not surprising then that such a decision have led to extended debates between international law scholars and experts that were very much doubting the possibility of putting the resolution of the political body of any given state on the same line with the decision of international criminal tribunal and thus equalizing Holocaust and Armenian "genocide" claims. That tendency spread not only in Turkey and Switzerland (for obvious reasons) but throughout the world where scholars debated the weak legal decision and later "nodded agreement" on the later decision of ECHR[7] that will be discussed later here.

drawing an equality sign between the Holocaust and Armenian "genocide" based only on some resolution of one of the chambers of Swiss parliament is it its turn a very shaky ground as the tragic event of Holocaust have been proved in the international criminal tribunal with the decision of such a tribunal being a basis of the whole modern concept of international criminal law.

It has to be pointed out that trials of Perincek in Switzerland have been conducted in the specific atmosphere. It is possible that the decisions of the Swiss courts have been compromised by the work of Armenian propaganda, that during the whole process have used all its vast arsenal of informational offensive in media, street protests, personal threats, defamation, etc. Armenian propagandistic organizations are famous for their ability to manipulate the public opinions and directing the public pressure. It is very possible that the same trend followed the decision of the Federal Court of Switzerland that on 12 December 2007 have dismissed the appeal of Perincek.

With that Perincek have successfully exhausted all the instances in Switzerland; a requirement crucial to appeal to the European Court of Human Rights. Perincek have launched an application to the ECHR on 10 June 2008.

After the long five-year trial ECHR have finally ruled in favor of Perincek. The Court have held that the Turkish applicant was not in violation of the law of Switzerland when denying Armenian "genocide". With that Switzerland itself was found in violation of article 10 of the European Convention on Human Rights that guarantees the freedom of expression. The Court also ruled

7 Ray Smith, "European Ruling Ignites Freedom Debate", *IPS*, February 15, 2014, Switzerland, http://www.ipsnews.net/2014/02/european-ruling-ignites-freedom-debate/

that thought Perincek challenged the existence of Armenian "genocide" during multiple conferences in Switzerland, he was not by any means in abuse of his rights within the meaning of the article 17 of the European Convention on Human Rights. Moreover, the Court basically held the Switzerland responsible for the violation of one of the principles of freedom of expression, clearly underlining that one of the fundamental aspects of freedom of expression that distinguished a tolerant and pluralistic democratic society from a totalitarian or dictatorial regime was the free exercise of the right to openly discuss questions of a sensitive and controversial nature.[8]

ECHR also acknowledged that it was not called upon to rule on the characterization of the events of 1915 in Ottoman Empire. The fact of the matter was that the existence of "genocide" is described by ECHR as a precisely defined legal concept that cannot be easily proved. It has to be pointed out that "genocide" indeed not a political, historical, sociological or any other concept – but a legally proven fact. So any other claims that are not a legally proven facts (historical opinions, political decisions, etc.) are moot and reflect only the opinions of the groups of people and not objective reality. In line with that ECHR was skeptical towards the possibility of general consensus on the events described as Armenian "genocide", taking into account that historical research was by definition open to discussion and debate and it will not necessarily lead to final conclusions or assertion of absolute truth.

As it can be seen ECHR have distanced itself from the analysis and characterization of the events of 1915 in Ottoman Empire and concentrated on the matter at its hand. Moreover it has also pointed out that that those States which had in some way recognised the Armenian genocide had not found it necessary to enable legislation that imposes criminal sanctions on individuals challenging the official views, being mindful that one of the main objectives of freedom of expression was to protect minority views capable of contributing to a debate on questions of general interest which were not fully settled.[9]

In its decision ECHR assumes that the exact meaning of the term "genocide" in the rulings against Perincek is under doubt when article 10 of the European Convention on Human Rights in the second paragraph demands only clear and precise definitions of certain conditions.[10] At the same time ECHR recognized the validity of the argument of the Federal Court of Switzerland that Perincek through his statements on the conferences in Switzerland, where he called Armenian "genocide" an "international lie" was aware that he was making

8 "Criminal conviction for denial that the atrocities perpetrated against the Armenian people in 1915 and years after constituted genocide was unjustified", *ECHR Registrar,* Press Release, 17.12.2013, http://hudoc.echr.coe.int/webservices/content/pdf/003-4613832-5581451.

9 Ibid.

10 *European Convention on Human Rights,* article 10.2, http://www.echr.coe.int/Documents/Convention_ENG.pdf

himself vulnerable to the possible sanctions under Swiss law. With that said Swiss governments intentions were at protecting rights of others such as memory and honor of relatives of those victims of atrocities that happened in Ottoman Empire in 1915. However, the Court found that the argument of Swiss government that statements of Perincek posed a serious threat to public order the insufficiently substantiated. Thus it was for the court to weigh up on one hand the rights of others (memory and honor of victims) and the freedom of expression of Perincek on the other hand.

Moreover, the court stressed out that Perincek was engaged in historical, legal and political discussion that constituted the part of the heated debate and that the characterization of the events of 1915 in Ottoman Empire were of great interest to the general public, hence the public debates, where the authorities' margin of appreciation was limited.

ECHR have disagreed with the arguments of the Swiss courts that used in their decisions the notion that there was a general consensus, especially in the academic community, concerning the legal characterizations of the events of 1915 in Ottoman Empire. It stressed out that event the Federal Court of Switzerland have acknowledged that there were no unanimity in the community as a whole in regard of legal understanding of the atrocities. According to the applicants' statements with which the Court have agreed – it was very difficult, almost impossible to solidify general consensus.

Moreover court had to point out that the political bodies of the Switzerland themselves had views that varied from institution to institution. From all the states of the world only around twenty have had any kind of recognition of the events of 1915 in Ottoman Empire as genocide. Most of such "recognitions" have not originated in the governments though, but like in case of Switzerland in political bodies such as Parliament or one of their chambers.

ECHR have agreed with Perincek that "genocide" was a very narrow and clear legal definition. Example can be the judgment of International Criminal Tribunal for Rwanda, where the court have ruled that for the crime of genocide the atrocities must be perpetrated with clear intent not only to eliminate certain members of the given group, but all of that group or its particular part.[11] Such legal crime is always difficult to substantiate. Thus the ECHR have agreed that the consensus to which Swiss courts have referred relate to these very specific points of law.

That particular reasoning provided by the ECHR clearly denies any allegations

11 *Case Law of International Criminal Tribunal for Rwanda*, para. ii, http://www.hrw.org/reports/2004/ij/ictr/3.htm#_Toc62641390

of Armenians that there is a consensus in the world on the intent of Ottoman Empire to destroy its Armenian population as a whole or in part. It is a first time actually that such a lack of consensus was proven in the international judiciary. Moreover, ECHR clearly states that this case has nothing to do with cases of denial of crimes of Holocaust. Because in such cases perpetrator have negated the crimes perpetrated by Nazis that had a very solid legal grounds. ECHR also pointed out that, unlike in the case of so-called Armenian "genocide", the crimes of Holocaust had been found by an international court to be clearly established. Thus, the atrocities against Armenians cannot fall in the same line with such a narrow legal definition as "genocide", as it was in the case of Jewish Genocide proven in the international court of law.

Then, it has to be pointed out that the historical significance of this decision of ECHR cannot be overlooked. It is a first time that the issues of so-called Armenian "genocide" have got any kind of legal review on the international level.

The European Court of Human Rights has come to the conclusion that Switzerland failed to socially substantiate the need to prosecute a person on charges of racial discrimination for his mere disagreement with the use of term "genocide" towards tragic events in Ottoman Empire of 1915 and after. ECHR have also taken into account two very interesting cases. First one, the decision of the Constitutional Court of Spain of 2007, have found it unconstitutional to criminalize a denial of crimes of genocide as it cannot be seen as a direct incitement to violence.

In the second case, French Constitutional Council in 2012 has declared unconstitutional the law that criminalized the offense of negating existence of genocides recognized by law. Council has substantiated the decision by proving that such criminalization would be incompatible with freedoms of expression and research.

With all the other arguments in row backing Perincek's rightful position ECHR had no other choice but to declare that the basis for the conviction of Perincek by Swiss authorities were in fact insufficient, not to say unjust. With that ECHR had actually eliminated the possible censorship loophole to suppress the expression of criticism to matters of public debate.

Then, it has to be pointed out that the historical significance of this decision of ECHR cannot be overlooked. It is a first time that the issues of so-called Armenian "genocide" have got any kind of legal review on the international level. Though it was not for ECHR to decide on the legal characterization of the events of 1915 and in subsequent year that have taken place in Ottoman Empire, it has nonetheless clearly identified the differences of the situation

from proven genocide in case of Holocaust, pointing out that Armenian "genocide" is not a historical fact. In atrocities that happened to Armenians in 1915 the main components are lacking grounds to be able to identify such a narrow legal definition as genocide. Unlike the Rwandan genocide in case of the alleged Armenian "genocide" there is no clear legal basis or the judgment of the competent international judicial body, where the intent of Ottoman Empire aimed at destruction Armenians as a whole group or in part, could have been put to question.

It has to be pointed out that for now the decision of ECHR is not yet binding, due to the fact that according to the articles 43 and 44 of the European Convention on Human Rights the Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of ECHR. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.[12]

With that in line after the debates in the Swiss political and social circles and media Swiss government have finally decided to use its right to refer the case to the Grand Chamber of ECHR. As it is stated in the statement of the Swiss Federal Office of Justise: "Switzerland's primary interest is in clarifying the scope available to the domestic authorities in applying the criminal anti-racism provision laid down in the Swiss Criminal Code (Art. 261bis CC). Switzerland created this penal provision, which entered into force on 1 January 1995, to close loopholes in criminal law and enable the country to accede to the UN Convention on the Elimination of All Forms of Racial Discrimination".[13]

No doubt that though such a legalistic goal is set as primary target for Switzerland there is a lot of politics behind it and there are a lot of pressure points from the Armenian lobbying as it was backed by the official statements of the leaders of the Republic of Armenia as a reaction to the decision of Swiss authorities.[14] At the same time that decision provoked understandable disappointments from the Turkish side.[15]

Given the circumstances it is only left to hope that ECHR will not take the case under the consideration of Grand Chamber, and if still considered, ECHR will uphold the decision of the Chamber. With that the Court will truly show that it

12 *European Convention on Human Rights,* articles 43, 44, http://www.echr.coe.int/Documents/Convention_ENG.pdf

13 "Perinçek: Switzerland requests referral to Grand Chamber", *FOJ*, Press Release, 11.03.2014, http://bit.ly/1hrARoJ

14 "We welcome Swiss government decision of Perincek case – Armenian President", *News.am*, http://news.am/eng/news/198982.html

15 "Turkish anger as Swiss appeal Perincek decision", *Swissinfo.ch*, http://bit.ly/1omTtL8

is an independent and non-political judicial body that is immune to pressure from politicians and lobbyists when making its decisions.

Strikingly one other case comes to mind when analyzing the Perincek case. Such events as the massacres and other atrocities in Khojaly, Azerbaijan in 1992 perpetrated by Armenian armed forces with support of the Russian 366th infantry regiment during war in Nagorno-Karabakh have not yet had their characterization in the Court of law as well. Thought widely believed to be genocide, scholars nonetheless agree that the final characterization of the event should be given by the court of law on the international level.

While discussing massacre in Khojaly there are undoubtedly seen elements of the crime of genocide. It is quite clear that the murderous acts committed in Khojaly carry evidence that can be identified as *actus reus* of the crime of genocide. It has to be pointed out that such acts were not limited only to Khojaly that have taken place during the Nagorno-Karabakh conflict's active stage. *Mens rea* of the genocide is very hard to prove and less clear in case of Khojaly. However, such actions of the Armenians as setting up ambushes in advance, following refugees on helicopters and orders given by radio suggest that *mens rea* of genocidal acts have formed prior to the commission such acts. Moreover, it is quite evident that in the case of Khojaly Armenians chose the target group as "Azerbaijanis" and intended to destroy parts of this group.[16]

Precisely because there are clear elements of possible crime of genocide in the event there is –like in the case of Armenian "genocide" – a clear need for international judicial opinion to clarify the character of the event. It is a pity that so much time is passing by but there are no judicial decisions on Khojaly massacre and other tragic events of Nagorno-Karabakh conflict.

For some time there is a need for the *ad hoc* international criminal tribunal to be set up for the investigation of the international crimes perpetrated in Nagorno-Karabakh conflict using the models of International Criminal Tribunal for Former Yugoslavia and International Criminal Tribunal for Rwanda. These two institutions have proven themselves capable of delivering justice and setting up new horizons for the international criminal law. Moreover, calls for such a tribunal to be set up for Nagorno-Karabakh conflict have been there for some time already.[17]

Such an *ad hoc* tribunal will be able to address the issues of characterization

16 Kamal Makili-Aliyev, *Enforcement of International Law in Nagorno-Karabakh Conflict*. Tbilisi: UNIVERSAL, 2008, p. 75, http://bit.ly/Nw809V

17 Ibid., p. 89; Elkhan Mehtiyev, "Armenian-Azerbaijani conflict: Prague Process and Current Status of Negotiations", 2006, http://anl.az/el/q/qarabag_6/q-13.htm; Elchin Mehdiyev, "Special tribunal should be created for prosecution of Khojaly genocide perpetrators", *Trend*, 26 February, 2014, http://en.trend.az/news/karabakh/2246324.html; etc.

of Khojaly massacre as well and establish the just and objective facts to bring justice and honor of the victims of these horrible events. As for the Armenian "genocide" political lobbyists, they have to finally acknowledge that such categories can be characterized only in the judicial instances and through the implementation of international criminal law in an international court. One international justice body has already proven that Armenian "genocide" cannot be considered a historical fact. With their actions such political lobbyists are actually making matters worse for Armenian people, as such decisions of the international judicial bodies may actually convince international community that "genocide" claim is a political myth and nothing more. That may even force some state to nullify the resolutions they have already adopted and backtrack on "recognitions". It would be wise then for Armenians to seek justice in courts and not in parliaments.

BIBLIOGRAPHY

Case Law of International Criminal Tribunal for Rwanda, Paragraph: ii. *Intent to destroy in whole or in part.*

Criminal Code of Switzerland, Art.261

Criminal conviction for denial that the atrocities perpetrated against the Armenian people in 1915 and years after constituted genocide was unjustified. (2013, 17 December). EHCR Registrar, Press Release.

"French Council Finds Bill Penalizing Denial Unconstitutional." (2012). Armenian Weekly.

Makili-Aliyev, Kamal, (2007) *Enforcement of International Law in Nagorno-Karabakh Conflict*. Tbilisi: Universal.

Mehdiyev, Elchin. (2014) "Special tribunal should be created for prosecution of Khojaly genocide perpetrators". *Trend*

Mehtiyev, Elkhan (2006). *Armenian-Azerbaijani conflict: Prague Process and Current Status of Negotiations*.

"Perinçek: Switzerland requests referral to Grand Chamber" (2014). Press Release, Federal Office of Justice.

Smith, Ray "European Ruling Ignites Freedom Debate", (2014, February 15). *IPS*, Switzerland.

"Turkish anger as Swiss appeal Perinçek decision", (2014, 14 March*), swissinfo.ch*

"We welcome Swiss government decision of Perinçek case – Armenian President", (2014, March 14). *News.am*

Weed, Matthew C. (2011, 10 March). *International Criminal Court and the Rome Statute: 2010 Review Conference*, CRS Report for Congress.

FACING LIBERTY: THE VICTORY OF RATIONAL ARGUMENTATION AND ITS CONSEQUENCES

(ÖZGÜRLÜKLE YÜZLEŞMEK: RASYONEL TARTIŞMANIN ZAFERİ VE BUNUN SONUÇLARI)

Maxime GAUIN
Researcher at AVİM

Abstract: *The ECHR's Perincek v. Switzerland verdict is understandable to its full extent only by considering the previous legal cases involving allegations of genocide. When the Armenian side can present its allegations freely and without counter-argument, it is generally able to obtain victories. On the other hand, the confrontation of arguments for and against the "Armenian genocide" label leads to disastrous results for the supporters of Armenian terrorism. Moreover, the decisions of the European Union's Court of Justice (2003-2004) rejecting the legal value of non-binding resolutions, and of the French Constitutional Council against the Boyer bill have paved the way for the ECHR's verdict. This decision is a major victory both for freedom of speech, but also for the recognition of the scholarly debate on the Armenian question. This decision should be used not only as an argument in exchange of ideas at every level, but also as an additional legal basis for defamation cases against Armenian nationalists who attempt to portray their opponents as being no better than Holocaust-deniers.*

Keywords: *Armenian Secret Army for the Liberation of Armenia (ASALA), Armenian revolutionary Federation (ARF), Armenian terrorism, European Court of European Rights, European Union's Court of Justice, defamation, Holocaust, Switzerland, Turkey.*

Öz: *Avrupa İnsan Hakları Mahkemesi'nin Perinçek İsviçre'ye Karşı kararı ancak soykırım iddialarını içeren daha önceki davalarla karşılaştırıldığında tamamen anlaşılabilir olmaktadır. Ermeni tarafı, özgürce ve karşı savlar olmadan iddialarını sunabildiğinde genelde bu konuda zafer elde edebilmiştir. Öte yandan, Ermeni Soykırımı etiketine karşı ve Ermeni Soykırımı etiketi için çıkan savların yüzleşmeleri Ermeni terörünün destekçileri için felaket sonuçlara sebep olmaktadır. Bununla beraber, Avrupa Birliği Adalet Divanı'nın bağlayıcılığı olmayan kararların hukuksal değerini reddeden (2003-2004) kararları ve Fransa Anayasa Konseyi'nin Boyer tasarısını geri çeviren kararı AİHM kararına*

giden yolu açmıştır. Bu karar konuşma özgürlüğü için olduğu kadar Ermeni sorununa dair akademik tartışmaların tanınması için de büyük bir zaferdir. Bu karar, her seviyeden fikir alışverişi için olduğu kadar, muhaliflerini Holokost-inkârcılarından farkları yokmuş gibi yansıtmaya çalışan Ermeni milliyetçilerine karşı hakaret davalarında ek bir yasal dayanak olarak da kullanılmalıdır.

Anahtar Kelimeler: *Ermenistan'ın Kurtuluşu için Ermeni Gizli Ordusu (ASALA), Ermeni Devrimci Federasyonu (ARF), Ermeni terörizmi, Avrupa İnsan Hakları Mahkemesi, Avrupa Birliği Adalet Divanı, hakaret, Holokost, İsviçre, Türkiye*

By its decision published on December 17, 2013, the European Court of Human Rights judged that the sentence of Doğu Perinçek by the Swiss justice was wrong. Not only is the ECHR's verdict a victory for freedom of speech, but for the first time, an international court said that the "genocide" allegation is not proven beyond any reasonable doubt.

This paper, without avoiding the strictly legal dimension of the case, stresses its historical background as well as its consequences for the historical work, primarily in Europe.

Background

"Genocide" claims and national criminal courts: 1921-1985

The idea to use the "extermination" (and, after 1965, the "genocide") claims found its origin in the assassination of Talat Paşa, former Minister of Interior (1913-1917) and Grand Vizier (1917-1918) of the Ottoman Empire by the Dashnak terrorist S. Tehlirian. Hagop der Hagopian, aka Chahan Natalie (1884-1983), one the leaders of the Armenian Revolutionary Federation until 1925 and among those in charge of the Nemesis operation, gave the order to Tehlirian to not attempt to flee after having killed Talat. The trial was used as a tribune for the vilification of the Committee of Union and Progress and, more generally for the Armenian nationalist propaganda. During the debate, this strategy obtained only mixed results, thanks to the efforts of the prosecutor. Regardless, in the end, the ARF obtained most of what it expected: Tehlirian considered to be crazy and, as a result, acquitted.[1] Even if the claims of state-sponsored extermination were not endorsed by the Berlin tribunal, the ARF—and other Armenian nationalists—never failed to say otherwise.

The first disciple of S. Tehlirian, Gourgen Yanikian, the murderer of Turkish Consul in Los Angeles Mehmet Baydar and Vice-Consul Bahadır Demir,[2] failed to transform his own trial into a powerful political tribune. The prosecutor and the president of the court agreed that the goal of the trial was to judge a double murder motivated by the nationality of the victims, nothing more and nothing less.[3] Yanikian was sentenced both in the first instance and by the appeal court to life-term imprisonment[4] (the death penalty was

1 Ara Krikorian (éd.), *Justicier du génocide arménien : le procès de Tehlirian*, Paris, Diasporas, 1981.

2 Michael Bobelian, *Children of Armenia*, New York, Simon & Schuster, 2009, pp. 141-163; Christopher Gunn, "Commemoration for the 40th Year of the First Victims of ASALA," *Review of Armenian Studies*, n° 27, 2013, pp. 267-273; Bilâl N. Şimşir, *Şehit Diplomatlarımız (1973-1994)*, Ankara-İstanbul, Bilgi Yayınevi, 2000, volume I, pp. 81-117.

3 Minutes of his trial: http://www.ataa.org/reference/Yanikian-Trial-Transcript.pdf

4 Appeal court verdict: http://law.justia.com/cases/california/calapp3d/39/366.html

suspended in the U.S. by the federal Supreme Court from 1972 to 1976). Yanikian's follower, Dashnak terrorist Hampig Sassounian was similarly sentenced to life imprisonment in 1984 for the assassination of Kemal Arıkan, the Turkish Consul General Kemal Arıkan in Los Angeles, in 1982. In 1986, the appeal court confirmed the sentence.[5]

The first unequivocal success of the defense strategy based on "genocide" claims took place in Aix-en-Provence (France), in 1982, during the trial of Max Hraïrk Kilndjian, a Dashnak indicted for the attempt of murder against the Turkish ambassador in Switzerland. M. K. Kilndjian was sentenced only as an "accomplice" for this crime and the sentence was two years in jail—virtually the time he served in preventive detention before the trial. The lawyer of the Turkish ambassador, Alain Vidal-Naquet, was (and is still) at the head of the biggest law firm of Marseille, but he was left almost alone, and, worse, without any argument regarding 1915. Conversely, the defense of Kilndjian strongly stressed on "genocide," explicitly presented as a justification for any violence against Turkish diplomats and introduced many "witnesses" to support these claims.[6]

Even more significant[7] was the trial of four terrorists of the Armenian Secret Army for the Liberation of Armenia (ASALA), who had attacked the Turkish consulate, killed a guard, wounded the consul and took hostages. The defense team was led by Patrick Devedjian and Henri Leclerc, who had been the lawyers of Kilndjian. This time, the Turkish side sent Türkkaya Ataöv, professor at Ankara University, to challenge the "genocide" claims and Dickran Kevorkian, spokesman of the Armenian patriarchate of İstanbul, to contest the accusations of "persecution" and "discrimination" against the Turkish Armenians. However, it was too few, too late. The defense introduced much more witnesses and the plaintiffs' lawyers were, once again, left without arguments on history.[8] Unlike the Kilndjian trial of 1982, the defense failed to convince the court about the attack itself. Indeed, the terrorists' lawyers tried to present the guard as an accident, and regardless, the court decided it was a murder; correspondingly, the terrorists were sentenced to pay F 490,000 to the widow and the orphans of the guard (who asked F 600,000).[9] So, the striking leniency of the criminal sentences (seven years for each terrorist) can be explained solely by the "genocide" allegation.

---

5 People v. Sassounian (1986), 182 Cal. App. 3d 361, http://law.justia.com/cases/california/calapp3d/182/361.html

6 Comité de soutien à Max Kilndjian, *Les Arméniens en cour d'assises. Terroristes ou résistants ?*, Marseille, Parenthèses, 1983 (stenographic account of the Kilndjian trial).

7 "Quatre Arméniens devant leurs juges — Le Commando suicide Yeghin Kechichian répond de l'occupation sanglante du consulat de Turquie à Paris le 24 septembre 1981", *Le Monde*, 23 janvier 1984.

8 "Procès Van", *Hay Baykar*, 23 février 1984, pp. 4-14.

9 "Arrêt de la cour d'assises de Paris", 30 janvier 1984.

The short, albeit serious, crisis that followed the Paris trial[10] led to a deal between President François Mitterrand, Turkish ambassador in Paris Adnan Bulak and the biggest French law firm, Gide-Loyrette-Nouel, who accepted to take in charge of, for the Turkish side, the forthcoming cases of Armenian terrorism. Jean Loyrette, principal of the firm, led the team. In addition to being one the best French lawyers of the second half of twentieth century, Jean Loyrette has a PhD in contemporary history from Oxford University. The first success of the new Turkish (or more accurately, Franco-Turkish) offensive strategy was not the trial of the Orly bombing, but the first trial of the Mouvement national arménien (political branch of the ASALA) in December 1984, at Créteil, for the illegal storing of weapons and explosives. The MNA's newspaper, *Hay Baykar*, which smilingly described the lawyers of the Turkish consulate as "rather soft" for the Paris trial[11] now expressed its bitterness—not to say its fear—about a "fierce and obstinate" plaintiff side (*une partie civile acharnée et opiniâtre*), considered (with reason) the main factor for the severity of the sentences.[12]

The first success of the new Turkish (or more accurately, Franco-Turkish) offensive strategy was not the trial of the Orly bombing, but the first trial of the Mouvement national arménien (political branch of the ASALA) in December 1984, at Créteil, for the illegal storing of weapons and explosives.

During the trial of the Orly attack (February-March 1985), that took place also in Créteil, Gilles de Poix and Christian de Thezillat, associates of Jean Loyrette, argued to find the three indicted persons guilty; Jean Loyrette himself argued against the Armenian terrorism and the "Armenian genocide" allegation, with powerful arguments. To reinforce this argumentation, four Turkish scholars—Sina Akşin, Türkkaya Ataöv, Hasan Köni and Mümtaz Soysal—testified against the "genocide" allegations; Avedis Simon Hacinliyian, senior lecturer at Bosphorus University, testified against the allegation of "persecution" of Armenians in Turkey.[13] Remarkably, none of the self-proclaimed historians who testified for Armenian terrorists during the previous trials dared this time to repeat their claims, either during the trials of the MNA or during the trial of the Orly bombing. Last but not least, Henri Leclerc, who had been extremely arrogant during the Paris trial in January 1984, got the lesson from his failure in front of the Créteil in December 1984

10 "Indignation en Turquie", *Le Monde*, 2 février 1984.

11 "Procès de Kevork Guzélian, Vasken Sislian, Aram Basmadjian et Hagop Djoulfayan", *Hay Baykar*, 23 février 1984, p. 3.

12 "Procès des boucs émissaires de la répression anti-arménienne à Créteil" *Hay Baykar*, 12 janvier 1985, pp. 4-9 (quote p. 4).

13 *Terrorist Attack at Orly: Statements and Evidence Presented at the Trial, February 19 - March 2, 1985*, Ankara: Faculty of Political Science, 1985. The original French version is available online: http://www.tetedeturc.com/home/spip.php?article96

and avoided during the second trial of the MNA at Bobigny (in March 1985, for concealment of a criminal) to "enter in a political debate"[14]—a self-explanatory confession: the "genocide" claims are political rather than historical.

These various court cases prove how important rational, systematic, argumentation about history is.

The Decision of the EU's Court of Justice (2003-2004)

In October 2003, the association Euro-Arménie (Marseille), represented by its lawyer, Philippe Krikorian, sued the European Parliament, the European Commission and the European Council for their decision of 2002 allowing the beginning of negotiations for Turkey's EU membership. This case is important because it proves that a non-binding resolution has no legal value—which means that they cannot be used to argue about any "consensus". Indeed, the EU's Court of Justice rejected all the claims, and sentenced the plaintiffs to pay the costs:

> *"As regards the fact that the Republic of Turkey enjoys a European Union accession partnership, the applicants rely on the argument that the conduct of the defendant institutions is unlawful because it is contrary to the 1987 resolution.*
>
> *19 It suffices to point out that the 1987 resolution is a document containing declarations of a purely political nature, which may be amended by the Parliament at any time. It cannot therefore have binding legal consequences for its author nor, a fortiori, for the other defendant institutions.*
>
> *20 That conclusion also suffices to dispose of the argument that the 1987 resolution could have given rise to a legitimate expectation, on the part of the applicants, that the institutions would comply with that resolution (see, to that effect, Joined Cases 87/77, 130/77, 22/83, 9/84 and 10/84 Salerno and Others v Commission and Council [1985] ECR 2523, paragraph 59, and Joined Cases C-213/88 and C-39/89 Luxembourg v Parliament [1991] ECR I-5643, paragraph 25). […]*
>
> *Since the applicants have been unsuccessful, they must be ordered to pay the costs."*[15]

In October 2004, the appeal court rejected the application of Euro-Arménie

14 "Bobigny : la solidarité arménienne condamnée", *Hay Baykar*, 10 mai 1985, pp. 8-9.

15 "Order of the Court of First Instance (First Chamber) of 17 December 2003. Grégoire Krikorian, Suzanna Krikorian and Euro-Arménie ASBL v European Parliament", Council of the European Union and Commission of the European Communities. Case T-346/03. http://curia.europa.eu/juris/liste.jsf?language=en&num=T-346/03

and Philippe Krikorian; the Armenian association was sentenced to pay the new costs.[16]

The Decision of the French Constitutional Council (2012)

On January 31, 2012, 76 deputies and 82 senators presented two similar, albeit distinct, applications to the Constitutional Council, after the vote (due to unprecedented pressures and tricks) of the Boyer bill, which pretended to criminalize the "denial of the genocides recognized by law." One month later, the Constitutional Council found the bill unconstitutional, because it would violate freedom of speech. This decision is incontrovertibly the most important element of the background; it is explicitly mentioned as an element of jurisprudence justifying the decision of the ECHR.

> *"5. Considering, on the other hand, that Article 11 of the Declaration of Man and the Citizen of 1789 provides: 'The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law'; that Article 34 of the Constitution provides: 'Statutes shall determine the rules concerning... civic rights and the fundamental guarantees granted to citizens for the exercise of their civil liberties'; that on this basis, Parliament is at liberty to enact rules regulating the exercise of the right of free communication, freedom of speech (including the written word) and freedom of the press; that it is also at liberty on this basis to establish criminal offences punishing the abuse of the exercise of the freedom of expression and communication which cause disruption to public order and the rights of third parties; that nonetheless, freedom of expression and communication is all the more precious since its exercise is a precondition for democracy and one of the guarantees of respect for other rights and freedoms; that the restrictions imposed on the exercise of this freedom must be necessary, appropriate and proportional having regard to the objective pursued;*
>
> *6. Considering that a legislative provision having the objective of 'recognising' a crime of genocide would not itself have the normative scope which is characteristic of the law; that nonetheless, Article 1 of the law referred punishes the denial or minimisation of the existence of one or more crimes of genocide 'recognised as such under French law'; that in thereby punishing the denial of the existence and the legal classification of crimes which Parliament itself has recognised and classified as such, Parliament has imposed an unconstitutional limitation on the exercise of freedom of expression and communication; that*

16 "Notice for the OJ : Order of the Court (Fourth Chamber) of 29 October 2004 in Case C-18/04 P: Grégoire Krikorian and Others v European Parliament", Council of the European Union, Commission of the European Communities http://curia.europa.eu/juris/document/document.jsf?text=&docid=49987&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=83798

accordingly, without any requirement to examine the other grounds for challenge, Article 1 of the law referred must be ruled unconstitutional; that Article 2, which is inseparably linked to it, must also be ruled unconstitutional,

HELD :

Article 1. – The Law on the punishment of denials of the existence of genocides recognised by law is unconstitutional.

Article 2. - This decision shall be published in the Journal officiel of the French Republic."[17]

In short, the Constitutional Council ruled in the name of the freedom of speech. This is a question of principle, not a technical issue. The decision also contains a warning for any politician who would be tempted to try again this dangerous game: The "recognition" of 2001 is unconstitutional,[18] and the Constitutional Council considers himself allowed to check the constitutionality of any old bill closely connected to a new one, presented to him for verification of its constitutionality. Two years later, in 2014, Jean-Louis Debré, the president of the Council, unequivocally stated, during a visit in Ankara: "These principles will never change. Therefore the verdict given by the Council will be a permanent one."[19]

Other court decisions confirm Mr. Debré's statement. Indeed, Philippe Krikorian had failed in front of the European Union's Court of Justice, for three times, in 2012-2013, in his attempt to "force" the French government to submit a new bill.[20] Last but not least, on January 16, 2014, the appeal court of Paris confirmed the sentence of Laurent Leylekian, then executive director of the European-Armenian Federation for Justice and Democracy, for defamation against Sırma Oran-Martz (a French citizen, who is the daughter of Baskın Oran). Mr. Leylekian called Ms. Oran-Martz, among other violent words, a "denialist," who "infect and infest the social political structures of the European Union's countries" and an "enemy of mankind." In page 6 of its verdict, the

17 "Decision no. 2012-647 DC of 28" 2012 Law on the punishment of denials of the existence of genocides recognised by law http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/case-law/decision/decision-no-2012-647-dc-of-28-february-2012.114637.html

18 For a jurisprudential example of a statement censored by the Constitutional Council because it has nothing to do in a law, see the decision of April 21, 2005: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/depuis-1958/decisions-par-date/2005/2005-512-dc/decision-n-2005-512-dc-du-21-avril-2005.965.html For additional arguments regarding the unconstitutionality of the "recognition," see Georges Vedel, " Les questions de constitutionalité posées par la loi du 29 janvier 2001 ", in Didier Mauss et Jeanette Bougrab (ed.), *François Luchaire, un républicain au service de la République*, Paris : Publications de la Sorbonne, 2005, pp. 37-61.

19 "French Judge Assures Gül Over 'Genocide Denial'," *Hürriyet Daily News*, February 21, 2014, http://www.hurriyetdailynews.com/french-judge-assures-gul-over-genocide-denial.aspx?pageID=238&nID=62751&NewsCatID=359

20 Conseil d'État statuant en contentieux, 26 novembre 2012 ; Arrêt de la cour d'appel d'Aix-en-Provence, n° 2013/684, 10 octobre 2013, http://www.armenews.com/IMG/ARRET_QPC_CA_AIX_DU_10.10.2013.pdf

appeal court of Paris places the words "Armenian genocide" in quotation marks, and on the same page, the judges even write: "what [Laurent Leylekian] calls the Armenian genocide."[21] In April 2014, Mr. Leylekian announced that he renounced to his application to the *Cour de cassation* (Supreme Court).[22] His sentence is, as a result, very final. This announcement was not commented on by any Armenian media, a striking proof of their embarrassment.

On January 16, 2014, the appeal court of Paris confirmed the sentence of Laurent Leylekian, then executive director of the European-Armenian Federation for Justice and Democracy, for defamation against Sırma Oran-Martz (a French citizen, who is the daughter of Baskın Oran). Mr. Leylekian called Ms. Oran-Martz, among other violent words, a "denialist," who "infect and infest the social political structures of the European Union's countries" and an "enemy of mankind."

The misuse of the Swiss anti-racist law

The failed attempts

In 1995, Switzerland adopted a law (integrated in the criminal code as Article 261 bis) banning the expression of racism, as well as the negation, the justification or the "crude minimization" of genocide (without precise references to what exactly must be called "genocide"). In 2001, the Association Suisse-Arménie (ASA) filed a complaint against seventeen leaders of Swiss Turkish associations. It must be noted, at first, that the ASA was established in 1992 by James Karnusian, the very same man who established the Armenian Secret Army for the Liberation of Armenia, together with Hagop Hagopian, in early 1970s.[23] The ASA, more concerned by his interpretation of the Turko-Armenian tragedy of 1915-16 than by the misdeeds of its founder, failed to obtain the sentence of these Swiss citizens of Turkish origin.

At the beginning of September 7, 2001, the prosecutor of Bern-Leupen recommended the acquittal of all the accused, explaining that there is no

21 Arrêt de la cour d'appel de Paris, pôle 2, chambre 7, n° 13/02194, 16 janvier 2014, http://www.turquie-news.com/IMG/pdf/ca_de_paris_leylekianoran_martz-2.pdf See also the comments of Sırma Oran-Martz : http://www.aydinlikgazete.com/guendem/33051-soykirim-sozcusu-leylekyan-fransada-mahkum-oldu.html During the first-instance trial, Ms. Oran-Martz's lawyer said: "'infect and infest', that the style of *Gringoire*!" (*Gringoire* was a French far rightist weekly, notorious of its vitriolic columns, and heavily compromised during the German occupation; *Gringoire*'s owner, without illusions, stopped the publication ten days before the landing in Normandy and immediately fled in Switzerland.)

22 "Défaire le négationnisme : une ambition intacte", *Les Nouvelles d'Arménie magazine*, n° 206, avril 2014, p. 43.

23 Karnusian himself confessed this fact in an interview to the editor-in-chief of *The Armenian Reporter*, in 1987. Following Karnusian's demand, this interview was published only after his death, eleven years later: "Rev. James Karnusian, Retired Pastor and One of Three Persons to Establish ASALA, Dies in Switzerland," *The Armenian Reporter*, April 18, 1998.

consensus on the "genocide" label regarding the fate of the Ottoman Armenians—unlike the genocide of the Jews– and that such issues should be left to historians. The prosecutor also regretted the vague wording of Article 261 bis, and gave as a counter-example the Austrian law, restricted to the Nazi crimes judged by the Nuremberg tribunal. On September 14, 2001, the tribunal acquitted all. On November 7, 2002, the Federal Tribunal (the Swiss Supreme Court) confirmed the acquittal. Correspondingly, in 2006, the Swiss daily *Die Weltwoche* published a series of articles, Hans-Lukas Kierser supporting the "Armenian genocide" allegation, Prof. Norman Stone rejecting this thesis. In spite of the pressure exerted by Armenian nationalist, no court case was opened against Prof. Stone.

The Perinçek case

On May 7, July 22 and September 18, 2005, in Lausanne (Canton of Vaud), Opfikon (Canton of Zurich) and Köniz (Canton of Bern), Doğu Perinçek publicly said that the "Armenian genocide" allegation is "an imperialistic lie" and explained why he defends such a thesis. If the rejection of the "Armenian genocide" label is shared by many respectable historians, Mr. Perinçek's harsh speeches were useless. Indeed, one of his goals was to undermine the article 261 bis of the Swiss criminal code. In fact, as seen above, there was no need to undermine it, because there was no jurisprudence interpreting this article as a way to restrict freedom of speech regarding the fate of the Ottoman Armenians in 1915-16. As early as July 15, 2005, the ASA, unimpressed by its previous failure, filed a complaint against Mr. Perinçek.

Mr. Perinçek bragged about "kilograms" of archives, especially Russian archives, proving his thesis. There are certainly Russian documents proving the existence of Armenian revolutionary activities, in 1914-1915 and well before; Russian military reports, from 1914 to 1918, unequivocally mentions the terrible war crimes perpetrated by Armenian volunteers of the Russian army.[24] However, Mr. Perinçek was less than careful in the choice of Russian documents, and left to the Federation of Romandie's Turkish Association (Fédération des associations turques de Suisse romande, FATSR) a very short time to translate a huge amount of Russian-only archival material. The few documents that the FATSR could translate before the trial were titles of ownership from the Georgian aristocracy.[25]

24 General Mayewski, *Les Massacres d'Arménie*, 1916; Mehmet Perinçek (ed.), *Rus Devlet Arşivlerinden 150 Belgede Ermeni Meselesi*, İstanbul, Kırmızı, 2013; Vladimir N. Tverdokhlebov, *War Journal of the Second Russian Fortress Artillery Regiment of Erzeroum*, İstanbul, 1919 (http://louisville.edu/a-s/history/turks/Khlebof War Journal.pdf); Michael A. Reynolds, *Shattering Empires. The Clash and Collapse of the Ottoman and Russian Empires, 1908-1918*, New York-Cambridge: Cambridge University Press, 2011, pp. 144, 156-158 and 194-197.

25 Interview with Celâl Bayar (president of the FATSR) in Geneva, August 2010.

The rest of the litigation is correctly summarized by the ECHR:

> *"By a judgment dated 9 March 2007, the Lausanne Police Court found the applicant guilty of racial discrimination in the meaning of Art. 261 bis, para. 4, of the Swiss Penal Code (paragraph 14 below) and sentenced him to a punishment of 90 days and a fine of 100 Swiss francs (CHF) (approximately 85 euros (EUR)), suspended for two years, with payment of a fine of 3,000 CHF (approximately 2,500 EUR) replaceable by 30 days incarceration, and payment of moral damages of 1,000 CHF (approximately 850 EUR) for the benefit of the Switzerland-Armenia Association. It noted that the Armenian genocide was a proven fact according to Swiss public opinion and in a more general manner. For that, it referred to various parliamentary acts (in particular to the postulate of Buman; see paragraph 16 below), to legal publications as well as various statements from the Swiss federal and cantonal political authorities. In addition, it also cited the recognition of the said genocide by various international authorities, such as the Council of Europe and the European Parliament. In addition, it found that the motives pursued by the applicant were similar to racist motives and did not fall within a historic debate.*
>
> *10. The applicant lodged an appeal against that judgment. He requested primarily the invalidation of the judgment and an additional investigation concerning in particular the status of the research and the position of historians on the Armenian question.*
>
> *11. On 13 June 2007, the Criminal Court of Cassation of the Cantonal Court of the Canton of Vaud dismissed the appeal brought by the applicant against the said judgment. According to it, following the example of the Jewish genocide, the Armenian genocide was, on the date of ratification of Article 261bis, para. 4, of the Swiss Criminal Code, a historic fact recognised as proven by the Swiss legislator. Consequently, the courts did not have to resort to historians' works to admit its existence. The cantonal court moreover emphasised that the applicant contented himself with denying the discussion of genocide, without even calling into question the existence of the massacres and deportations of Armenians.*
>
> *12. The applicant lodged an appeal in criminal matters before the Federal Tribunal against the said decision. He requested primarily the reversal of the judgment rendered in the sense of his acquittal and release from any conviction, both civil and criminal. In substance, he reproached the two cantonal authorities, from the perspective of the application of Art. 261bis, para. 4, of the Swiss Criminal Code and of the violation of the fundamental rights which he alleged, for not having conducted a sufficient investigation with regard to the materiality of the circumstances of fact making it possible to describe the events of 1915 as genocide.*
>
> *13. By a judgment dated 12 December 2007 (ATF 6B_398/2007), the relevant excerpts of which are below, the Federal Tribunal dismissed the applicant's appeal."*

If, finally, Mr. Perinçek's daring initiative had the positive result to produce a European jurisprudence, he does not deserve actual thanks, since he is (and will probably remain) the only person in Europe (not to say in the world as well) sentenced for having contested the "Armenian genocide" label. He created the problem at least as much as he contributed to fixing it. No comparison can be made with the Lewis affair in France. Indeed, Armenian associations have lost three of four court cases against Bernard Lewis, in 1994-1995, and the Forum des associations arméniennes won the last, civil, one, in 1995, only because Prof. Lewis called the "genocide" thesis "the Armenian side of this story."[26] In 2005, in a different case, the *Cour de cassation* ruled that the article 1382 of the civil code ("any damage must be repaired") cannot be used to restrict freedom of speech among individuals.[27] Six years later, the court strongly confirmed its new jurisprudence.[28]

The ECHR crushed the accusation of "racism"

The critiques formulated above about Mr. Perinçek do not diminish the importance of the ECHR's decision. By a remarkable imitation, forgetting, among other annoying facts, the popularity of the Holocaust denial in current Armenia and the close cooperation of the Armenian Revolutionary Federation with Fascist Italy and Nazi Germany[29], the Armenian nationalist propaganda usually assimilates any challenge of its "genocide" claims to "racism," saying that it is similar to the anti-Semites who deny the very existence of the Shoah. This allegation, repeated without originality by the Swiss defense, is crushed by the ECHR.

> *"112. The Court notes that it is not disputed that the topic of the description as 'genocide' of the events in 1915 and the following years is an important issue for the public. The applicant's interventions are part of a lively and contentious debate. As for the type of speech given by him, the Court recalls that he is a doctor of law and the President of the Turkish Labourers' Party. Moreover, he considers himself an historian and writer. Although the domestic authorities had described his words as more 'nationalist' and 'racist' than 'historic' (consideration 5.2 of the judgment by the Federal Court, paragraph 13 above), the essence of the applicant's statements and theories is nevertheless part of an*

26 Bernard Lewis, *Notes on a Century*, London: Weidenfeld & Nicolson, 2012, pp. 286-295.

27 Cour de cassation, chambre civile, 27 septembre 2005, n° 03-13622, http://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007051612&dateTexte=

28 Cour de cassation, chambre civile, 6 octobre 2011, n° 10-18142, http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000024648298&fastReqId=391179403&fastPos=1

29 "Document Reveals Dashnag Collaboration With Nazis," *Congressional Record*, November 1st, 1945, pp. A4840-A4841; Arthur Derounian, "The Armenian Displaced Persons," *Armenian Affairs Magazine*, I-1 ; Béatrice Penati, " "C'est l'Italie qui est prédestinée par l'Histoire" : la Rome fasciste et les nationalistes caucasiens en exil (1928-1939) ", *Oriente Moderno*, LXXXVIII-1, 2008, pp. 66-69.

> *historic context, as is shown in particular by the fact that one of his interventions occurred at a conference in commemoration of the Treaty of Lausanne of 1923. Furthermore, the applicant was also speaking as a politician on a question that has to do with the relations between two nations, i.e. Turkey, on one hand, and Armenia, on the other hand, a country whose people were the victim of massacres and deportations. Bearing on the description of a crime, this question also had a legal connotation. Hence, the Court considers that the applicant's speech was of a nature at once historic, legal and political."*

This paragraph unequivocally proves that the ECHR did not take seriously the accusations of "racism" against Doğu Perinçek—who, whatever could have been his errors in Switzerland, is obviously not "racist." Such accusations, indeed, are circular and tautological: the "denial" of the supposed "Armenian genocide" is considered as "racist," without any specific argument.

The actual racism in the Turco-Armenian conflict is mostly on the side of Armenian nationalists.

The actual racism in the Turco-Armenian conflict is mostly on the side of Armenian nationalists. The words of Laurent Leylekian, already mentioned, in an article published online in October 2009 (the web site was closed down in February 2011) are self-explanatory:

> *"Yes, bloody Turks are guilty. No matter what their good will, purposes or activities are, they are all guilty. From the newborn baby to the elderly about to die, from Islamist to Kemalist, from those coming from Sivas to Konya, from the religious to the atheist… they are all guilty. Towards Armenia, towards themselves, towards history and towards humanity they are all guilty."*

Anyway, the ECHR's rejection of the accusation of "racism" is confirmed in the part of the decision rejecting the comparison between the Armenian case and the genocide of the Jews.

The ECHR made a clear distinction with the Shoah

For historians and for all those who contest the "Armenian genocide" label, the most relevant part of the ECHR's decision is the following (italics added):

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

> *Committee on 8 November 1996, Communication no. 550/1993, Doc. CCPR/C/58/D/550/1993 (1996)). Firstly, the applicants in these cases had not only contested the simple legal description of a crime, but denied historic facts, sometimes very concrete ones, for example the existence of gas chambers. Secondly, the sentences for crimes committed by the Nazi regime, of which these persons deny the existence, had a clear legal basis, i.e. Article 6, paragraph c), of the Statutes of the International Military Tribunal (in Nuremberg), attached to the London Agreement of 8 August 1945 (paragraph 19 above). Thirdly, the historic facts called into question by the interested parties had been judged to be clearly established by an international jurisdiction."*

This paragraph is a considerable, maybe unprecedented, victory. An international court actually validates two facts which is certainly obvious, but strongly denied by Armenian propagandists:

1) There is no "clear legal basis" for the claims of "Armenian genocide." Indeed, the trials of 1919-1920 in İstanbul seriously violate the basic rights of defense. The indicted were not allowed to be assisted by an advocate during the investigation, and the right of cross-examination did not exist during the trial. For the trials which took place between April and October 1920, even the right to hire a lawyer did not exist. Most of the sentences pronounced during this last period were overruled in appeal, in January 1921. All the other sentences were annulated by the amnesty included in the Lausanne treaty (1923).[30]

Quickly dissatisfied by these martial-courts,[31] the British authorities confirmed their intention, expressed as early as January-February 1919, to organize their own tribunal in Malta. However, the Ottoman documents seized by the British army, far from proving any intent to exterminate the Armenian population, explicitly warned the local officials against any measure liable to lead to massacres.[32] Correspondingly, the attempts to find, in the U.S. archives, evidence incriminating any of the 144 Ottoman officials interned in Malta failed completely.[33] The British authorities having lost any hope to find incriminatory evidence,[34] the prisoners were released in two waves, during the year 1921.[35]

---

30 Maxime Gauin and Pulat Tacar, "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*, XXIII-3, August 2012, pp. 821-835, http://ejil.org/pdfs/23/3/2308.pdf

31 Memorandum of the Armeno-Greek section of the British High Commissioner in İstanbul, forwarded to London by Admiral Calthorpe on Augsut 1st, 1919, The National Archives (Kew Gardens/London), FO 371/4174/118377, fº 256.

32 Salâhi R. Sonyel, "Armenian Deportations: A Reappraisal in the Light of New Documents," *Belleten*, January 1972, and, by the same author,*The Displacement of Armenians: Documents*, Ankara: TTK, 1978 (I checked the originals in FO 371/4241/170751 and FO 371/9158/5523).

33 Letter of Ambassador Geddes to the Foreign Office, July 13, 1921, FO 371/6504/E 8519. Also see the manuscript note of R. C. Lindsay for D. G. Osborne, undated (the response of Osborne is dated January 29, 1921), FO 371/6499/E 1445.

34 Letter of judge Lindsay Smith to the High Commissioner, August 24, 1921 (referring to the opinion of the prosecutor), FO 371/6504/E 10023.

35 Guenter Lewy, *The Armenian Massacres…*, p. 127.

2) There is a scholarly debate on the Armenian relocations of 1915-16, including on the allegation of "genocide."[36]

The Shoah has been rightfully considered by both the ECHR and the UN as an incontrovertible fact, not subjected to any serious debate about its very existence and its intentional nature. The contestation of its existence is generally motivated by racism, and, even more, is a fundamental way to disseminate anti-Semitism during recent decades (especially after the Six-Day War, in 1967). [37] However, in the words of Joseph Weiler, professor of law at New York University, "The very appellation ['Armenian genocide'] is hotly contested."[38]

On the contrary, in its decision announced in 1996 and cited by the ECHR in its Perinçek v. Switzerland decision, the U.N. Human Rights Committee ruled:

> *"9.6 To assess whether the restrictions placed on the author's freedom of expression by his criminal conviction were applied for the purposes provided for by the Covenant, the Committee begins by noting, as it did in its General Comment 10 that the rights for the protection of which restrictions on the freedom of expression are permitted by article 19, paragraph 3, may relate to the interests of other persons or to those of the community as a whole. Since the statements made by the author, read in their full context, were of a nature as to raise or strengthen anti-semitic feelings, the restriction served the respect of the Jewish community to live free from fear of an atmosphere of anti-semitism. The Committee therefore concludes that the restriction of the author's freedom of expression was permissible under article 19, paragraph 3 (a), of the Covenant.*
>
> *9.7 Lastly the Committee needs to consider whether the restriction of the author's freedom of expression was necessary. The Committee noted the State party's argument contending that the introduction of the Gayssot Act was intended to serve the struggle against racism and anti-semitism. It also noted the statement of a member of the French Government, the then Minister of Justice, which characterized the denial of the existence of the Holocaust as the principal vehicle for anti-semitism. In the absence in the material before it of any argument undermining the validity of the State party's position as to the necessity of the restriction, the Committee is satisfied that the restriction of Mr.*

36 See, for example, Edward J. Erickson, *Ottomans and Armenians: a Study in Counter-Insurgency*, New York-London: Palgrave MacMillan, 2013; Michael M. Gunter, *Armenian History and the Question of Genocide*, New York-London, Palgrave MacMillan, 2011; Guenter Lewy, *The Armenian Massacres in Ottoman Turkey*, Salt Lake City: University of Utah Press, 2005.

37 For convincing demonstrations on the links between anti-Semitism and Holocaust denial: Lucy S. Dawidowicz, "Lies About the Holocaust," *Commentary*, December 1980, pp. 31-37; Valérie Igounet, *Histoire du négationnisme en France*, Paris: Le Seuil, 2000 ; Nicolas Lebourg and Joseph Beauregard, *François Duprat, l'homme qui réinventa l'extrême droite, de l'OAS au Front national*, Paris : Denoël, 2012.

38 Joseph Weiler, "Editorial," *European Journal of International Law*, vol. 23, n° 3, August 2012, p. 608, http://ejil.org/pdfs/23/3/2297.pdf

> *Faurisson's freedom of expression was necessary within the meaning of article 19, paragraph 3, of the Covenant."*[39]

After this decision, new evidence of Robert Faurisson's anti-Semitism and fascination with Nazism emerged: He actually expressed such feelings as early as the 1950s, so years before he began to deny the very existence of the Nazi gas chambers.[40]

Similarly, the ECHR itself ruled in its decision Garaudy v. France:

> *"However, there is no doubt that denying the reality of clearly established historical facts such as the Holocaust, as the applicant [Roger Garaudy] does in his book, does not constitute in any way a work of historical research akin to a quest the truth. The aim and the result of such an approach are completely different, because it is actually rehabilitate the National Socialist regime and, consequently, to charge the victims themselves for falsification of history. Thus, the denial of crimes against humanity appears as one of the most acute forms of defamation of Jews as a people and of incitement to hatred against them. Negation or revision of historical facts question the values that underpin the fight against racism and anti-Semitism are likely to seriously disrupt public order. Infringing the rights of others, such acts are incompatible with democracy and human rights and their authors clearly intended targets of the type prohibited by Article 17 of the Convention."*[41]

After this decision, new evidence of Robert Faurisson's anti-Semitism and fascination with Nazism emerged: He actually expressed such feelings as early as the 1950s, so years before he began to deny the very existence of the Nazi gas chambers.

Roger Garaudy (1913-2012) was probably the less racist of the Holocaust deniers; regardless, and in spite of his precautions, his book *Les Mythes fondateurs de la politique israélienne* (originally published in 1996) is incontrovertibly a slander against the Jews as a whole. That is why he was sentenced, not only for the "contestation of crimes against humanity" but also for defamation against a racial, ethnic or religious group (the Jews).[42]

The distinction, by the ECHR, between the Armenian case and the genocide of the Jews is rather similar to the verdict of the appeal court of Paris confirming the sentence of Laurent Leylekian for defamation (see above). In addition, even before—and of course after—the vote of the Gayssot act, which

39 *Robert Faurisson v. France,* Communication No. 550/1993 , U.N. Doc. CCPR/C/58/D/550/1993(1996). http://www1.umn.edu/humanrts/undocs/html/VWS55058.htm

40 Valérie Igounet, *Robert Faurisson : portrait d'un négationniste*, Paris : Denoël, 2012.

41 *Garaudy v. France,* requête no 65831/01 http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-44357

42 "Le philosophe Roger Garaudy est condamné pour contestation de crimes contre l'humanité ", *Le Monde*, 1er mars 1998. The appeal court even added to the charges the incitement to hatred against a racial, ethnic or religious group: " La condamnation de Roger Garaudy est alourdie en appel ", *Le Monde*, 18 décembre 1998.

criminalizes Holocaust denial in France, the French jurisprudence considered that calling somebody "a kind Robert Faurisson" as slander—if, of course, the targeted person is not racist and not a Holocaust-denier.[43]

The ECHR's decision offers a strong jurisprudential basis to sue for defamation, in Europe, the Armenian extremists who do not accept the scholarly debate and use slander instead of arguments based on archives and other primary sources. My lawyer, Patrick Maisonneuve, filed in my name a complaint, at the Paris tribunal, for defamation, against Jean-Marc "Ara" Toranian (spokesman of the ASALA in France from 1976 to 1983, co-chairman of the Coordination Council of France's Armenian Associations since 2010) and two users of his web site, armenews.com. These two persons accused me of "denialism" and "fascism," among other slanders. The defamation cases are facilitated by the frequent addition to charges of "fascism," "racism" and even more the accusation of perpetrating "the last step of the genocide."

One year before 2015, the legal response to slander should be systematic. It would be, indeed, an illusion to believe that scholarly publications will be sufficient. The historians who contest Armenian propaganda have always been subjected to defamation and threats, but, unfortunately, for decades (1977-2005), they remained too passive—it is especially obvious in the cases of Stanford Jay Shaw, Justin McCarthy and Heath Lowry in the United States, and Gilles Veinstein in France.[44] They now have to counter-attack by all the legal means.

Conclusion

The Perinçek affair offered eventually and somewhat paradoxically (since, without Mr. Perinçek, there would have been no misuse of the Swiss anti-racist law), a golden opportunity for a fair debate on the Armenian issue. The dishonest ways and slanders, must be prevented, as well as the liberticidal bills. The ECHR's decision provides a powerful legal instrument against both these dangers to free historical research and free discussion. This exceptional opportunity should not be missed. In front of the ECHR, legal and historical argument did matter, as they did in front of the Créteil courts in 1984-85.

43 Bernard Lugan, *Douze années de combat judiciaires (1990-2002)*, Lyon, éditions de *L'Afrique réelle*, no date (ca 2002-2003).

44 http://www.tetedeturc.com/home/spip.php?article15

BIBLIOGRAPHY

Unpublished primary sources

The National Archives (Kew Gardens/London), FO 371/4174, FO 371/4241, FO 371/6499, FO 371/6504, FO 371/9158.

Interview with Celâl Bayar in Geneva, August 2010.

Published primary sources

Comité de soutien à Max Kilndjian, *Les Arméniens en cour d'assises. Terroristes ou résistants ?*, Marseille, Parenthèses, 1983 (stenographic account of the Kilndjian trial).

Conseil constitutionnel, décision n° 2012-647 DC, 28 février 2012, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/case-law/decision/decision-no-2012-647-dc-of-28-february-2012.114637.html (official English translation).

Conseil constitutionnel, décision N° 2005-512 DC, 21 avril 2005, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/depuis-1958/decisions-par-date/2005/2005-512-dc/decision-n-2005-512-dc-du-21-avril-2005.965.html

Cour d'appel d'Aix-en-Provence, arrêt n° 2013/684, 10 octobre 2013, http://www.armenews.com/IMG/ARRET_QPC_CA_AIX_DU_10.10.2013.pdf

Cour d'appel de Paris, pôle 2, chambre 7, arrêt n° 13/02194, 16 janvier 2014, http://www.turquie-news.com/IMG/pdf/ca_de_paris_leylekianoran_martz-2.pdf

Cour de cassation, chambre civile, 27 septembre 2005, n° 03-13622, http://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007051612&dateTexte=

Cour de cassation, chambre civile, 6 octobre 2011, n° 10-18142, http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000024648298&fastReqId=391179403&fastPos=1

Court of Justice of the European Union, Grégoire Krikorian, Suzanna Krikorian and Euro-Arménie ASBL v European Parliament, Council of the European Union and Commission of the European Communities, Case T-346/03,

http://curia.europa.eu/juris/liste.jsf?language=en&num=T-346/03
http://curia.europa.eu/juris/document/document.jsf?text=&docid=49987&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=83798

European Court of Human Righths, Roger Garaudy c. France, 23 juin 2003, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-44357

European Court of Human Righths, Doğu Perinçek c. Suisse, 17 décembre 2013, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-139276

Ara Krikorian (ed.), *Justicier du génocide arménien : le procès de Tehlirian*, Paris, Diasporas, 1981.

Minutes of Yanikian trial, 1973: http://www.ataa.org/reference/Yanikian-Trial-Transcript.pdf and appeal verdict (1974): Appeal court verdict: http://law.justia.com/cases/california/calapp3d/39/366.html

People v. Sassounian (1986), 182 Cal. App. 3d 361, http://law.justia.com/cases/california/calapp3d/182/361.html

Salâhi R. Sonyel, *The Displacement of Armenians: Documents*, Ankara: TTK, 1978.

Terrorist Attack at Orly: Statements and Evidence Presented at the Trial, February 19 - March 2, 1985, Ankara: Faculty of Political Science, 1985. The original French version is available online: http://www.tetedeturc.com/home/spip.php?article96

U.N. Committee of Human Rights, Robert Faurisson v. France, Communication No. 550/1993 , U.N. Doc. CCPR/C/58/D/550/1993(1996), http://www1.umn.edu/humanrts/undocs/html/VWS55058.htm

Secondary sources

"Document Reveals Dashnag Collaboration With Nazis," *Congressional Record*, November 1st, 1945, pp. A4840-A4841.

"French Judge Assures Gül Over 'Genocide Denial'," *Hürriyet Daily News*, February 21, 2014, http://www.hurriyetdailynews.com/french-judge-assures-gul-over-genocide-denial.aspx?pageID=238&nID=62751&NewsCatID=359

"Rev. James Karnusian, Retired Pastor and One of Three Persons to Establish ASALA, Dies in Switzerland," *The Armenian Reporter*, April 18, 1998.

« Bobigny : la solidarité arménienne condamnée », *Hay Baykar*, 10 mai 1985, pp. 8-9.

« Indignation en Turquie », *Le Monde*, 2 février 1984.

« La condamnation de Roger Garaudy est alourdie en appel », *Le Monde*, 18 décembre 1998.

« Le philosophe Roger Garaudy est condamné pour contestation de crimes contre l'humanité », *Le Monde*, 1er mars 1998.

« Procès de Kevork Guzélian, Vasken Sislian, Aram Basmadjian et Hagop Djoulfayan », *Hay Baykar*, 23 février 1984.

« Procès des boucs émissaires de la répression anti-arménienne à Créteil », Hay Baykar, 12 janvier 1985, pp. 4-9.

« Procès Van », *Hay Baykar*, 23 février 1984, pp. 4-14.

« Dossier : l'affaire Gilles Veinstein », http://www.tetedeturc.com/home/spip.php?article15

« Quatre Arméniens devant leurs juges — Le Commando suicide Yeghin Kechichian répond de l'occupation sanglante du consulat de Turquie à Paris le 24 septembre 1981 », *Le Monde*, 23 janvier 1984.

Arthur Derounian, "The Armenian Displaced Persons," *Armenian Affairs Magazine*, I-1, Winter 1949-1950.

Béatrice Penati, « "C'est l'Italie qui est prédestinée par l'Histoire" : la Rome fasciste et les nationalistes caucasiens en exil (1928-1939) », *Oriente Moderno*, LXXXVIII-1, 2008, pp. 41-73.

Bernard Lewis, *Notes on a Century*, London: Weidenfeld & Nicolson, 2012.

Bernard Lugan, *Douze années de combat judiciaires (1990-2002)*, Lyon, éditions de L'Afrique réelle, no date (ca 2002-2003).

Bilâl N. Şimşir, *Şehit Diplomatlarımız (1973-1994)*, Ankara-İstanbul, Bilgi Yayınevi, 2000.

Christopher Gunn, "Commemoration for the 40th Year of the First Victims of ASALA," *Review of Armenian Studies*, n° 27, 2013, pp. 267-273.

Edward J. Erickson, *Ottomans and Armenians: a Study in Counter-Insurgency*, New York-London: Palgrave MacMillan, 2013.

Georges Vedel, « Les questions de constitutionalité posées par la loi du 29 janvier 2001 », in Didier Mauss et Jeanette Bougrab (ed.), *François Luchaire, un républicain au service de la République*, Paris : Publications de la Sorbonne, 2005, pp. 37-61.

Guenter Lewy, *The Armenian Massacres in Ottoman Turkey*, Salt Lake City: University of Utah Press, 2005.

Joseph Weiler, "Editorial," *European Journal of International Law*, vol. 23, n° 3, August 2012, pp. 607-612, http://ejil.org/pdfs/23/3/2297.pdf

Laurent Leylekian, « Défaire le négationnisme : une ambition intacte », *Les Nouvelles d'Arménie magazine*, n° 206, avril 2014, p. 43.

Michael A. Reynolds, *Shattering Empires. The Clash and Collapse of the Ottoman and Russian Empires, 1908-1918*, New York-Cambridge: Cambridge University Press, 2011.

Michael Bobelian, *Children of Armenia*, New York, Simon & Schuster, 2009.

Michael M. Gunter, *Armenian History and the Question of Genocide*, New York-London, Palgrave MacMillan, 2011.

Nicolas Lebourg and Joseph Beauregard, *François Duprat, l'homme qui inventa Front national*, Paris : Denoël, 2012.

Salâhi R. Sonyel, "Armenian Deportations: A Reappraisal in the Light of New Documents," *Belleten*, January 1972, pp. 51-69.

Valérie Igounet, *Histoire du négationnisme en France*, Paris: Le Seuil, 2000.

Valérie Igounet, *Robert Faurisson : portrait d'un négationniste*, Paris : Denoël, 2012.

CHRONOLOGY

(KRONOLOJİ)

A Chronology of the Case of *Perinçek v. Switzerland*

7 May, 22 July and 18 September 2005

Doğu Perinçek explained in various conferences in Lausanne and Bern that the events of 1915 could not be considered as "genocide".

15 July 2005

The association "Switzerland-Armenia" applied for legal proceedings against Perinçek with reference to the Swiss National Council's decision adopted in 16 December 2003 by a vote of 107 to 67 which is worded as follows: "The National Council acknowledges the 1915 genocide of the Armenians. It requests the Federal Council to acknowledge this and to forward its position by the usual diplomatic channels."

7 March 2007

Mr. Perinçek's lawyer, Mr. Moreillon, demanded the following in a letter to the court: 1) To take a decision to extend the judicial enquiry on the status of the massacres/genocides with regard to the Armenian question of 1915. 2) To demand all required documents from the United Nations to further examine the actual circumstances surrounding the mentioned tragedy. 3)To have the court consult to unbiased experts who had not dealt directly or indirectly with this historical issue. 4) To have the court consult via experts the archives of Austria, Hungary, Ottoman Empire, Tsarist Russia and Armenia in determining the circumstances with regard to the Armenian issue of 1915 within the bounds of possibility. 5) To decide to extend the investigation on the status of current historical studies and the stance of historians.

9 March 2007

The Court found that Mr. Perinçek's motives were of a racist tendency and that he had stated that in 1915 it was Turks, not Armenians, who were attacked therefore it means the Armenians also committed genocide. The Court further stated that the massacre of the Armenians by the Ottoman Empire had been long accepted as genocide, that the court did not have to make a judgment on what the Armenians had lived through prior to and during the First World War and that the "Armenian genocide" could be compared to the Jewish holocaust.

The Lausanne Police Court convicted Perinçek of racial discrimination in accordance with Article 261bis, paragraph 4 of the Swiss Criminal Code and sentenced him to a punishment of 90 days and a fine of 100 Swiss francs. Additionally, the Court convicted him to pay 1000 Swiss francs for the benefit of the Switzerland-Armenia association for moral indemnities and 10.000 Swiss francs for court expenses. Moreover, it was decided that Perinçek would pay the whole expenses of the case which was 5.873,55 Swiss francs.

12 March 2007

Dr. Perinçek's lawyer lodged an appeal against the judgment. He primarily requested the invalidation of the judgment and an additional investigation concerning in particular the status of the research and the position of historians on the Armenia issue.

13 June 2007

The conviction of the Lausanne Police Court was upheld by the Criminal Cassation Division of the Vaud Cantonal Court.

Upon this decision of the court, Mr. Perinçek lodged an appeal before the Federal Court requesting the reversal of the judgment rendered in the sense of his acquittal and release from any conviction, both civil and criminal. In particular, he reproached the two cantonal authorities from the perspective of application of Article 261bis, paragraph 4 of the Swiss Criminal Code and of violation of his fundamental rights, and stated that the authorities had not conducted a sufficient investigation with regard to the materiality of the circumstances making it possible to describe the events of 1915 as genocide.

12 December 2007

The Federal Court dismissed Mr. Perinçek's appeal in its judgment.

10 June 2008

Having no means left to appeal in Swiss courts, Perinçek carried his appeal to the European Court of Human Rights on the grounds that Swiss courts breached his freedom of expression in accordance with the Article 10 of the European Convention on Human Rights. Particularly, he argued that Article 261bis, paragraph 4, of the Swiss Criminal Code was not sufficiently foreseeable in its effect with reference to the previous decision of the Bern-Laupen Court regarding the same issue, and that the alleged breach of his freedom of expression had not been "necessary in a democratic society." He further stated that the Swiss courts contradicted with the following articles of the European Convention on Human Rights: Article 6 on right to a fair trial, Article 7 on no punishment without law, Article 14 on prohibition of discrimination, Article 17 on prohibition of abuse of rights, Article 18 on limitation on use of restrictions on rights. He further demanded that the Article 40 of the Convention be implemented in accordance with the Article 60 of the internal regulations and demanded a compensation of intangible damages in accordance with fairness.

18 January 2011

The Swiss Ministry of Justice, in its defense submitted to the European Court of Human Rights (ECHR), emphasized that the Swiss Court's decision was in accordance with the following articles of the European Convention on Human Rights on freedom of speech: Article 10, paragraph 2 and Article 17. Furthermore, the Swiss Government emphasized the judicial discretion of the national courts and demanded the rejection of the case submitted by Mr. Perinçek to European Court of Human Rights.

15 September 2011

The Turkish government submitted written comments as a third party. The Turkish government stated in these comments that it took part in the case with the intention to defend freedom of expression.

17 December 2013

European Court of Human Rights ruled that there had been a violation of Article 10 of the European Convention on Human Rights on "freedom of expression" in the case of Doğu Perinçek v. Switzerland.

11 March 2014

The Swiss Federal Office of Justice issued a written statement on 11 March 2014 stating that Switzerland has decided to object to the judgment of the ECHR and refer it to the Grand Chamber of the ECHR .

CALL FOR PAPERS:
REVIEW OF ARMENIAN STUDIES

The Review of Armenian Studies was established with the aim of publishing papers of a high standard of quality to stimulate inter-disciplinary debate between academics and practitioners on issues falling within its scope of research. The Review of Armenian Studies invites paper submissions on any topic related to Armenian Question.

The peer-reviewed Review of Armenian Studies journal is published twice a year. Articles submitted for publication are subject to peer review. The journal's language is English. Review of Armenian Studies accepts scientific research that has not been previously submitted to another journal for publication. Submissions must be written in accordance with the principles of scientific writing and standards put forward by the journal and with a straightforward language.

Since 2001, 29 issues of Review of Armenian Studies had been published. Previous issues include contributions from prominent academics (including Prof. Justin McCarthy and Prof. Guenter Lewy) as well as leading historians and accomplished students engaged in the field of historical, political and social research on the Armenian Issue.

Review of Armenian Studies is indexed by the EBSCO and TÜBİTAK/ULAKBİM.

Topics

Although we welcome any contributions related to the Armenian Issue, some major topics may well include the following titles.

- Politics of Armenia
- Armenian History
- Culture and Socio-politics in Armenia
- Regional and international politics of Armenia
- Turkey-Armenia Relations
- Armenia- Iran Relations
- Armenia's relations with the States in Caucasus region
- US-Armenia Relations
- Armenia's Relations with the EU

Manuscript Submission

Please submit manuscripts via e-mail to Aslan Yavuz Şir

ayavuzsir@avim.org.tr or info@avim.org.tr

Manuscripts should range from 3,000 to 13,000 words and be approximately 10-30 single-spaced pages in length including footnotes and bibliography. Articles must be word processed using Microsoft Word, 12 point font, Times New Roman, and should be single-spaced throughout allowing good (1 1/2 inch) margins. Pages should be numbered sequentially.

The title page of the article should include the following information:

- Manuscript title
- Names and affiliations of all contributing authors
- Full address for correspondence, including telephone and email address
- Abstract: please provide a short summary of up to 300 words.
- Keywords: please provide 5 key words in alphabetical order, suitable for indexing. Ideally these words will not have appeared in the title.

We are now welcoming contributions for the 30th issue of this journal.

Complete submissions are due June 2, 2014.

The editorial office will make every effort to deal with submissions to the journal as quickly as possible. All papers will be acknowledged on receipt by email.

www.orsam.org.tr

ORSAM
CENTER FOR MIDDLE EASTERN STRATEGIC STUDIES

Your Link to Middle East

ORDER FORM

Name :..... **Address** :.....

Last Name :..... .....

Telephone :..... .....

E-mail :..... .....

Subscriptions

☐ **Ermeni Araştırmaları Journal -** *4 Months* Annual 25 TL ~~27~~

☐ **Review of Armenian Studies Journal** - *6 Months* Annual 15 TL ~~18~~

☐ **Uluslararası Suçlar ve Tarih Journal** - *Per Year* Annual 9 TL

Ordering of Single Volumes

☐ **Book of Ermeni Sorunu Temel Bilgi ve Belgeler** 15 TL
(Extended version and 2nd edition)

☐ **Ermeni Araştırmaları Journal** – Latest volume (volume 46) 9 TL

☐ **Review of Armenian Studies Journal** – Latest volume (volume 29) 9 TL

☐ **Uluslarası Suçlar ve Tarih Journal** – Latest volume (volume 14) 9 TL

Ordering of Previous Volumes

☐ Previous volume/volumes ..... of Ermeni Araştırmaları Journal Each is 5 TL

☐ Previous volume/volumes ..... of Review of Armenian Studies Journal Each is 5 TL

☐ Previous volume/volumes ..... of Uluslarası Suçlar ve Tarih Journal Each is 5 TL

** To receive your order, send the form with your receipt.*

Contact

Address: Süleyman Nazif Sokak No: 12 Daire: 4 06550 Çankaya / ANKARA
Telephone: 0312 438 50 23 • **Fax:** 0312 438 50 26
E-mail: teraziyayincilik@gmail.com

Account Number:
Terazi Yayıncılık Garanti Bankası A.Ş. Çankaya /Ankara Şubesi
Account No: 181 /6296007 **IBAN No:** TR960006200018100006296007

Postal Check Account No: 5859221

www.avim.org.tr