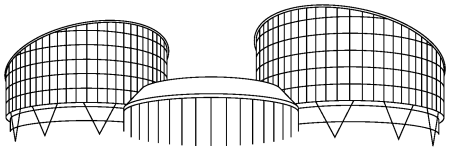

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF PERİNÇEK v. SWITZERLAND

(Application no. 27510/08)

JUDGMENT

STRASBOURG

15 October 2015

This judgment is final but may be subject to editorial revision.

PERİNÇEK v. SWITZERLAND JUDGMENT

In the case of Perinçek v. Switzerland,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Dean Spielmann, *President*,
Josep Casadevall,
Mark Villiger,
Isabelle Berro,
Işıl Karakaş,
Ján Šikuta,
Päivi Hirvelä,
Vincent A. De Gaetano,
Angelika Nußberger,
Linos-Alexandre Sicilianos,
Helen Keller,
André Potocki,
Helena Jäderblom,
Aleš Pejchal,
Johannes Silvis,
Faris Vehabović,
Egidijus Kūris, *judges*,

and Johan Callewaert, *Deputy Grand Chamber Registrar*,

Having deliberated in private on 28 January and 9 July 2015,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

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

2. The applicant alleged, in particular, that his criminal conviction and sentence in Switzerland on account of public statements that he had made there in 2005 had been in breach of his right to freedom of expression and of his right not to be punished without law.

3. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). On 12 November 2013 a Chamber of this Section, composed of the following judges: Guido Raimondi, President, Peer Lorenzen, Dragoljub Popović, András Sajó, Nebojša Vučinić, Paulo Pinto de Albuquerque, and Helen Keller, and also of Stanley Naismith, Section Registrar, declared the application partly admissible and partly

inadmissible, found that there had been a breach of Article 10 of the Convention, and held that it was not necessary to examine separately the admissibility or merits of the applicant's complaint under Article 7 of the Convention. A concurring opinion by Judges Raimondi and Sajó and a partly dissenting opinion by Judges Vučinić and Pinto de Albuquerque were annexed to the Chamber judgment, delivered on 17 December 2013.

4. On 17 March 2014 the Swiss Government requested that the case be referred to the Grand Chamber, in accordance with Article 43 of the Convention. This request was accepted by the panel of the Grand Chamber on 2 June 2014.

5. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24 of the Rules of Court. On 15 October 2014 the Armenian Government, who had been granted leave to intervene (see paragraph 7 below), asked Judge Keller to withdraw from the case, citing her having taken part in the Chamber which had examined it. On 16 October 2014 Judge Keller refused to do so. On 22 December 2014 the Armenian Government asked the President of the Grand Chamber to have Judge Keller removed from the case, again citing her having taken part in the Chamber which had examined it. On 7 January 2015, having regard to the terms of Article 26 §§ 4 and 5 of the Convention and Rule 24 § 2 (d) of the Rules of Court, the President refused that request. On 28 May 2015 Judge Silvis, substitute, replaced Judge Lazarova Trajkovska, who was unable to take part in the further consideration of the case (Rule 24 § 3 of the Rules of Court).

6. On 3 June 2014 the Swiss Government requested that the Grand Chamber either not hold a hearing in the case or hold it *in camera* (Article 40 § 1 of the Convention and Rule 63 §§ 1 and 2 of the Rules of Court). On 10 June 2014 the Court decided, under Rule 71 § 2 read in conjunction with Rule 59 § 3 of the Rules of Court, to reject the Swiss Government's request not to hold a hearing. On 15 January 2015 the Court rejected their request to hold the hearing *in camera* as well.

7. The applicant and the Swiss Government each filed written observations (Rules 59 § 1 and 71 § 1 of the Rules of Court). In addition, third-party comments were received from the Turkish Government, who had exercised their right to intervene in the case (Article 36 § 1 of the Convention and Rule 44 § 1 (b) of the Rules of Court). Third-party comments were also received from the Armenian and French Governments, who had been given leave to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3 of the Rules of Court), as well as from the following non-governmental organisations and persons, which had likewise been granted such leave: (a) the Switzerland-Armenia Association; (b) the Federation of the Turkish Associations of French-speaking Switzerland; (c) the Coordinating Council of the Armenian Organisations in France ("*CCAF*"); (d) the Turkish Human Rights Association, the Truth

Justice Memory Centre and the International Institute for Genocide and Human Rights Studies; (e) the International Federation for Human Rights ("*FIDH*"); (f) the International League against Racism and Anti-Semitism ("*LICRA*"); (g) the Centre for International Protection; and (h) a group of French and Belgian academics. The parties replied to these comments in the course of their oral submissions at the hearing (Rule 44 § 6 of the Rules of Court).

8. The Armenian Government were in addition given leave to take part in the hearing (Article 36 § 2 of the Convention and Rule 44 § 3 of the Rules of Court).

9. The hearing took place in public in the Human Rights Building, Strasbourg, on 28 January 2015 (Rules 59 § 3 and 71 § 2 of the Rules of Court).

There appeared before the Court:

(a) *for the Swiss Government, respondent*
Mr F. SCHÜRMANN, Head of the International Human Rights Protection Section, Federal Office of Justice, Federal Police and Justice Department, *Agent*,
Prof D. THÜRER, professor emeritus, University of Zurich, *Counsel*,
Mr J. LINDENMANN, Deputy Director, Public International Law Directorate, Federal Department of Foreign Affairs,
Mr A. SCHEIDEGGER, Deputy Head of the International Human Rights Protection Section, Federal Office of Justice, Federal Police and Justice Department,
Ms C. EHRICH, legal officer, International Human Rights Protection Section, Federal Office of Justice, Federal Police and Justice Department, *Advisers*;

(b) *for the applicant*
Mr M. CENGIZ, lawyer,
Prof L. PECH, Professor of European Law, Middlesex University, *Counsel*;

(c) *for the Turkish Government, third party*
Mr E. İŞCAN, Ambassador, Permanent Representative of Turkey to the Council of Europe, *Agent*,
Prof S. TALMON, professor of law, University of Bonn, *Counsel*,
Mr A.M. ÖZMEN, Legal Adviser, Ministry of Foreign Affairs,
Ms H.E. DEMIRCAN, Head of Section, Ministry of Foreign Affairs,
Ms M. YILMAZ, Counsellor, Permanent Representation of Turkey to the Council of Europe, *Advisers*;

(d) *for the Armenian Government, third party*
Mr G. KOSTANYAN, Prosecutor General, *Agent*,
Mr A. TATOYAN, Deputy Minister of Justice, *Deputy Agent*,
Mr G. ROBERTSON QC,
Ms A. CLOONEY, barrister-at-law, *Counsel*,
Mr E. BABAYAN, Deputy Prosecutor General,
Mr T. COLLIS, *Advisers*.

The applicant was also present. The Court heard addresses by the applicant, Mr Cengiz, Prof Pech, Mr Schürmann, Prof Thürer, Prof Talmon, Mr Kostanyan, Mr Robertson QC and Ms Clooney.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The applicant

10. The applicant was born in 1942 and lives in Ankara.
11. He is a doctor of laws and chairman of the Turkish Workers' Party.

B. The statements at issue

12. In 2005 the applicant took part in three public events in Switzerland.
13. The first was a press conference held in front of the *Château d'Ouchy* in Lausanne (Canton of Vaud) on 7 May 2005. In the course of that press conference, he made the following statement in Turkish:

> "Let me say to European public opinion from Bern and Lausanne: the allegations of the 'Armenian genocide' are an international lie. Can an international lie exist? Yes, once Hitler was the master of such lies; now it's the imperialists of the USA and EU!

> Documents from not only Turkish but also Russian archives refute these international liars. The documents show that imperialists from the West and from Tsarist Russia were responsible for the situation boiling over between Muslims and Armenians. The Great Powers, which wanted to divide the Ottoman Empire, provoked a section of the Armenians, with whom we had lived in peace for centuries, and incited them to violence. The Turks and Kurds defended their homeland from these attacks. It should not be forgotten that Hitler used the same methods – that is to say, exploiting ethnic groups and communities – to divide up countries for his own imperialistic designs, with peoples killing one another. The lie of the 'Armenian genocide' was first invented in 1915 by the imperialists of England, France and Tsarist Russia, who wanted to divide the Ottoman Empire during the First World War. As Chamberlain later admitted, this was war propaganda. ... The USA occupied and divided Iraq with the Gulf Wars between 1991 and 2003, creating a puppet State in the north. They then added the oilfields of Kirkuk to this State. Today, Turkey is required to act as the guardian of this puppet State. We are faced with imperialist encirclement. The lies about the 'Armenian genocide' and the pressure linked to the Aegean and Cyprus are interdependent and designed to divide us and take us hostage. ... The fact that successive decisions have been taken that even refer to our liberation war as a 'crime of humanity' shows that the USA and EU have included the Armenian question among their strategies for Asia and the Middle East ... For their campaign of lies about the 'Armenian genocide', the USA and EU have manipulated people with Turkish identity cards. In particular, certain historians have been bought and journalists hired by the American and German secret services to be transported from one conference to another. ... Don't believe the Hitler-style lies such as that of the 'Armenian genocide'. Seek the truth like Galileo, and stand up for it."

14. The second event was a conference held in the Hilton hotel in Opfikon (Canton of Zürich) on 22 July 2005 to commemorate the 1923 Treaty of Lausanne (Treaty of Peace signed at Lausanne on 24 July 1923 between the British Empire, France, Italy, Japan, Greece, Romania and the Serb-Croat-Slovene State, on the one part, and Turkey, on the other part, 28 League of Nations Treaty Series 11). In the course of that conference, the applicant spoke first in Turkish and then in German, and said the following:

> "The Kurdish problem and the Armenian problem were therefore, above all, not a problem and, above all, did not even exist ..."

15. After that, the applicant handed out copies of a tract written by him, entitled "The Great Powers and the Armenian question", in which he denied that the events of 1915 and the following years had constituted genocide.

16. The third event was a rally of the Turkish Workers' Party held in Köniz (Canton of Bern) on 18 September 2005. In the course of that rally, the applicant made the following statement in German:

> " ... even Lenin, Stalin and other leaders of the Soviet revolution wrote about the Armenian question. They said in their reports that no genocide of the Armenian people had been carried out by the Turkish authorities. This statement was not intended as propaganda at the time. In secret reports the Soviet leaders said – this is very important – and the Soviet archives confirm that at that time there were occurrences of ethnic conflict, slaughter and massacres between Armenians and Muslims. But Turkey was on the side of those defending their homeland and the Armenians were on the side of the imperialist powers and their instruments ... and we

call on Bern, the Swiss National Council and all parties of Switzerland: Please take an interest in the truth and leave these prejudices behind. That is my observation, and I have read every article about the Armenian question and these are merely prejudices. Please leave these prejudices behind and join (??), what he said about these prejudices, and this is the truth, there was no genocide of the Armenians in 1915. It was a battle between peoples and we suffered many casualties ... the Russian officers at the time were very disappointed because the Armenian troops carried out massacres of the Turks and Muslims. These truths were told by a Russian commander ..."

C. The criminal proceedings against the applicant in relation to these statements

17. On 15 July 2005 the Switzerland-Armenia Association lodged a criminal complaint against the applicant on account of the first of the above-mentioned statements. The investigation was then expanded to cover the other two oral statements as well. On 23 July 2005 the applicant was interviewed by the Winterthur public prosecutor in relation to the statement that he had made in the Hilton hotel in Opfikon. On 20 September 2005 he was interviewed by a cantonal investigating judge in the Canton of Vaud.

18. On 27 April 2006, considering that the three statements made by the applicant fell within the ambit of Article 261 *bis* § 4 of the Criminal Code (see paragraph 32 below), the competent cantonal investigating judge of the Canton of Vaud decided to commit the applicant for trial.

19. The trial took place before the Lausanne District Police Court on 6 and 8 March 2007.

20. On 6 March 2007 the court heard the applicant, the public prosecutor, and the Switzerland-Armenia Association, which had been constituted civil party. The court then went on to hear six professional historians – one American, three French, one German and one British – and one sociologist that the parties had called to give evidence.

21. On 8 March 2007 counsel for the applicant asked the court to gather further evidence in relation to the events of 1915 and the following years. The court rejected the request, holding that it was dilatory and would lead to an adjournment of the proceedings. More importantly, it was not necessary to take more evidence on this point, given that these events had been analysed by "hundreds of historians for decades" and had been the "object of innumerable publications". The court had already heard such evidence by the historians called by the applicant and the civil party, which they regarded as the most competent in relation to this topic. It would therefore be superfluous to take further evidence in relation to it.

22. On 9 March 2007 the Lausanne District Police Court found the applicant guilty of the offence under Article 261 *bis* § 4 of the Criminal Code (see paragraph 32 below) and ordered him to pay ninety day-fines of 100 Swiss francs (CHF – 62 euros (EUR) at that time) each, suspended for two years, a fine of CHF 3,000 (EUR 1,859 at that time), which could be

replaced by thirty days' imprisonment, and the sum of CHF 1,000 (EUR 620 at that time) in compensation to the Switzerland-Armenia Association for non-pecuniary damage. The court held:

"I. The defendant

Dogu Perinçek was born in Gaziantep, Turkey on 17 June 1942. He is a Turkish politician resident in that country. After some ten months' manual employment in Germany, between 1962 and 1963, he studied law at the University of Ankara and was awarded his doctorate in 1968. He is the founder of an extreme left-wing journal. In 1969, he founded the Revolutionary Worker-Peasant Party of Turkey. Dogu Perinçek can be defined as a left-wing extremist and a follower of Lenin or Mao. He spent several years in prison in the 1980s on account of his political views. He is currently the General Chairman of the Turkish Workers' Party, which represents 0.5% of the Turkish electorate. Dogu Perinçek describes himself as a cultivated person with a very good knowledge of history. He speaks fluent German.

In his personal life, the defendant is married and the father of four children, three of whom are adults. He states that he earns about CHF 3,000.00 per month. Part of his income comes from royalties and an old-age pension. He also benefits from his wife's income. He states that his financial situation is healthy. He has never had a criminal conviction in Switzerland. No account will be taken of his criminal convictions in Turkey because, to the Court's knowledge, they relate to political offences. It may also be noted that the European Court of Human Rights has found against Turkey on two occasions in cases concerning the defendant. He will therefore be treated as a person being prosecuted for the first time.

II. The facts and the law

This case does not, in itself, present any factual problems. To simplify matters, a copy of the committal order made by the cantonal investigating judge on 27 April 2006, which specifies that Dogu Perinçek was committed for trial in this court following an adversarial hearing, and not *in absentia*, as the indictment indicates, can be appended to this judgment.

On 7 May 2005 in Lausanne, then on 18 September 2005 in Köniz, BE, Dogu Perinçek stated publicly that the Armenian genocide was an international lie. The defendant also acknowledges that on 22 July 2005 he stated in connection with the Armenian genocide that the problem of the Armenians, like that of the Kurds, had never been a problem and that it (the genocide) had never existed (paragraph 2 of the committal order).

There is no dispute as to the facts since Dogu Perinçek admits to denying the Armenian genocide. He therefore comes within the scope of Article 261 *bis* of the Criminal Code, under which he is charged. Dogu Perinçek acknowledges that massacres took place but justifies them in the name of the laws of war and maintains that the massacres were perpetrated by the Armenian as well as by the Turkish side. He also acknowledges that the Turkish Ottoman Empire moved thousands of Armenians from the borders of Russia towards what are now Syria and Iraq, but denies totally the genocidal nature of these deportations. He maintains that at most these deportations reflected security needs. He has even claimed that the Ottoman troops were acting to protect the Armenians in the conflict between the Ottoman Empire and Russia. Moreover, he has often stated in public that the Armenians, or at least some of them, were traitors, as they were allied to the Russians against the troops of the Empire. The defendant has received varying degrees of support for his opinions from the historians whom he called to give evidence to the court. The historians called

by the civil party have disagreed totally with him. In this context, it should be noted that in response to Dogu Perinçek's comments, the Switzerland-Armenia Association filed a complaint against him on 15 July 2005. The association's civil-party claims will be considered later.

Like the parties, the Court recognises that denying the existence of a massacre as such, however large-scale, is not in itself covered by Article 261 *bis* of the Criminal Code. As the law clearly states, it has to concern a genocide as defined by, for example, the International Convention of 9 December 1948 on the Prevention and Punishment of the Crime of Genocide and Article 6 of the Rome Statute. In its submissions, the defence maintained that when it drew up Article 261 *bis* of the Criminal Code, Parliament only had in mind the genocide of the Jews in the Second World War. The defence also argued that to be entitled to the protection of Article 261 *bis*, a genocide must necessarily be recognised as such by an international court of justice. It stressed that the Armenian genocide had not been universally recognised, in particular not by Turkey, and that certain historians shared Dogu Perinçek's opinions. It concluded, first, that as the situation was unclear and, second and above all, that as the genocide of the Armenians had not been recognised by an international court of justice, Dogu Perinçek's denial of the Armenian genocide could not come within the scope of Article 261 *bis* of the Criminal Code. It told the Court that the latter could not act as historian and noted in that particular regard that it had made an interlocutory application during the hearing for the Court to establish a neutral committee of historians to investigate whether or not the 1915-17 massacres had constituted a genocide.

The civil party and the prosecution contend that it is a sufficient and necessary condition that a genocide be widely recognised and that it is for the Court to take formal note of this international recognition. It does not have to transform itself into a self-taught historian. The courts rule on the facts and the law. The civil party and the prosecution consider that the Armenian genocide is a well-known fact, whether or not it has been recognised by an international court of justice. The opposing parties at least agree on one point, namely that it is not for the Court to write history. The Court is of the same opinion as all the parties. There will not therefore be any gaps in this judgment if it does not refer to the views of the historians who have given evidence to the Court or to the exhibits produced by the civil party or the defence.

The first question that has to be asked is therefore whether the genocides acknowledged by Swiss criminal law are confined to those recognised by an international court of justice. The Court has several means at its disposal for answering this question. From the standpoint of a literal interpretation, Article 261 *bis* of the Criminal Code refers only to genocide. It does not, for example, refer to 'a genocide recognised by an international court of justice'. Nor does it specify 'the genocide of the Jews, to the exclusion of the genocide of the Armenians'. Is this an omission of Parliament?

The historical interpretation that is also available to the Court provides the answer. According to the Official Gazette of the National Council, the legislators referred explicitly to the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 and quoted, by way of example, the genocide of the Kurds and the Armenians (BO/CN [Official Gazette/National Council] 1993, p. 1076). From a historical standpoint, therefore, it can be inferred that Parliament took the Armenian genocide as an example when drafting Article 261 *bis* of the Criminal Code (Combi report). It must therefore be recognised that the legislators did not simply have the genocide of the Jews in mind when they drew up Article 261 *bis*.

By referring explicitly to the genocide of the Armenians and the Kurds, Parliament also wished to show that it was not necessary for the genocide to be recognised by an international court of justice. As noted, there was an explicit reference to the Convention against Genocide of 9 December 1948. Legal theorists support this view. For example, according to Corboz (Bernard Corboz, *Les infractions en droit Suisse*, vol. II, p. 304), the genocide must be established. It can be inferred from this statement that it is necessary and sufficient for the genocide to be recognised, without necessarily having been granted recognition by an international court or any other supranational body likely to be binding on the courts (an example might be a commission of historians with internationally acknowledged expertise). According to Trechsel (Stefan Trechsel, *Kurzkommentar*, ad Article 261 *bis* no. 35), in the context of genocide denial, German legal theory openly acknowledges the 'Auschwitz lie', but the denial of another genocide is also covered by Article 261 *bis* of the Criminal Code.

In his thesis, Alexandre Guyaz reaches the same conclusion (Alexandre Guyaz, *L'incrimination de la discrimination raciale*, thesis, Lausanne, 1996 p. 300). The following extract may be cited:

> 'Criminal law embodies here a broader approach to revisionism, since Article 261 *bis* § 4 is not confined to denial of crimes against humanity committed by the National Socialist regime. This wide scope has been confirmed unequivocally by the National Council, which, at second reading, amended the French text by replacing the term 'the genocide' with 'a genocide', thereby alluding to all genocides that might unfortunately take place'.

It is therefore both necessary and sufficient for a genocide to have taken place. But this genocide must be known and recognised: Corboz refers to an established genocide (Corboz, op. cit.).

What then of the situation in our country?

With regard to Switzerland, the Court notes that the National Council has approved a non-binding parliamentary motion (*postulat*) recognising the genocide (the Buman motion). The motion was approved on 16 December 2003. As noted earlier, the Armenian genocide served as a basis for the drafting of Article 261 *bis* of the Criminal Code (Combi report). The parliamentary motion was approved against the advice of the Federal Council, which apparently considered that the matter should be the preserve of historians. Yet it was this same Federal Council that expressly cited the Armenian genocide in its dispatch of 31 March 1999 on the Convention on the Prevention and Punishment of the Crime of Genocide, which was to serve as the basis of the current Article 264 of the Criminal Code criminalising genocide (*Feuille fédérale* ["FF" – Federal Gazette], 1999, pp. 4911 *et seq.*). The University of Lausanne has used the Armenian genocide as an example in a published work on humanitarian law. School history textbooks deal with the genocide of the Armenians. It may also be pointed out that the governments of Vaud and Geneva have recognised the Armenian genocide: on 5 July 2005 for the Canton of Vaud and on 25 June 1998 for the Republic and Canton of Geneva, whose President was Micheline Calmy-Rey, our current Minister for Foreign Affairs. This rapid overview enables the Court to conclude that the Armenian genocide is an established historical fact according to Swiss public opinion. The current position of the Federal Council, characterised by extreme caution when it is not inconsistent, changes absolutely nothing. It is easy to understand why a government prefers not to become involved in particularly sensitive issues. The international repercussions which this case has had are noteworthy.

Looking beyond our frontiers, several countries, including France, have recognised the Armenian genocide. To take just the example of France, according to Yves Ternon, the Act of 29 January 2001 was based on the opinion of a group of some hundred historians. In item 15 of the defence's list no. 1, Jean-Baptiste Racine, in his book on the Armenian genocide, says that States' recognition has often been in response to initiatives taken by the academic community. These decisions are not, therefore, taken lightly, particularly since recognition of the Armenian genocide can adversely affect an individual country's relations with Turkey.

The Armenian genocide has also been recognised by international bodies. Admittedly, it has received very little prominence in the United Nations. The only really significant reference to the event is in the Whitaker report (Jean-Baptiste Racine, op cit., p. 73 item 96). The European Parliament, on the other hand, first started to consider the Armenian issue in 1981. The relevant committee rapporteur, whose report, according to Jean-Baptiste Racine, was meticulously argued and documented, said that:

> 'The events of which the Armenians of Turkey were victims during the war years of 1915-17 must be considered a genocide according to the United Nations Convention on the Prevention and Punishment of the Crime of Genocide.'

On 18 June 1987, the European Parliament finally adopted a resolution recognising the Armenian genocide.

This genocide has also been recognised by the Council of Europe. For information, the Council of Europe has some fifty member States. It is dedicated to defending the values of democracy and human rights. Its headquarters in Strasbourg is also the seat of the European Court of Human Rights, which is responsible for applying the 1950 Convention of the same name (on all these matters, see Jean-Baptiste Racine, op. cit. pp. 66 *et seq.*).

It must therefore be acknowledged that the Armenian genocide is an established historical fact.

It then has to be asked whether Dogu Perinçek acted intentionally. This amounts to asking whether he could have believed, in good faith, that he was not acting wrongfully, in other words that he was not denying the obvious when stating, on no fewer than three occasions, that the Armenian genocide had not existed, and that it was an 'international lie'.

Dogu Perinçek has acknowledged during the investigation and at the trial that he knew that Switzerland, like many other countries, recognised the Armenian genocide. Moreover, he would never have described it as an 'international lie' if he had not known that the international community did indeed consider these events to be a genocide. He even stated that he considered the Swiss law to be unconstitutional.

The defendant is a doctor of laws. He is a politician. He describes himself as a writer and historian. He is aware of the arguments of those who disagree with him. He has quite simply chosen to ignore them and proclaim that the Armenian genocide never took place. Dogu Perinçek cannot therefore claim, or believe, that the genocide did not exist. Moreover, as the Public Prosecutor stated in his address, Dogu Perinçek has formally stated that he would never change his position, even if a neutral panel should one day conclude that the Armenian genocide did indeed take place stance. It can be concluded, without question, that for the defendant genocide denial is, if not an article of faith, at least a political slogan with distinct nationalist overtones.

Legal theory is unanimous in considering that there has to be a racist motive. It is clear that Dogu Perinçek's motives appear to be racist and nationalistic. This is a very long way from historical debate. As noted by the prosecution, Dogu Perinçek speaks of an imperialist plot to undermine Turkey's greatness. To justify the massacres, he resorts to the laws of war. He has described the Armenians as being the aggressors of the Turkish people. He is a follower of Talaat Pasha – the defendant is a member of the eponymous committee – who, together with his two brothers, was historically the initiator, instigator and driving force of the Armenian genocide.

Dogu Perinçek meets all the subjective and objective conditions required by Article 261 *bis* of the Criminal Code.

He must be found guilty of racial discrimination.

III. The penalty

Dogu Perinçek appears to be an intelligent and cultivated person, which makes his stubbornness all the less understandable. He is a provocateur. He has displayed a certain arrogance towards the Court in particular, and towards Swiss laws in general. He is unable to adduce any attenuating circumstances. There are multiple offences because the defendant has discriminated against the Armenian people, by denying their tragic history, on three occasions in three different places. His mode of action amounts to that of an agitator. The terms used, such as international lie, are particularly virulent. Under these circumstances, the Court agrees with the prosecution that a sentence of ninety days is an appropriate penalty for the conduct of the defendant.

In his address, the Public Prosecutor proposed that the day-fine be set at CHF 100.00. It was noted in the section on personal information that Dogu Perinçek's financial situation was healthy. CHF 3,000.00 is undoubtedly a good salary in Turkey. The defendant was able to entrust his defence to counsel of his choice. He travelled from Turkey to Switzerland and during the several days of the trial stayed in the Beau-Rivage Palace (p. 61). All this reveals a certain measure of affluence and the proposed sum of CHF 100.00 is far from excessive.

Under the law as it formerly stood, the Court would have been unable to make a favourable assessment of Dogu Perinçek's future conduct. Nowadays, suspended terms of imprisonment are the norm, in the absence of any particularly unfavourable circumstances, which is not the case here. Dogu Perinçek is a foreigner in our country. He will return to his own land. He was formally warned by the Court that if he persisted in denying the Armenian genocide he could be liable to another criminal investigation and risk a further conviction with the possibility, crucially, of the suspension of his sentence being revoked. It considers that this threat should alone be sufficient to deter the defendant from reoffending, so the fine that it orders to be paid will be accompanied by a suspended term of imprisonment. He will be given a substitute fine of CHF 3,000.00 as a significant immediate penalty, the equivalent of 30 days' imprisonment.

IV. Civil law claims and costs

The Switzerland-Armenia Association, through its counsel, seeks CHF 10,000.00 in compensation for non-pecuniary damage and the same sum for costs incurred in the criminal proceedings. In accordance with its articles of association and the law (Article 49 of the Code of Obligations) the Switzerland-Armenia Association is entitled to claim compensation for non-pecuniary damage. It is difficult to award an association compensation of this sort because, by definition, legal entities are devoid

of feelings. The Court will therefore confine itself to awarding a token sum of CHF 1,000.00 as compensation.

The case was sufficiently complex to justify the involvement of counsel. In view of the amount of work performed by this professional officer, the Court will award a sum of CHF 10,000.00 to the civil party as a contribution to its counsel's fees. It is not appropriate to award these sums personally to Sarkis Shahinian, who is the association's representative.

Dogu Perinçek will meet all the costs of the case."

23. The applicant appealed against that judgment, seeking to have it set aside and additional investigative measures taken to establish the state of research and the position of historians on the events of 1915 and the following years. The Switzerland-Armenia association also appealed, but later withdrew its appeal.

24. On 13 June 2007 the Criminal Cassation Division of the Vaud Cantonal Court dismissed the appeal in the following terms:

"... C. Dogu Perinçek has duly appealed against the original judgment. As his main submission, he has appealed on grounds of nullity and applied to have additional investigative measures taken with a view to establishing the current state of research and the position of historians on the Armenian question. In the alternative, he has lodged an ordinary appeal, seeking to have the judgment varied so as to clear him of the charge of racial discrimination under Article 261 *bis* § 4, second sentence, of the Criminal Code, exempt him from paying costs and discharge him of any obligation to pay the complainant and the civil party compensation or criminal costs.

The Switzerland-Armenia Association, which had also appealed, has withdrawn its appeal and has now filed a memorial.

The law

1. Since the appellant's submissions include both an appeal on grounds of nullity and an ordinary appeal, the Court of Cassation must determine the order in which the grounds relied on should be examined, according to their particular nature and the issues raised (Bersier, *Le recours à la Cour de cassation pénale du Tribunal cantonal en procédure vaudoise*, in JT 1996 III 66 *et seq.*, esp. pp. 106 *et seq.* and the references cited; Besse-Matile and Abravanel, *Aperçu de jurisprudence sur les voies de recours à la Cour de cassation pénale du Tribunal cantonal vaudois*, in JT 1989 III 98 *et seq.*, esp. p. 99 and the references cited).

In support of his grounds of nullity, the appellant alleges a violation of Article 411, letters (f), (g), (h) and (i) of the Code of Criminal Procedure. These provisions concern grounds of nullity that justify setting the decision aside only if the irregularity found has influenced or could influence the judgment (Bersier, op. cit., p. 78). Normal practice is for the ordinary grounds of appeal to be examined before the related grounds of nullity (Bovay, Dupuis, Moreillon, Piguet, *Procédure pénale vaudoise, Code annoté*, Lausanne 2004, no. 1.4. ad Article 411).

The grounds of nullity raised by the appellant mainly concern factual matters that must only be considered if they are relevant to the legal outcome. In this particular case, the Court should first consider the ordinary grounds of appeal, namely the meaning and scope of Article 261 *bis* of the Criminal Code, and determine whether, in this particular context, the lower court may, exceptionally, make a historical judgment

(see Chaix and Bertossa, *La répression de la discrimination raciale: Loi d'exception*? in SJ 2002 p. 177, esp. p. 184).

I Ordinary appeal

2. (a) The appellant objects to the first-instance court's application of Article 261 *bis* of the Criminal Code. He submits, firstly, that it is for the courts to perform the task of a historian and as such to determine whether an Armenian genocide took place before applying Article 261 *bis*. In his view such a genocide has not been established. He therefore considers that the Court has misinterpreted the notion of genocide and the scope of Article 261 *bis* in this regard.

(b) According to Article 261 *bis* of the Criminal Code, an offence is committed by any person who publicly denigrates or discriminates against a person or group of persons on the grounds of their race, ethnic origin or religion in a manner that violates human dignity, whether through words, written material, images, gestures, acts of aggression or other means, or any person who on the same grounds denies, grossly trivialises or seeks to justify a genocide or other crimes against humanity.

Article 261 *bis* of the Criminal Code enshrines in domestic law the undertakings entered into by Switzerland when it signed the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965 ('the CERD'), which came into force on 29 December 1994 (RS [*Recueil systématique* – Compendium of Federal Law] 0.104; Favre, Pellet, Stoudmann, *Code pénal annoté*, 2nd edition, Lausanne 2004, no. 1.1. ad Article 261 *bis* of the Criminal Code). The fact that Article 261 *bis* of the Criminal Code is based on a convention reflects the current trend to incorporate the provisions of international treaties into domestic law. However, what sets the anti-racist legislation apart is the fact that the national parliament decided that, in the case of genocide and other crimes against humanity, the law should go beyond the minimum standards set by the CERD (Chaix and Bertossa, op. cit., esp. p. 179).

(c) The notion of genocide is now defined by Article 264 of the Criminal Code. Courts responsible for applying Article 261 *bis* of the Criminal Code must be guided by this definition, derived from the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948. However, their task is to punish not the genocide in question but persons who deny its existence (Chaix et Bertossa, op. cit., esp. p. 183).

In connection with the scope of the notion of genocide, several writers note that the Federal Council's memorandum only refers to the genocide of the Jews during the Second World War (FF 1992 III 308; Chaix and Bertossa, op. cit., esp. p. 183). However, Parliament has clearly incorporated a broader concept of revisionism into Article 261 *bis* of the Criminal Code that is not confined to the denial of crimes against humanity committed by the National-Socialist regime. This extended scope was unequivocally confirmed by the National Council, which, on second reading, corrected the French text by replacing the words 'the genocide' with 'a genocide' (Guyaz, *L'incrimination de la discrimination raciale*, thesis 1996, p. 300). Parliament justified this change by arguing that the legislation must apply to all cases of genocide that might unfortunately take place, and citing as an example the massacre of the Armenians (BO/CN 1993, p. 1076).

Historically, therefore, Parliament did not intend to restrict the application of Article 261 *bis* of the Criminal Code to the genocide of the Jews. By accepting the change to the wording, it indicated that it should apply to all genocides, in particular that of the Armenians.

In the case of the Armenian genocide, therefore, the courts are not required to rely on the work of historians to acknowledge its existence, since this particular case is specifically covered by the legislation and the intentions of those who enacted it, on the same basis as the genocide of the Jews in the Second World War. It must therefore be recognised that the Armenian genocide is deemed to be an established fact.

(d) In this case, the lower court stated explicitly that it did not intend to act as a historian, even though it did wander into this territory by attempting to assess the general opinion of institutions in Switzerland and abroad on this subject. It was unnecessary for it to do so since all that counts is the will of Parliament, which stated clearly in the preparatory debates that the wording of Article 261 *bis* of the Criminal Code covered the Armenian genocide. It is therefore wrong for the appellant to state, with reference to the Federal Council's memorandum (FF 1992 III 308), that it is not established that the wording of Article 261 *bis* of the Criminal Code was such as to include the Armenian genocide. Nor is the case-law of the Federal Court decisive since every case so far where the subject has arisen has concerned the Jews of the Second World War and associated revisionism.

In the final analysis, since the Armenian genocide is acknowledged by Parliament itself to be an established fact, there is nothing exceptional about this case that would call for additional investigative measures and a historical approach to assess whether a genocide had taken place.

The ground of appeal based on the meaning and scope of the notion of genocide must be dismissed as ill-founded.

3. (a) To be an offence, the conduct criminalised in Article 261 *bis* of the Criminal Code must be intentional and motivated by hatred or racial discrimination; it is sufficient to have behaved recklessly (ATF 124 IV 125 point 2b, 123 IV 210 point 4c). According to Corboz, the discrimination requirement has to be interpreted strictly: the act must mainly reflect the state of mind of the perpetrator, who hates or despises the members of another race, ethnic group or religion. Article 261 *bis* must not be applied in the case of objective academic research or serious political debates that are devoid of animosity or racial prejudice (Corboz, *Les infractions de droit suisse*, Volume II, Bern 2002, note 37 on Article 261 *bis* of the Criminal Code).

(b) In this case, the appellant tries to explain the positions he holds in terms of the debate between historians, which necessitates respect for freedom of expression. He also maintains that he has simply denied that the events in question constituted genocide, without ever disputing the existence of massacres and deportations of Armenians, which he justifies by the laws of war.

This argument relates to the subjective aspect of the offence, but is vitiated by the fact that he coupled the term genocide with that of 'international lie', which the lower court described as particularly virulent. It should be noted in this regard that the statements in question were made at public meetings with strong nationalist overtones that bore little relation to serious historical debates devoid of racist prejudices. On these occasions, the accused, who describes himself as a writer and historian, quite simply dismissed his opponents' arguments and announced that the Armenian genocide had never existed. The appellant, who is aware of the widespread acceptance of this proposition, was merely seeking to make a political rather than a historical point, as he claimed, and it was not by chance that these statements were made at meetings to commemorate the 1923 Treaty of Lausanne. This Court must therefore agree with the lower court's finding that the motives of the accused were racist and nationalistic.

In the final analysis, the objection is not just to his rejection of the use of the term genocide but also to the way it was expressed and the associated texts cited, all of which mean that Dogu Perinçek explicitly and intentionally denied a historical fact regarded as established, namely the Armenian genocide, and did so on several occasions without displaying any inclination to alter his point of view.

This ground must be dismissed as ill-founded.

4. (a) The appellant asks to be exempted from any obligations to pay compensation for non-pecuniary damage.

(b) Under Article 49 § 1 of the Code of Obligations, any person whose personality rights have been illegally violated can claim financial compensation for non-pecuniary damage, if this is justified by the severity of the violation and the perpetrator has not provided an alternative form of satisfaction. Pursuant to this Article, the violation must be in excess of what a person should normally bear, from the standpoint of the length or the intensity of the suffering caused (Bücher, *Personnes physiques et protection de la personnalité*, 4th edition, Basel, Geneva, Munich 1999, no. 603, p. 141; Tercier. op. cit., nos. 2047 *et seq.*, pp. 270 *et seq.*; Deschenaux and Tercier, op. cit., no. 24 *et seq.*, p. 93). The amount of the compensation depends mainly on the severity of the violation – or, more specifically, on the severity of the physical or psychological suffering caused by the violation – and the likelihood that the payment of a sum of money will significantly reduce the resulting non-pecuniary damage (ATF 125 III 269, point 2a: ATF 118 II 410, point 2a).

The courts have discretion to determine the level of compensation. By its very nature, compensation for non-pecuniary injury, to which a simple monetary value can only be ascribed with great difficulty, cannot be determined by reference to mathematical criteria, to ensure that the assessed amount does not exceed a certain level; however, the compensation awarded must be equitable. The relevant court will therefore ensure that the amount reflects the severity of the damage suffered and that the sum awarded does not appear derisory to the victim (ATF 125 III 269, previously cited; ATF [118] II 410, previously cited).

The level of compensation for non-pecuniary damage is a matter for federal law, and one which this Court is therefore free to examine (Article 415 §§ 1 and 3 and Article 447 § 1 of the Code of Criminal Procedure). Since the outcome is to a large extent dependent on an assessment of the circumstances, the appeal court must only intervene with restraint, in particular when the lower court has misused its discretion by basing its decision on considerations that are unrelated to the applicable provision, by failing to take account of relevant information or by setting a level of compensation that is inequitable because it is manifestly too low or too high (ATF 126 III 269, cited above; ATF 118 II [410], cited above). However, since this is a question of equity – and not one of exercise of discretion in the strict sense of the term, which would limit its power of review to abuse or excess of discretion – the appeal court is free to decide whether the sum awarded takes sufficient account of the severity of the violation or whether it is disproportionate to the intensity of the non-pecuniary damage suffered by the victim (ATF 125 III 269, cited above; ATF 123 III 10, point 4c/aa*;* ATF 118 II [410], cited above).

(c) In this case, the appellant was found guilty of racial discrimination, for which he therefore incurs civil liability.

The lower court considered that it was difficult to award an association compensation of the order of CHF 10,000 for non-pecuniary damage because, by definition, legal entities are devoid of feelings. It therefore reduced the complainant's

claim and awarded it a symbolic sum of CHF 1,000 in compensation. This assessment is not arbitrary and the sum awarded is appropriate.

This ground, and the entire ordinary appeal, must be dismissed as ill-founded.

5. (a) The appellant seeks to be exempted from any obligations to pay criminal costs.

(b) The complainant is a civil party as a matter of law (Article 94 of the Code of Criminal Procedure). The costs which civil parties may claim under Article 97 of the Code of Criminal Procedure are awarded according to the principle laid down in Article 163 § 2 of the [Code], which provides that the rules relating to expenses are applicable by analogy.

The right to costs is enshrined in the cantonal procedural legislation. According to the case-law, civil parties are, in principle, only eligible for costs if the accused has received a sentence or been ordered to pay damages (JT 1961 III 9). The lower court has discretion to set the level of the costs payable to the civil party, and the Court of Cassation only intervenes in this decision in the event of a manifestly incorrect application of the law or a misuse of discretion, particularly regarding the level of the costs awarded (JT 1965 III 81).

(c) In this particular case, an examination of the case file shows that all the necessary conditions were met for the award of costs for criminal expenses incurred. The lower court noted that the case was sufficiently complex to justify the presence of a lawyer and awarded the Switzerland-Armenia Association CHF 10,000 towards its criminal costs. In view of the amount of work performed by the lawyer, the court did not exceed its discretion.

This ground, and the entire appeal on points of law, must be dismissed as ill-founded.

II. Appeal on grounds of nullity

1. Alleging a violation of Article 411, letters (f), (g), (h) and (i) of the Code of Criminal Procedure, the appellant submits that the judgment has an inadequate factual basis because the court failed to take account of the documents produced and the evidence of certain historians. He also maintains that there were doubts about the facts of the case, or indeed an arbitrary assessment of the evidence in connection with the citing of certain historical works on the massacre of the Armenians. Finally, he bases his appeal on grounds of nullity on the fact that the court dismissed an interlocutory application for additional investigative measures to obtain documents and information aimed at clarifying the Armenian situation in 1915 and determining whether or not the term genocide could be used.

These grounds must be dismissed since they are solely concerned with questions of fact whose resolution would not be likely to influence the judgment (Bersier, op. cit., p. 78), It is not necessary for the courts to act as a historian on the question of the Armenian genocide, since the parliamentary debates show that its existence is considered to be established (see point 2 (c) above).

The appeal on grounds of nullity must be dismissed as ill-founded.

2. In the final analysis, the appeal is ill-founded, both on grounds of nullity and as an ordinary appeal. It must therefore be dismissed in its entirety.

Given the outcome of the appeal, the appellant shall pay the costs at second instance."

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

26. In a judgment of 12 December 2007 (6B_398/2007), the Swiss Federal Court dismissed the appeal in the following terms:

> "3.1. Article 261 *bis* § 4 of the Criminal Code punishes conduct on the part of anyone who publicly denigrates or discriminates against a person or group of persons on the grounds of their race, ethnic origin or religion in a manner that violates human dignity, whether through words, written material, images, gestures, acts of aggression or any other means, or who on the same grounds denies, grossly trivialises or seeks to justify a genocide or other crimes against humanity. An initial literal and grammatical approach shows that the wording of the law (through the use of the indefinite article 'a genocide' ['*un génocide*']) makes no explicit reference to any specific historical event. The law therefore does not preclude punishment of denial of genocides other than that perpetrated by the Nazi regime; nor does it explicitly classify denial of the Armenian genocide as an act of racial discrimination under criminal law.
>
> 3.2. Article 261 *bis* § 4 of the Criminal Code was enacted when Switzerland acceded to the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965 (RS [*Recueil systématique* – Compendium of Federal Law] 0.104). The wording initially proposed in the Bill tabled by the Federal Council did not refer specifically to genocide denial (see FF 1992 III 326). The offence of revisionism, or Holocaust denial, was intended to be included within the constituent element of dishonouring the memory of a deceased person, appearing in the fourth paragraph of the draft Article 261 *bis* of the Criminal Code (Memorandum by the Federal Council of 2 March 1992 concerning Switzerland's accession to the 1965 International Convention on the Elimination of All Forms of Racial Discrimination and the corresponding revision of criminal law; FF 1992 III 265 *et seq.*, specifically 308 *et seq.*). The memorandum does not contain any specific reference to the events of 1915.
>
> During the parliamentary debates, the National Council's Legal Affairs Committee proposed inserting the following wording in Article 261 *bis* § 4 of the Criminal Code: '... or who on the same grounds grossly trivialises or seeks to excuse genocide or other crimes against humanity' ... The Committee's French-language rapporteur, National Councillor Comby, explained that there was a discrepancy between the German and French versions, pointing out that the wording was obviously referring to any genocide and not only the Holocaust (BO/CN 1992 II 2675 *et seq.*). The National Council nevertheless adopted the Committee's proposal as it stood (BO/CN 1992 II 2676). Before the Council of States, the proposal by the latter's Legal Affairs Committee to maintain the wording of Article 261 *bis* § 4 of the Criminal Code approved by the National Council was set against a proposal by Mr Küchler, which did not, however, call into question the phrase 'or who on the same grounds denies, grossly trivialises or seeks to justify genocide or other crimes against humanity' (BO/CE [Official Gazette/Council of States] 1993 96; as to the scope of this proposal, see ATF [Judgments of the Swiss Federal Court] 123 IV 202, point 3c,

p. 208, and Poncet, ibid.). That proposal was adopted without any more detailed reference being made to denial of the Armenian genocide during the debate. During the elimination of divergences, the National Council's Legal Affairs Committee proposed, through Mr Comby, that the amendments inserted by the Council of States be adopted, with the exception of the fourth paragraph, where the Committee proposed the wording 'a genocide', by way of reference to any that might occur. The French-language rapporteur observed that some people had mentioned massacres of Kurds or other populations, for example Armenians, and that all these genocides should be covered (BO/CN 1993 I 1075 *et seq.*). Further brief comments were made in relation to the definition of genocide and how a Turkish citizen might refer to the Armenian tragedy, and it was also observed that the Committee did not intend the provision to apply to one particular genocide alone but to all genocides, for example in Bosnia and Herzegovina (BO/CN 1993 I 1077; statement by Ms Grendelmeier). The National Council ultimately adopted the following wording of paragraph 4: '... or any other means, violates the human dignity of a person or group of persons on the grounds of their race, ethnic origin or religion, or who on the same grounds denies, grossly trivialises or seeks to justify a genocide...' (BO/CN 1993 I 1080). In the subsequent parliamentary proceedings, the Council of States maintained its position, adopting the wording 'a genocide' ('*un génocide*') as a simple editorial amendment in the French version, and the National Council eventually endorsed the Council of States' decision, without any further reference being made to denial of the Armenian genocide (BO/CN 1993 I 1300, 1451; BO/CE 1993 452, 579).

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

...

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

3.4.1. The desire to combat negationist and revisionist opinions in relation to the Holocaust was, admittedly, a central factor in the drafting of Article 261 *bis* § 4 of the Criminal Code. In its case-law, however, the Federal Court has held that Holocaust denial objectively constitutes the factual element of the offence provided for in Article 261 *bis* § 4 of the Criminal Code since it concerns a historical fact that is generally acknowledged as established (ATF 129 IV 95, point 3.4.4, pp. 104 *et seq.*), although the judgment in question makes no reference to the historical intention of the legislature. Similarly, many authors have viewed the Holocaust as a matter of common knowledge for the criminal courts (Vest, *Delikte gegen den öffentlichen Frieden*, note 93, p. 157), as an indisputable historical fact (Rom, op. cit., p. 140), or as a classification ('genocide') that is beyond doubt (Niggli, *Discrimination raciale*, note 972, p. 259, who simply notes that this genocide was what prompted the introduction of the provision in question; to similar effect, see Guyaz, op. cit., p. 305). Only a few voices have referred to the intention of the legislature to recognise it as a historical fact (see, for example, Ulrich Weder, *Schweizerisches Strafgesetzbuch, Kommentar* (ed. Andreas Donatsch), Zürich 2006, Article 261 *bis* § 4, p. 327; Chaix/Bertossa, op. cit., p. 184).

3.4.2. The process of ascertaining what genocides the legislature had in mind when formulating the provision is, moreover, thwarted by a literal interpretation (see point 3.1 above), which clearly shows the legislature's intention to favour an open-

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

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

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

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

4.2. As regards the decisive factual issue, the Police Court not only based its opinion on the existence of political declarations of recognition, but it also pointed out that the opinion of the authorities issuing such declarations had been formed on the basis of expert opinion (for example, a panel of approximately one hundred historians in the case of the French National Assembly when it passed the Law of 29 January 2001) or reports described as cogently argued and substantiated (European Parliament). Thus, as well as relying on the existence of political recognition, this line of argument notes the existence in practice of a broad consensus within the community, which is reflected in the political declarations and is itself based on a wide academic consensus as to the classification of the events of 1915 as genocide. It may also be noted, in the same vein, that during the debate leading to the official

recognition of the Armenian genocide by the National Council, reference was made to the international research published under the title *Der Völkermord an den Armeniern und die Shoah* (BO/CN 2003 2017; statement by Mr Lang). Lastly, the Armenian genocide is portrayed as one of the 'classic' examples in general literature on international criminal law, or on genocide research (see Marcel Alexander Niggli, *Rassendiskriminierung*, note 1418 *et seq.*, p. 440, and the numerous references cited therein; see also note 1441, p. 446, and references).

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

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

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

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

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

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

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

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

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

It has not been disputed in the instant case that the Armenian community constitutes a people, or at the very least an ethnic group (as to this concept, see Niggli, *Rassendiskriminierung*, 2nd ed., note 653, p. 208), which identifies itself in particular through its history, marked by the events of 1915. It follows that denial of the Armenian genocide – or the representation of the Armenian people as the aggressor, as put forward by the appellant – in itself constitutes a threat to the identity of the members of this community (Schleiminger, op. cit., Article 261 *bis* of the Criminal Code, note 65 and reference to Niggli). The Criminal Court, which found that there had been motives linked to racism, likewise ruled out that the approach pursued by the appellant pertained to historical debate. These findings of fact, about which the appellant raised no complaint (section 106(2) of the Federal Court Act), are binding on the Federal Court (section 105(1) of the Federal Court Act). They provide sufficient evidence of the existence of motives which, above and beyond nationalism, can only be viewed as racial, or ethnic, discrimination. It is consequently unnecessary in the present case to settle the debate among legal writers mentioned in point 6 above. In any event, the appellant has not raised any complaints concerning the application of federal law in relation to this matter.

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

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

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

appellant's conviction on the basis of Article 261 *bis* § 4 of the Criminal Code does not appear arbitrary in its outcome, any more than it breaches federal law."

D. The 2008 criminal proceedings against the applicant in Turkey

27. In 2008 the applicant was arrested and charged in the context of the so-called Ergenekon proceedings (of which short descriptions may be found in *Nedim Şener v. Turkey*, no. 38270/11, § 6, 8 July 2014; *Şık v. Turkey*, no. 53413/11, § 10, 8 July 2014; *Tekin v. Turkey* (dec.), no. 3501/09, §§ 3-16, 18 November 2014; and *Karadağ v. Turkey* (dec.), no. 36588/09, §§ 3-16, 18 November 2014). On 5 August 2013 the Istanbul Assize Court convicted him, alongside many others, and sentenced him to life imprisonment. That judgment was appealed against, and the proceedings are now pending before the Turkish Court of Cassation (see *Tekin*, § 17, and *Karadağ*, § 17, both cited above, as well as *Yıldırım v. Turkey* (dec.), no. 50693/10, § 14, 17 March 2015). He was released from pre-trial detention in March 2014.

E. Other material submitted by the participants in the proceedings

28. The third party the Turkish Human Rights Association, the Truth Justice Memory Centre and the International Institute for Genocide and Human Rights Studies referred to the web-versions of two articles in Turkish newspapers. The first, published in the daily *Vatan* on 26 July 2007, said that after the assassination of Hrant Dink the applicant had sent an open letter to the Armenian Patriarch of Istanbul. In that letter he had denounced the assassination as a provocation by the United States of America against Turkey, and had invited the Patriarch openly to say that it had been instigated by the United States of America and thus, as a leader of the Armenians in Turkey, set an example to those defending the unity of the Turkish nation. The second article, published in the daily *Milliyet* on 19 May 2007, did not mention the applicant. It described anonymous threats sent to Armenian schools in Istanbul in connection with the Armenian position in relation to the events of 1915 and the following years. It added that in reaction to those threats, the provincial director of education had sought to reassure the Armenians and asked the authorities to take precautionary measures.

II. RELEVANT DOMESTIC LAW

A. Constitution of the Swiss Confederation

29. Article 7 of the Constitution of the Swiss Confederation of 1999, which superseded the Constitution of 1874, is entitled "Human dignity". It provides:

> "Human dignity must be respected and protected."

30. Article 16 of the Constitution, entitled "Freedom of expression and of information", provides, in so far as relevant:

> "1. Freedom of expression and of information is guaranteed.
>
> 2. Every person has the right freely to form, express, and impart their opinions. ..."

31. Article 36 of the Constitution, entitled "Restrictions on fundamental rights", provides:

> "1. Restrictions on fundamental rights must have a legal basis. Significant restrictions must have their basis in a federal act. The foregoing does not apply in cases of serious and immediate danger where no other course of action is possible.
>
> 2. Restrictions on fundamental rights must be justified in the public interest or for the protection of the fundamental rights of others.
>
> 3. Any restrictions on fundamental rights must be proportionate.
>
> 4. The essence of fundamental rights is sacrosanct."

B. Article 261 *bis* of the Swiss Criminal Code

1. Text of the provision

32. Article 261 *bis* of the Swiss Criminal Code, entitled "Racial discrimination", was enacted on 18 June 1993. It is in the chapter of the Code that deals with offences against public peace (*paix publique*). It came into force on 1 January 1995 and reads:

> "Any person who publicly stirs up hatred or discrimination against a person or group of persons on the grounds of their race, ethnic origin or religion;
>
> any person who publicly disseminates an ideology aimed at systematic denigration or defamation of the members of a race, ethnic group or religion;
>
> any person who with the same objective organises, encourages or participates in propaganda campaigns;
>
> any person who publicly denigrates or discriminates against a person or group of persons on the grounds of their race, ethnic origin or religion in a manner that violates human dignity, whether through words, written material, images, gestures, acts of aggression or other means, or any person who on the same grounds denies, grossly trivialises or seeks to justify a genocide or other crimes against humanity;

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

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

2. Enactment history

33. The initiative to enact that Article came up in the context of Switzerland's accession to the 1965 International Convention on the Elimination of All Forms of Racial Discrimination ("the CERD" – see paragraph 62 below). In a memorandum of 2 March 1992, published in FF 1992 III 265-340, on Switzerland's accession to this Convention and the consequent need to revise its criminal law, the Swiss Government considered the requirements arising from, in particular, Article 4 the CERD (see paragraph 62 below) and opined, at p. 297, that with the exception of the prohibition of discrimination by the authorities (prohibited under Article 4 (c) of the CERD), which was covered by Article 4 of the Swiss Constitution of 1874, then in force, Switzerland's laws failed to meet, or did so only partially, CERD's requirements.

34. The Swiss Government referred, at pp. 298-301, to the potential conflict between, on the one hand, the imposition of criminal penalties for racist propaganda and ideologies intended to defame or discredit parts of the population and, on the other, the constitutional rights to freedom of opinion and association. It noted that the CERD sought to resolve this conflict through the clause "with due regard to the principles embodied in the Universal Declaration of Human Rights" in its Article 4. The Swiss doctrine was largely of the view that these rights were of equal value and merited equal protection. The solution therefore lay in balancing them. Racial discrimination, being an attack on human dignity, violated the constitutional rights to personal liberty and equality before the law, and was prohibited under public international law. On the other hand, the rights to freedom of opinion and association were important for political debate in a democratic society and were not to be underestimated. While the essence of these rights were not affected by the proposed criminalisation of racial discrimination, they precluded the criminalisation of all types of speech envisaged by Article 4 of the CERD. In some cases this could lead to, for instance, unjustified restrictions on sociological or ethnological studies. The emphasis was therefore to be put on incitement to racial hatred and discrimination, and contempt and denigration, which were the main and truly blameworthy element of racial superiority theories that led to racial hatred and xenophobia. This Article made it possible to take account of fundamental freedoms when putting in place criminal law rules designed to ensure compliance with the CERD. The special place occupied by the rights to freedom of opinion and association in Western democracies in general and in Swiss semi-direct democracy in particular made resort to this possibility

largely justified. It was therefore necessary to enter a reservation to Article 4 of the CERD (see paragraph 63 below).

35. The proposed wording of what subsequently became Article 261 *bis* § 4 thus read (ibid., p. 304):

> "[A]ny person who publicly violates the human dignity of another person or a group of persons on the grounds of their race, ethnic origin or religion, whether through words, written material, images, gestures, acts of aggression or other means, or any person who on the same grounds dishonours the memory of a deceased person ... shall be punishable by a term of imprisonment or a fine."

36. According to the Swiss Government's memorandum (at pp. 308-09):

> "[D]ishonouring the memory of a deceased person has been included in the definition of the offence as a means of countering the historical falsifications of revisionists whose pseudo-scientific works disseminate theories known as 'the Auschwitz lie', which claims that the Holocaust never took place and the gas chambers did not exist. It maintains that far fewer than six million Jews were killed and that, besides, the Jews draw economic and financial benefits from the Holocaust. This falsification of history cannot be considered a mere quarrel between historians. It often conceals a form of racist propaganda that is particularly dangerous when aimed at young persons during their education."

37. In the ensuing debates in the Swiss Federal Parliament, a member of the National Council emphasised that neither the CERD nor the new provision were limited to the Holocaust, but were concerned with combating xenophobia, racism, intolerance and anti-Semitism in general BO/CN 1992 VI 2650-79, at p. 2654). The rapporteur of the parliamentary committee concerned referred to a discrepancy between the German and French versions of the text and made it clear, at the National Council sitting of 17 December 1992, that the idea was to refer to "all forms of genocide while alluding to the main example of it, namely the Jewish Holocaust, but it is clear that all crimes of this nature have to be condemned. For this reason, the term 'any genocide' (*tout génocide*) should be used rather than 'genocide' (*le génocide*)" (ibid., at p. 2675). In the subsequent debates in the Parliament, on 8 June 1993 the rapporteur of the National Council committee concerned clarified the scope of what has since become Article 261 *bis* § 4 of the Criminal Code, as follows (BO/CN 1993 III 1075-80, at pp. 1075-76):

> "The committee has considered the various points of difference between the Council of States and the National Council and has finally proposed that you ... adopt the amendments put forward by the Council of States, with the exception of the fourth paragraph, concerning genocide, where the committee proposes using the term 'a genocide', by way of reference to any genocide that might unfortunately take place. Several speakers have referred to the massacres of Kurds [specifically, those committed by the former Iraqi regime] or other groups of the population, such as the Armenians. All these examples of genocide have to be covered.
>
> As regards the criteria to be taken into account, ... there exists the United Nations Convention for the Prevention and Punishment of the Crime of Genocide. It is

necessary to refer to this international convention for the definition of the notion of genocide."

38. This approach was confirmed by the national councillor Ms Grendelmeier in these terms (ibid., at p. 1077):

"The issue of what constitutes genocide was also discussed. It was stated that a Turkish citizen would probably not use the term genocide to define the dramatic events concerning the Armenian people. The committee considered that by using the general term 'genocide', genocide as a whole, rather than 'the' or 'a' particular genocide, has to become punishable everywhere, for example also in Bosnia and Herzegovina. When a people is not only denied its right to exist but is also effectively driven towards extinction, this constitutes genocide and has to be a criminal offence."

39. Article 261 *bis* § 4 was enacted by both chambers of the Swiss Federal Parliament on 18 June 1993, by 114 votes to 13 in the National Council and by 34 votes to nil in the Council of States. However, having been challenged, it could only enter into force after the Swiss people had confirmed it in a referendum (FF 1993 II 868-69). The referendum took place on 25 September 1994. The turnout was 45.9%. 54.7% of the votes were in favour of the Article, with 1,132,662 people voting for and 939,975 people voting against (Office fédéral de la statistique, *Miroir statistique de la Suisse*, 1996, pp. 378 *et seq.*).

40. Since the enactment of Article 261 *bis* of the Criminal Code, there have been sixteen proposals for its repeal or a restriction of its ambit. All of these have been turned down by the Swiss Parliament.

3. Application in relation to statements bearing on the events of 1915 and the following years before the applicant's case

41. Following two petitions to the Swiss Parliament to recognise, respectively refuse to recognise, the events of 1915 and the following years as genocide, made respectively by Armenians and Turks in September 1995 and January 1996, in April 1997 the Switzerland-Armenia Association brought a private prosecution under Article 261 *bis* § 4 against some of the persons who had signed the Turkish petition.

42. On 16 July 1998 the Bern-Laupen District Court dismissed the proceedings, finding that an association, as opposed to an individual, could not be the victim of acts contrary to Article 261 *bis* § 4. On an appeal by the Switzerland-Armenia Association, on 10 February 1999 the Supreme Court of the Canton of Bern upheld that decision.

43. In reaction to this ruling, on 18 April 2000 two Swiss nationals of Armenian ethnic origin brought a private prosecution under Article 261 *bis* § 4 against twelve persons who had signed the Turkish petition.

44. In a judgment of 14 September 2001 the Bern-Laupen District Court acquitted the defendants. It noted, *inter alia*, that unlike the Austrian and French Holocaust denial laws, which only concerned the Holocaust, Article 261 *bis* § 4 was not limited to a specific historic event. However,

having reviewed at some length the position in relation to the events of 1915 and the following years, the court decided to leave open the question whether they qualified as "a genocide" within the meaning of that Article, as it found that the defendants had to be acquitted in any event, as they lacked the requisite *mens rea*: having grown up and received their education in Turkey, they had denied that the events of 1915 and the following years had constituted genocide under the influence of the Turkish educational system, and had therefore not acted with a racist motive.

45. The two persons who had brought the proceedings appealed to the Supreme Court of the Canton of Bern. In a judgment of 16 April 2002 it dismissed their appeal, holding that proceedings under Article 261 *bis* § 4 could not be brought by a private prosecutor as it only protected public peace, not individual legal interests, since genocide denial could not in itself harm an individual, regardless of his or her personal history.

46. The further appeal to the Swiss Federal Court was dismissed in a judgment of 7 November 2002 (ATF 129 IV 95). The court held, *inter alia*, that the offence under Article 261 *bis* § 4 was a public order one and that individual rights were only indirectly protected under that provision. Individual victims could not therefore take part in the proceedings against the alleged perpetrator. Furthermore, the mere denial, gross minimisation or attempted justification of a genocide within the meaning of Article 261 *bis* § 4 were not acts of racial discrimination in the strict sense of the term. While such utterances could affect individuals, the harm, even if serious, remained indirect.

C. Other relevant provisions of the Swiss Criminal Code

47. Article 264 of the Swiss Criminal Code, entitled "Genocide", defines this offence in the following terms:

> "Anyone who commits any of the following acts with the intent to destroy, in whole or in part, a national, racial, religious or ethnic group shall be punishable by life imprisonment or a custodial sentence of not less than ten years:
>
> (a) killing members of the group or causing them serious bodily or mental harm;
>
> (b) inflicting on members of the group living conditions calculated to bring about its physical destruction in whole or in part;
>
> (c) ordering or taking measures intended to prevent births within the group;
>
> (d) forcibly transferring or arranging for the transfer of children of the group to another group."

D. Non-binding motion (*postulat*) no. 02.3069

48. On 18 March 2002 the National councillor Mr Jean-Claude Vaudroz tabled before the National Council a non-binding motion (*postulat*) intended

to recognise the events of 1915 and the following years as genocide. Following the expiry of Mr Vaudroz's term of office, on 8 December 2003 the proposal was taken up by Mr Dominique de Buman. In support of the proposal, it was said that the extermination of Armenians in the Ottoman Empire during the First World War had served as a reference point in the coining of the word "genocide" by Raphael Lemkin, and that the rules laid down in the ensuing convention clearly corresponded to the process of destruction suffered by the Armenian people. By recognising it as genocide, Switzerland would render justice to the victims and the survivors and their descendants, prevent the commission of other crimes against humanity, and show its commitment to human rights, respect for minorities and international criminal justice. Reference was made to other bodies that had recognised these events as genocide, and the hope was expressed that the motion's adoption would contribute for the establishment of a durable peace between Turks and Armenians, which could only be based on a common vision that corresponded to the historical truth.

49. On 15 May 2002 the Swiss Government expressed its opposition to the proposal, saying that while it had on several occasions voiced regrets in relation to the tragic massacres and mass deportations that had resulted in very many victims among the Armenian population of the Ottoman Empire, it was of the view that this question concerned historical research. It went on to say that, since this matter touched upon a painful historical episode, the efforts to come to terms with it had to be made chiefly by the countries concerned. Swiss foreign policy sought to achieve reconciliation between Turkey and Armenia through political dialogue, which had been established in 2000 and concerned in particular human rights. The motion's adoption risked prejudicing the regular official dialogue that had been established. The motion's sponsors intended that it would contribute to a durable peace between Turkey and Armenia by addressing a message of justice to the Armenian victims, but its acceptance could well have the opposite result and add to the emotional baggage that weighed down relations between those two countries.

50. On 16 December 2003, following a plenary debate, the National Council passed the motion by 107 votes to 67, with 11 abstentions. It was given the number 02.3069 and reads:

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

E. The Swiss Federal Court Act 2005

51. Section 106(2) of the Swiss Federal Court Act 2005 provides that the Federal Court does not examine whether there has been a breach of

fundamental rights or cantonal or inter-cantonal law unless the appellant has properly raised and pleaded the point.

III. RELEVANT INTERNATIONAL AND EUROPEAN LAW

A. General international law

1. Relating to genocide

52. The Convention on the Prevention and Punishment of the Crime of Genocide ("the Genocide Convention") (78 United Nations Treaty Series (UNTS) 277) was adopted by the General Assembly of the United Nations ("the UN") on 9 December 1948 and entered into force on 12 January 1951. Switzerland acceded to it on 7 September 2000 with effect from 6 December 2000 (2121 UNTS 282). Its relevant provisions read:

Article I

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

Article II

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

(a) Killing members of the group;

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

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

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

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

Article III

"The following acts shall be punishable:

(a) Genocide;

(b) Conspiracy to commit genocide;

(c) Direct and public incitement to commit genocide;

(d) Attempt to commit genocide;

(e) Complicity in genocide."

...

Article V

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

Article VI

"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."

...

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 for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."

53. Article 6 of the Charter of the International Military Tribunal, annexed to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("the London Agreement") of 8 August 1945 (82 UNTS 279), concerned crimes against peace, war crimes and crimes against humanity. It provided, in so far as relevant:

"...

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

...

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

54. The Rome Statute of the International Criminal Court ("the Rome Statute" and "the ICC") (2187 UNTS 3) was adopted on 17 July 1998 and ratified by Switzerland on 12 October 2001 (2187 UNTS 6). It entered into force on 1 July 2002. Its relevant provisions read:

Article 5
Crimes within the jurisdiction of the Court

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

(a) The crime of genocide;

(b) Crimes against humanity;

(c) War crimes;

(d) The crime of aggression.

..."

Article 6
Genocide

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

(a) Killing members of the group;

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

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

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

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

Article 7
Crimes against humanity

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

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation or forcible transfer of population;

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

(f) Torture;

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

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

(i) Enforced disappearance of persons;

(j) The crime of apartheid;

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

..."

55. In its judgment of 2 September 1998 in *The Prosecutor v. Akayesu* (no. ICTR-96-4-T), Trial Chamber I of the International Tribunal for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January and 31 December 1994 ("the ICTR") highlighted the distinguishing feature of the crime of genocide:

> "498. Genocide is distinct from other crimes inasmuch as it embodies a special intent or *dolus specialis*. Special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged. Thus, the special intent in the crime of genocide lies in 'the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such'."

56. The Tribunal also elaborated on the crime of genocide in relation to the other crimes provided for by its Statute (cumulative charges):

> "469. Having regard to its Statute, the Chamber believes that the offences under the Statute – genocide, crimes against humanity, and violations of article 3 common to the Geneva Conventions and of Additional Protocol II – have different elements and, moreover, are intended to protect different interests. ... Thus it is legitimate to charge these crimes in relation to the same set of facts. It may, additionally, depending on the case, be necessary to record a conviction for more than one of these offences in order to reflect what crimes an accused committed. If, for example, a general ordered that all prisoners of war belonging to a particular ethnic group should be killed, with the intent thereby to eliminate the group, this would be both genocide and a violation of common article 3, although not necessarily a crime against humanity. Convictions for genocide and violations of common article 3 would accurately reflect the accused general's course of conduct.
>
> 470. Conversely, the Chamber does not consider that any [act] of genocide, crimes against humanity, and violations of article 3 common to the Geneva Conventions and of Additional Protocol II are lesser included forms of each other. The ICTR Statute does not establish a hierarchy of norms, but rather all three offences are presented on an equal footing. While genocide may be considered the gravest crime, there is no justification in the Statute for finding that crimes against humanity or violations of common article 3 and additional protocol II are in all circumstances alternative charges to genocide and thus lesser included offences. As stated, and it is a related point, these offences have different constituent elements. Again, this consideration renders multiple convictions for these offences in relation to the same set of facts permissible."

57. The Tribunal held the following with respect to the crime of direct and public incitement to commit genocide (footnotes omitted):

> "557. The 'direct' element of incitement implies that the incitement assume a direct form and specifically provoke another to engage in a criminal act, and that more than mere vague or indirect suggestion goes to constitute direct incitement. Under Civil law systems, provocation, the equivalent of incitement, is regarded as being direct where it is aimed at causing a specific offence to be committed. The prosecution must prove a definite causation between the act characterized as incitement, or provocation

in this case, and a specific offence. However, the Chamber is of the opinion that the direct element of incitement should be viewed in the light of its cultural and linguistic content. Indeed, a particular speech may be perceived as 'direct' in one country, and not so in another, depending on the audience. The Chamber further recalls that incitement may be direct, and nonetheless implicit. Thus, at the time the Convention on Genocide was being drafted, the Polish delegate observed that it was sufficient to play skilfully on mob psychology by casting suspicion on certain groups, by insinuating that they were responsible for economic or other difficulties in order to create an atmosphere favourable to the perpetration of the crime.

558. The Chamber will therefore consider on a case-by-case basis whether, in light of the culture of Rwanda and the specific circumstances of the instant case, acts of incitement can be viewed as direct or not, by focusing mainly on the issue of whether the persons for whom the message was intended immediately grasped the implication thereof.

559. In light of the foregoing, it can be noted in the final analysis that whatever the legal system, direct and public incitement must be defined ... as directly provoking the perpetrator(s) to commit genocide, whether through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audiovisual communication."

58. In its judgment of 28 November 2007 in *Nahimana et al. v. the Prosecutor* (no. ICTR-99-52-A), the Appeals Chamber of the ICTR said the following with respect to the crime of incitement to commit genocide (footnotes omitted):

"692. The Appeals Chamber considers that there is a difference between hate speech in general (or inciting discrimination or violence) and direct and public incitement to commit genocide. Direct incitement to commit genocide assumes that the speech is a direct appeal to commit an act [of genocide]; it has to be more than a mere vague or indirect suggestion. In most cases, direct and public incitement to commit genocide can be preceded or accompanied by hate speech, but only direct and public incitement to commit genocide is prohibited [as constituting direct and public incitement to commit genocide]. This conclusion is corroborated by the *travaux préparatoires* to the Genocide Convention.

693. The Appeals Chamber therefore concludes that when a defendant is indicted [of direct and public incitement to commit genocide], he cannot be held accountable for hate speech that does not directly call for the commission of genocide. The Appeals Chamber is also of the opinion that, to the extent that not all hate speeches constitute direct incitement to commit genocide, the jurisprudence on incitement to hatred, discrimination and violence is not directly applicable in determining what constitutes direct incitement to commit genocide. ..."

59. In its judgment of 26 February 2007 *(Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43), the International Court of Justice ("the ICJ") noted the following:

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

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

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

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

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

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

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

themselves include mental elements. 'Killing' must be intentional, as must 'causing serious bodily or mental harm'. Mental elements are made explicit in paragraphs *(c)* and *(d)* of Article II by the words 'deliberately' and 'intended', quite apart from the implications of the words 'inflicting' and 'imposing'; and forcible transfer too requires deliberate intentional acts. The acts, in the words of the ILC, are by their very nature conscious, intentional or volitional acts (Commentary on Article 17 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind, ILC Report 1996, *Yearbook of the International Law Commission, 1996*, Vol. II, Part Two, p. 44, para. 5).

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

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

'the *mens rea* requirement for persecution is higher than for ordinary crimes against humanity, although lower than for genocide. In this context the Trial Chamber wishes to stress that persecution as a crime against humanity is an offence belonging to the same genus as genocide. Both persecution and genocide are crimes perpetrated against persons that belong to a particular group and who are targeted because of such belonging. In both categories what matters is the intent to discriminate: to attack persons on account of their ethnic, racial, or religious

> characteristics (as well as, in the case of persecution, on account of their political affiliation). While in the case of persecution the discriminatory intent can take multifarious inhumane forms and manifest itself in a plurality of actions including murder, in the case of genocide that intent must be accompanied by the intention to destroy, in whole or in part, the group to which the victims of the genocide belong. Thus, it can be said that, from the viewpoint of *mens rea*, genocide is an extreme and most inhuman form of persecution. To put it differently, when persecution escalates to the extreme form of wilful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide.' (IT-95-16-T, Judgment, 14 January 2000, para. 636.)"

60. In the same judgment, the ICJ based the findings of fact that led it to conclude that the Srebrenica massacre had constituted a genocide chiefly on those of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("the ICTY"), in spite of the plethora of other material that had been placed before it (paragraphs 212-24 and 278-97 of the judgment).

61. In its judgment of 3 February 2015 *(Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* (http://www.icj-cij.org/docket/files/118/18422.pdf, last accessed on 5 June 2015), the ICJ, having examined the numerous pieces of written and oral evidence placed before it by the parties, and taking in particular into account the findings of fact of the ICTY, found that there had been a "pattern of conduct" on the part of the Yugoslav People's Army and the Serb forces in their actions against the Croats (paragraphs 407-16 of the judgment). However, taking into account the context and the opportunity for these forces to engage in acts of violence, the court was ultimately not satisfied that the only reasonable inference that could be drawn from this pattern of conduct was the intent to destroy, in whole or in part, the Croat group, and that the acts constituting the *actus reus* of genocide within the meaning of Article II (a) and (b) of the Genocide Convention (see paragraph 52 above) had not been committed by the Yugoslav National Army and the Serb forces with the specific intent required for them to be characterised as acts of genocide. On this basis, the court concluded that Croatia had failed to substantiate its allegation that genocide had been committed (paragraphs 417-41 of the judgment). The court came to the same conclusion with respect to Serbia's counter-claim that the acts perpetrated by Croatia against the Serb population of the Krajina had constituted genocide: it did not find it established that there had been a special genocidal intent (*dolus specialis*) (paragraphs 500-15 of the judgment).

2. International Convention on the Elimination of All Forms of Racial Discrimination

62. The International Convention on the Elimination of All Forms of Racial Discrimination ("the CERD") (660 UNTS 195) was adopted by the UN General Assembly on 21 December 1965 and opened for signature on 7 March 1966. It entered into force on 4 January 1969. Switzerland acceded to it on 29 November 1994 with effect from 29 December 1994 (1841 UNTS 337). Its relevant provisions read:

Article 1

"1. In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

..."

Article 2

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

...

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

..."

...

Article 4

"States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, *inter alia* ***:***

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

..."

Article 5

"In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

...

(d) Other civil rights, in particular:

...

(viii) The right to freedom of opinion and expression;

..."

Article 6

"States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination."

63. When acceding to the CERD, Switzerland made the following reservation concerning Article 4 (1841 UNTS 337):

"Switzerland reserves the right to take the legislative measures necessary for the implementation of article 4, taking due account of freedom of opinion and freedom of association, provided for inter alia in the Universal Declaration of Human Rights."

64. In its initial report under the CERD (UN Doc. CERD/C/270/Add.1), published on 14 March 1997, Switzerland said, in paragraph 71, that it considered that the public interest in the exercise of freedom of expression had to give way before the greater interest of victims of discrimination, who had a right to the protection of their personality. For this reason, Article 261 *bis* § 4 of the Swiss Criminal Code (see paragraph 32 above) made such acts of discrimination punishable, even though the CERD did not expressly prohibit them. The same applied to the prohibition of the denial of or

attempts to justify the crimes committed by the Nazi regime, and to the denial or minimisation of genocide more generally.

65. In its third periodic period reports under the CERD (UN Doc. CERD/C/351/Add.2), published on 22 May 2001, Switzerland said, in paragraphs 102 and 109, that in its first judgment under Article 261 *bis* § 4 of the Swiss Criminal Code (ATF 123 IV 202), the Swiss Federal Court had held that this provision protected not only public order but also the dignity of the individual. It was however essential that public order was protected only indirectly, as a consequence of the protection accorded to human dignity.

66. The UN Committee on the Elimination of Racial Discrimination – the body of independent experts that monitors the implementation of the CERD – while in 1997 criticising Germany and Belgium for not broadening their Holocaust denial laws to cover all genocides (UN Doc. A/52/18(Supp), §§ 217 and 226), said the following in paragraphs 14 and 15 of its General Recommendation No. 35 of 26 September 2013 on combating racist hate speech (UN Doc. CERD/C/GC/35), that (footnotes omitted):

> "[P]ublic denials or attempts to justify crimes of genocide and crimes against humanity, as defined by international law, should be declared as offences punishable by law, provided that they clearly constitute incitement to racial violence or hatred. The Committee also underlines that 'the expression of opinions about historical facts' should not be prohibited or punished.
>
> 15. While [A]rticle 4 [of the CERD] requires that certain forms of conduct be declared offences punishable by law, it does not supply detailed guidance for the qualification of forms of conduct as criminal offences. On the qualification of dissemination and incitement as offences punishable by law, the Committee considers that the following contextual factors should be taken into account:
>
> – The content and form of speech: whether the speech is provocative and direct, in what form it is constructed and disseminated, and the style in which it is delivered.
>
> – The economic, social and political climate prevalent at the time the speech was made and disseminated, including the existence of patterns of discrimination against ethnic and other groups, including indigenous peoples. Discourses which in one context are innocuous or neutral may take on a dangerous significance in another: in its indicators on genocide the Committee emphasized the relevance of locality in appraising the meaning and potential effects of racist hate speech.
>
> – The position or status of the speaker in society and the audience to which the speech is directed. The Committee consistently draws attention to the role of politicians and other public opinion-formers in contributing to the creation of a negative climate towards groups protected by the Convention, and has encouraged such persons and bodies to adopt positive approaches directed to the promotion of intercultural understanding and harmony. The Committee is aware of the special importance of freedom of speech in political matters and also that its exercise carries with it special duties and responsibilities.

– The reach of the speech, including the nature of the audience and the means of transmission: whether the speech was disseminated through mainstream media or the Internet, and the frequency and extent of the communication, in particular when repetition suggests the existence of a deliberate strategy to engender hostility towards ethnic and racial groups.

– The objectives of the speech: speech protecting or defending the human rights of individuals and groups should not be subject to criminal or other sanctions."

3. International Covenant on Civil and Political Rights

67. The International Covenant on Civil and Political Rights ("the ICCPR") (999 UNTS 171) was adopted on 16 December 1966 and opened for signature on 19 December 1966. Its substantive provisions entered into force on 23 March 1976. Switzerland acceded to it on 18 June 1992 with effect from 18 September 1992 (1678 UNTS 394). Its relevant provisions read:

Article 19

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

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

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

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

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

Article 20

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

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

68. In connection with Switzerland's accession to the ICCPR in 1992, the Swiss Government noted that the Swiss Criminal Code, as then in force, only covered some aspects of Article 20 § 2 of the Covenant, and that Switzerland would thus need to enter a reservation to that Article. However, it went on to note that a new criminal law provision was envisaged in connection with Switzerland's impending accession to the CERD (see paragraph 62 above), and that after the entry into force of 261 *bis* of the Swiss Criminal Code (see paragraph 32 above) the reservation would be withdrawn (FF 1991 I 1129-85, at pp. 1139-40).

69. The reservation read (1678 UNTS 395):

> "Switzerland reserves the right to adopt a criminal provision which will take into account the requirements of article 20, paragraph 2, on the occasion of its forthcoming accession to the 1966 International Convention on the Elimination of All Forms of Racial Discrimination."

70. It was withdrawn on 16 October 1995 with immediate effect (1891 UNTS 393).

71. At its 102nd session (2011) the UN Human Rights Committee – the body of independent experts that monitors the implementation of the ICCPR – adopted General Comment no. 34 concerning Article 19 of the Covenant (CCPR/C/GC/34). This Comment reads, in so far as relevant (footnotes omitted):

> "**Freedom of opinion**
>
> 9. Paragraph 1 of article 19 requires protection of the right to hold opinions without interference. This is a right to which the Covenant permits no exception or restriction. Freedom of opinion extends to the right to change an opinion whenever and for whatever reason a person so freely chooses. No person may be subject to the impairment of any rights under the Covenant on the basis of his or her actual, perceived or supposed opinions. All forms of opinion are protected, including opinions of a political, scientific, historic, moral or religious nature. It is incompatible with paragraph 1 to criminalize the holding of an opinion. The harassment, intimidation or stigmatization of a person, including arrest, detention, trial or imprisonment for reasons of the opinions they may hold, constitutes a violation of article 19, paragraph 1.
>
> 10. Any form of effort to coerce the holding or not holding of any opinion is prohibited. Freedom to express one's opinion necessarily includes freedom not to express one's opinion.
>
> **Freedom of expression**
>
> 11. Paragraph 2 requires States parties to guarantee the right to freedom of expression, including the right to seek, receive and impart information and ideas of all kinds regardless of frontiers. This right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, subject to the provisions in article 19, paragraph 3, and article 20. It includes political discourse, commentary on one's own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse. It may also include commercial advertising. The scope of paragraph 2 embraces even expression that may be regarded as deeply offensive, although such expression may be restricted in accordance with the provisions of article 19, paragraph 3 and article 20.
>
> ...
>
> **The application of article 19 (3)**
>
> ...
>
> 28. The first of the legitimate grounds for restriction listed in paragraph 3 is that of respect for the rights or reputations of others. The term 'rights' includes human rights as recognized in the Covenant and more generally in international human rights law. For example, it may be legitimate to restrict freedom of expression in order to protect

the right to vote under article 25, as well as rights article under 17 (see para. 37). Such restrictions must be constructed with care: while it may be permissible to protect voters from forms of expression that constitute intimidation or coercion, such restrictions must not impede political debate, including, for example, calls for the boycotting of a non-compulsory vote. The term 'others' relates to other persons individually or as members of a community. Thus, it may, for instance, refer to individual members of a community defined by its religious faith or ethnicity.

29. The second legitimate ground is that of protection of national security or of public order (*ordre public*), or of public health or morals.

...

35. When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.

36. The Committee reserves to itself an assessment of whether, in a given situation, there may have been circumstances which made a restriction of freedom of expression necessary. In this regard, the Committee recalls that the scope of this freedom is not to be assessed by reference to a 'margin of appreciation' and in order for the Committee to carry out this function, a State party, in any given case, must demonstrate in specific fashion the precise nature of the threat to any of the enumerated grounds listed in paragraph 3 that has caused it to restrict freedom of expression.

...

Limitative scope of restrictions on freedom of expression in certain specific areas

...

49. Laws that penalize the expression of opinions about historical facts are incompatible with the obligations that the Covenant imposes on States parties in relation to the respect for freedom of opinion and expression. The Covenant does not permit general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events. Restrictions on the right of freedom of opinion should never be imposed and, with regard to freedom of expression, they should not go beyond what is permitted in paragraph 3 or required under article 20.

The relationship between articles 19 and 20

50. Articles 19 and 20 are compatible with and complement each other. The acts that are addressed in article 20 are all subject to restriction pursuant to article 19, paragraph 3. As such, a limitation that is justified on the basis of article 20 must also comply with article 19, paragraph 3.

51. What distinguishes the acts addressed in article 20 from other acts that may be subject to restriction under article 19, paragraph 3, is that for the acts addressed in article 20, the Covenant indicates the specific response required from the State: their prohibition by law. It is only to this extent that article 20 may be considered as *lex specialis* with regard to article 19.

52. It is only with regard to the specific forms of expression indicated in article 20 that States parties are obliged to have legal prohibitions. In every case in which the State restricts freedom of expression it is necessary to justify the prohibitions and their provisions in strict conformity with article 19."

72. In a report submitted to the UN General Assembly on 7 September 2012 (Promotion and protection of the right to freedom of opinion and expression, UN Doc. A/67/357) the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression said in paragraph 55, in the chapter devoted to "Domestic legislation that contravenes international norms and standards", that:

> "[H]istorical events should be open to discussion and, as stated by the Human Rights Committee, laws that penalize the expression of opinions about historical facts are incompatible with the obligations that the International Covenant on Civil and Political Rights imposes on States parties in relation to the respect for freedom of opinion and expression. By demanding that writers, journalists and citizens give only a version of events that is approved by the Government, States are enabled to subjugate freedom of expression to official versions of events".

73. In a report submitted to the UN Human Rights Council on 1 July 2013 (UN Doc. A/HRC/24/38), the UN Independent Expert on the promotion of a democratic and equitable international order recommended, in paragraph 56 (e), that States should "repeal legislation that is incompatible with articles 18 and 19 [of the International Covenant on Civil and Political Rights]; in particular, ... memory laws and any laws that hinder open discussion of political and historical events". He made a similar recommendation in paragraph 69 (j) of the version of the report that he submitted to the UN General Assembly on 7 August 2013 (UN Doc. A/68/284).

B. Relevant Council of Europe instruments and materials

1. Additional Protocol to the Convention on Cybercrime

74. The Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (European Treaty Series No. 189, 2466 UNTS 205), was opened for signature on 28 January 2003 and entered into force on 1 March 2006. It has been signed by thirty-six out of the forty-seven Member States of the Council of Europe (plus two other States: Canada and South Africa), but thus far only ratified by twenty-four, and three of those (Denmark, Finland and Norway) have, by way of reservations, made use of the possibility to under Article 6 § 2 fully or partly to refrain from criminalising acts covered by Article 6 § 1 (see paragraphs 75 and 76 below). Switzerland signed the Protocol on 9 October 2003 but has not ratified it, and it is, by its Article 10 § 2, not into force in respect of it.

75. Article 6 of the Protocol, entitled "Denial, gross minimisation, approval or justification of genocide or crimes against humanity", provides:

> "1. Each Party shall adopt such legislative measures as may be necessary to establish the following conduct as criminal offences under its domestic law, when committed intentionally and without right:
>
> distributing or otherwise making available, through a computer system to the public, material which denies, grossly minimises, approves or justifies acts constituting genocide or crimes against humanity, as defined by international law and recognised as such by final and binding decisions of the International Military Tribunal, established by the London Agreement of 8 August 1945, or of any other international court established by relevant international instruments and whose jurisdiction is recognised by that Party.
>
> 2. A Party may either
>
> (a) require that the denial or the gross minimisation referred to in paragraph 1 of this article is committed with the intent to incite hatred, discrimination or violence against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors, or otherwise
>
> (b) reserve the right not to apply, in whole or in part, paragraph 1 of this article."

76. The explanatory report to the Protocol reads, in so far as relevant (footnotes omitted):

> "39. In recent years, various cases have been dealt with by national courts where persons (in public, in the media, etc.) have expressed ideas or theories which aim at denying, grossly minimising, approving or justifying the serious crimes which occurred in particular during the second World War (in particular the Holocaust).The motivation for such behaviours is often presented with the pretext of scientific research, while they really aim at supporting and promoting the political motivation which gave rise to the Holocaust. Moreover, these behaviours have also inspired or, even, stimulated and encouraged, racist and xenophobic groups in their action, including through computer systems. The expression of such ideas insults (the memory of) those persons who have been victims of such evil, as well as their relatives. Finally, it threatens the dignity of the human community.
>
> 40. Article 6, which has a similar structure as Article 3, addresses this problem. The drafters agreed that it was important to criminalize expressions which deny, grossly minimise, approve or justify acts constituting genocide or crimes against humanity, as defined by international law and recognised as such by final and binding decisions of the International Military Tribunal, established by the London Agreement of 8 [August] 1945. This owing to the fact that the most important and established conducts, which had given rise to genocide and crimes against humanity, occurred during the period 1940-1945. However, the drafters recognised that, since then, other cases of genocide and crimes against humanity occurred, which were strongly motivated by theories and ideas of a racist and xenophobic nature. Therefore, the drafters considered it necessary not to limit the scope of this provision only to the crimes committed by the Nazi regime during the 2nd World War and established as such by the Nuremberg Tribunal, but also to genocides and crimes against humanity established by other international courts set up since 1945 by relevant international legal instruments (such as UN Security Council Resolutions, multilateral treaties, etc.). Such courts may be, for instance, the International Criminal Tribunals for the

former Yugoslavia, for Rwanda, the Permanent International Criminal Court. This Article allows to refer to final and binding decisions of future international courts, to the extent that the jurisdiction of such a court is recognised by the Party signatory to this Protocol.

41. The provision is intended to make it clear that facts of which the historical correctness has been established may not be denied, grossly minimised, approved or justified in order to support these detestable theories and ideas.

42. The European Court of Human Rights has made it clear that the denial or revision of 'clearly established historical facts – such as the Holocaust – ... would be removed from the protection of Article 10 by Article 17' of the ECHR (see in this context the Lehideux and Isorni judgment of 23 September 1998).

43. Paragraph 2 of Article 6 allows a Party either (i) to require, through a declaration, that the denial or the gross minimisation referred to in paragraph 1 of Article 6, is committed with the intent to incite hatred, discrimination or violence against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors. or (ii) to make use of a reservation, by allowing a Party not to apply – in whole or in part – this provision."

2. Committee of Ministers Resolution (68) 30

77. On 31 October 1968 the Committee of Ministers of the Council of Europe adopted Resolution (68) 30. It recommended to the governments of member states of the Council of Europe to, among other things, (a) sign and ratify the CERD if they had not yet done so, and (b) upon ratification "stress by an interpretative statement the importance which they attach ... to the respect for the rights laid down in the [Convention]".

3. Committee of Ministers Recommendation 97/20 on "hate speech"

78. On 30 October 1997 the Committee of Ministers of the Council of Europe adopted Recommendation 97/20 on "hate speech", which reads, in so far as relevant:

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

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

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

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

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

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

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

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

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

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

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

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

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

Recommends that the governments of member states:

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

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

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

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

79. An appendix to that recommendation defined "hate speech" as "covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin". It went on to lay down a number of principles that applied to hate speech. The relevant ones were:

Principle 2

"The governments of the member states should establish or maintain a sound legal framework consisting of civil, criminal and administrative law provisions on hate speech which enable administrative and judicial authorities to reconcile in each case respect for freedom of expression with respect for human dignity and the protection of the reputation or the rights of others.

To this end, governments of member states should examine ways and means to:

– stimulate and co-ordinate research on the effectiveness of existing legislation and legal practice;

– review the existing legal framework in order to ensure that it applies in an adequate manner to the various new media and communications services and networks;

– develop a co-ordinated prosecution policy based on national guidelines respecting the principles set out in this recommendation;

– add community service orders to the range of possible penal sanctions;

– enhance the possibilities of combating hate speech through civil law, for example by allowing interested non-governmental organisations to bring civil law actions, providing for compensation for victims of hate speech and providing for the possibility of court orders allowing victims a right of reply or ordering retraction;

– provide the public and media professionals with information on legal provisions which apply to hate speech."

Principle 3

"The governments of the member states should ensure that in the legal framework referred to in Principle 2, interferences with freedom of expression are narrowly circumscribed and applied in a lawful and non-arbitrary manner on the basis of objective criteria. Moreover, in accordance with the fundamental requirement of the rule of law, any limitation of, or interference with, freedom of expression must be subject to independent judicial control. This requirement is particularly important in cases where freedom of expression must be reconciled with respect for human dignity and the protection of the reputation or the rights of others."

Principle 4

"National law and practice should allow the courts to bear in mind that specific instances of hate speech may be so insulting to individuals or groups as not to enjoy the level of protection afforded by Article 10 of the European Convention on Human Rights to other forms of expression. This is the case where hate speech is aimed at the destruction of the rights and freedoms laid down in the Convention or at their limitation to a greater extent than provided therein."

Principle 5

"National law and practice should allow the competent prosecution authorities to give special attention, as far as their discretion permits, to cases involving hate speech. In this regard, these authorities should, in particular, give careful consideration to the suspect's right to freedom of expression given that the imposition of criminal sanctions generally constitutes a serious interference with that freedom. The competent courts should, when imposing criminal sanctions on persons convicted of hate speech offences, ensure strict respect for the principle of proportionality."

4. Work of the European Commission against Racism and Intolerance

80. The European Commission against Racism and Intolerance ("the ECRI"), the Council of Europe's body tasked with combating racism, racial discrimination, xenophobia, anti-Semitism and intolerance, said, in paragraph 18 (e) of its Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination of 13 December 2002 (CRI(2003)8) that the law should penalise, if "committed intentionally", "the public denial, trivialisation, justification or condoning, with a racist aim, of crimes of genocide, crimes against humanity or war crimes". In the explanatory memorandum to the recommendation, the ECRI said that paragraph 18 (e) referred to "the crimes of genocide, crimes against humanity and war crimes". The crime of genocide was to be "understood as defined in Article II of the [Genocide Convention] and Article 6 of the [Rome Statute]", and crimes against humanity and war crimes were to be "understood as defined in Articles 7 and 8 of the [Rome Statute]".

81. In its report of 10 December 2010 (CRI(2011)5), adopted in the course of the fourth monitoring cycle in respect of Turkey, the ECRI noted, *inter alia*, the following (footnotes omitted):

"83. ... It is difficult to ascertain the sizes of the various minority groups living in Turkey at present, as the most recent publicly available official estimates date from 2000 and do not cover all relevant groups. ... According to [these estimates], the Armenian population in Turkey is estimated at between 50,000 and 93,500 persons ...

...

90. In addition to issues with respect to the restitution of property of foundations, the Armenian minority reports difficulties in the field of minority language education due to a lack of textbooks in Armenian and of teachers trained in the Armenian language. This situation has contributed to a gradual decline in the numbers of parents deciding to send their children to Armenian schools; some parents also reportedly avoid sending their children to Armenian schools because they are afraid that either they or their children will be threatened in consequence. ECRI notes that in 2008, a propaganda documentary entitled 'The Blonde Bride: The Truth behind the Armenian Issue' was distributed by the Ministry of National Education to all primary schools, along with a notice that it should be screened; the documentary showed bloody images of massacres and children were to write a composition about how they felt after watching it. While the Ministry of National Education eventually ceased distribution of the DVD following wide-scale complaints from parents, the DVDs were not collected from schools, and decisions whether or not to screen it were left to individual education authorities. ECRI is of the view that the dissemination and

screening of such materials in schools runs directly counter to the objective of building a more open and tolerant society, and considers it especially regrettable that such material has been targeted at children.

91. ECRI notes that on 23 July 2009, the Ministry of National Education approved the appointment to Armenian schools of Armenian language, religious culture and ethics teachers. Such teachers had to be Turkish nationals of Armenian origin and hold the necessary teaching qualifications from a faculty recognised by the Turkish Board of Education. They may receive in-service training. ECRI hopes that improved relations between Turkey and Armenia will provide an additional opportunity to resolve some of the concrete problems mentioned above, such as the training of teachers and provision of textbooks in Armenian minority schools. ECRI notes that at present, and although this situation may be seen as far from ideal, Armenia itself is the only realistic source of an adequate range of textbooks in Armenian.

...

137. ... In January 2007, the chief editor of the bilingual Armenian-Turkish Agos weekly newspaper, Hrant Dink, was assassinated, having previously received death threats of which the authorities were reportedly aware. ... In addition to specific, high profile acts of violence such as those mentioned above, minority schools, businessmen and religious institutions have reportedly been threatened by emails, letters and phone calls.

...

142. ... Occasional statements by leading politicians, in particular around Armenian claims of genocide, have also shown that mutual resentment and mistrust may flourish unless considerable care is taken when addressing sensitive issues in political discourse.

...

151. ... [I]n late 2008/early 2009 ... boycotts of Jewish businesses were organised, and some businesses in Eskişehir displayed signs indicating that Jews, Armenians and dogs were not welcome to enter. It was not until one newspaper published photographs of these signs, along with an article asking what more the Ministry of Justice was waiting for, that the latter took action in that case."

C. Relevant European Union law

82. Framework Decision 2008/913/JHA of 28 November 2008 of the Council of the European Union on combating certain forms and expressions of racism and xenophobia by means of criminal law (OJ L 328/55, 6.12.2008, pp. 55-58) provides for the approximation of the laws of the Member States of the European Union on offences involving racism and xenophobia.

83. First proposed by the European Commission in November 2001 (Proposal for a Council Framework Decision on combating racism and xenophobia, COM(2001) 664 final, OJ C 75 E, 26.3.2002, pp. 269-73), the decision was adopted by the Council of the European Union on 28 November 2008. It entered into force on 6 December 2008. By its

Article 10 § 1, the Member States of the European Union were to take the necessary measures to comply with its provisions by 28 November 2010.

84. The recitals to the decision read, in so far as relevant:

> "...
>
> (6) Member States acknowledge that combating racism and xenophobia requires various kinds of measures in a comprehensive framework and may not be limited to criminal matters. This Framework Decision is limited to combating particularly serious forms of racism and xenophobia by means of criminal law. Since the Member States' cultural and legal traditions are, to some extent, different, particularly in this field, full harmonisation of criminal laws is currently not possible.
>
> ...
>
> (14) This Framework Decision respects the fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, in particular Articles 10 and 11 thereof, and reflected in the Charter of Fundamental Rights of the European Union, and notably Chapters II and VI thereof.
>
> (15) Considerations relating to freedom of association and freedom of expression, in particular freedom of the press and freedom of expression in other media have led in many Member States to procedural guarantees and to special rules in national law as to the determination or limitation of liability.
>
> ..."

85. Article 1 of the decision, entitled "Offences concerning racism and xenophobia" provides, in so far as relevant:

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

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."

86. Article 7 of the decision, entitled "Constitutional rules and fundamental principles", provides:

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

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

87. In its report on the decision's implementation, issued on 27 January 2014 (COM (2014) 27 final), the Commission noted that out of the Member States which had specifically criminalised the conduct set out in Article 1 § 1 (c) of the decision (see paragraph 85 above), France, Italy, Latvia, Luxembourg and Romania did not require that the conduct be carried out in a manner likely to incite to violence and hatred, whereas Bulgaria, Portugal, Slovenia and Spain required more than a mere likelihood of incitement. The Commission went on to note that thirteen Member States – Austria, Belgium, the Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Hungary, Ireland, the Netherlands, Sweden and the United Kingdom – had no criminal-law provisions governing such conduct. Germany and the Netherlands had stated that national case-law applicable to Holocaust denial or trivialisation would also apply to the conduct covered by that Article.

88. Some Member States had made use of the possibility under Article 1 § 2 of the decision (see paragraph 85 above) to punish hate speech only if it was carried out in a manner likely to disturb public order or was threatening, abusive or insulting. Cyprus and Slovenia had opted for both alternatives. Germany made all such conduct dependent on being capable of disturbing the public peace. Similarly, Hungarian case-law pointed to such conduct being dependent on a likely disturbance of public peace. In Malta and Lithuania, the offence of condoning, denial or trivialisation hinged on either of the two options.

89. Cyprus, France, Lithuania, Luxembourg, Malta, Romania and Slovakia had, in relation to denials or gross trivialisations of the crimes defined in the Rome Statute, availed themselves of the possibility under

Article 1 § 4 of the decision to only punish such conduct if those crimes had been established by a competent national or international court (see paragraph 85 above).

90. The Commission concluded that a number of Member States had not transposed fully or correctly the decision's provisions. It said that in the course of 2014 it would engage in dialogue with those States with a view to ensuring the decision's proper transposition, while giving due consideration to freedom of expression.

IV. COMPARATIVE LAW MATERIALS

91. In the Chamber proceedings, the Swiss Government submitted a comparative law study (opinion 06-184) issued on 19 December 2006 by the Swiss Institute of Comparative Law. This study analysed the legislation of fourteen European countries (Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Italy, Luxembourg, the Netherlands, Norway, Spain, Sweden and the United Kingdom), the United States and Canada regarding the offence of denial of crimes against humanity, in particular genocide. The summary of the study reads:

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

is punishable by up to five years' imprisonment or a fine. In Austria, anyone who, acting in such a way that his or her position may be known by a large number of people, denies or severely trivialises genocide or other crimes against humanity committed by the National Socialist regime is punishable by up to ten years' imprisonment. Following the same approach, Belgian law punishes by imprisonment for between eight days and one year anyone who denies or grossly trivialises, seeks to justify or approves of the genocide committed by the German National Socialist regime.

In other countries, in the absence of special statutory provision for criminal offences, the courts have intervened to ensure that negationism is punished. In particular, the Netherlands Supreme Court has held that the provisions of the Criminal Code prohibiting discriminatory acts were to be applied to punish denial of crimes against humanity. In addition, a Bill aimed at criminalising negationism is currently being examined in that country. The Canadian Human Rights Tribunal has referred to the criminal offence of exposing others to hatred or contempt, as provided for in the Canadian Human Rights Act, as a basis for condemning the content of a negationist website. The position of the judges in the United States is less settled, since that country affords extremely strict protection of freedom of expression, for historical and cultural reasons. However, it may be noted that in general, victims of offensive speech have to date succeeded in obtaining damages where they may legitimately have felt that their physical integrity was under threat.

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

92. The Chamber went on to note that since the publication of this study in 2006, there had been significant developments in France and Spain.

93. In France, an Act had been enacted on 29 January 2001 (Law no. 2001-70) with a single section, reading:

"France publicly recognises the Armenian genocide of 1915."

94. After that, on 23 January 2012 the French Parliament had passed an Act whose section 1 made it an offence to publicly condone, deny or grossly trivialise genocide, crimes against humanity and war crimes, as "defined non-exhaustively" in Articles 6, 7 and 8 of the [Rome Statute], Articles 211-1 and 212-1 of the French Criminal Code, and Article 6 of the Charter of the International Military Tribunal, "and as recognised by law, in an international treaty signed and ratified by France or to which France has

acceded, in a decision taken by a European Union or an international institution, or as characterised by a French court, such decision being enforceable in France". Section 2 of the Act expanded the list of associations that could act as civil parties in such proceedings.

95. In a decision of 28 February 2012 (*Décision n° 2012-647 DC du 28 février 2012*) the French Constitutional Council declared this Act unconstitutional in the following terms:

"...

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

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

5. Secondly, under Article 11 of the 1789 Declaration: 'The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law.' Article 34 of the Constitution provides: 'The law shall lay down the rules regarding ... civic rights and the fundamental guarantees afforded to citizens for the exercise of their civil liberties'. On that basis, Parliament is at liberty to enact rules regulating the exercise of the right of free communication, freedom of speech, freedom of written expression and freedom of the press; it is also at liberty on that account to establish criminal offences punishing abuses of the exercise of the freedom of expression and communication which undermine public order and the rights of others. However, freedom of expression and communication is all the more precious since its exercise is a precondition for democracy and one of the guarantees of respect for other rights and freedoms. Any restrictions imposed on the exercise of this freedom must be necessary, appropriate and proportionate to the aim pursued.

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

section 1 of the referred law must be declared unconstitutional; and section 2, which is inseparably linked to it, must likewise be declared unconstitutional.

DECIDES:

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

..."

96. The Chamber went on to note that in a judgment of 7 November 2007 (no. 235/2007; BOE-T-2007-21161) the Spanish Constitutional Court had declared unconstitutional the offence of genocide denial laid down in Article 607 § 2 of the Spanish Criminal Code. As worded before that judgment, that provision had made it an offence to disseminate, by any means, "ideas or doctrines denying or justifying" genocide. As a result of the judgment, the words "denying or" were struck off.

97. In that judgment the Spanish Constitutional Court noted that Spain did not have a "militant democracy" and that its Constitution, which lacked a provision akin to Article 17 of the Convention, did not prohibit speech contrary to its essence unless it could effectively harm constitutional rights. The court went on to say that incitement to genocide or racial or ethnic hatred were criminalised under other provisions of the Criminal Code, in line with Spain's international law obligations. Some other States, which had been particularly affected by the genocide committed under national-socialism, had also criminalised denial of the Holocaust. In reviewing whether Article 607 § 2 of the Criminal Code was compatible with the constitutional right to freedom of expression, the court sought to determine the exact way in which this Article was to be construed. It noted that it criminalised both denial and justification of genocide. In the court's view, denial was to be understood as maintaining that certain acts had not taken place or had not been carried out in such a way as to be classified as genocide, whereas justification did not entail denying outright the existence of a genocide but relativising it or denying that it was illegal, by identifying to some extent with its perpetrators. The salient question was whether these two forms of expression were "hate speech" as outlined in this Court's case-law. Mere denial was not, for it could not in itself give rise to a climate of hostility towards a group that had been the victim of a genocide whose reality was disputed. It could therefore only be prohibited if it was in fact conducive to an attitude of hostility towards such a group – all the more because mere conclusions about the existence or otherwise of specific acts, not accompanied by value judgments about those acts or their illegality, fell also within the scope of academic freedom, which was constitutionally entitled to an even higher degree of protection. However, Article 607 § 2 did not contain such a limiting requirement. It thus outlawed conduct that did not constitute even a potential danger and could not therefore be constitutionally criminalised. Justification, on the other hand, being a value

judgment, could in some cases be regarded as a means to indirectly incite to genocide. If it presented a genocide as right and thus incited to hatred towards a specific group, it could lead to a climate of hostility and violence, and was thus properly criminalised. Conduct that was disrespectful or degrading for a group of people could properly be outlawed.

98. Lastly, the Chamber noted the relevant provisions of Luxembourg's criminal law.

99. In addition to the above materials, the Grand Chamber had available to it several treatises and articles (M. Whine, *Expanding Holocaust Denial and Legislation Against It*, in I. Hare and J. Weinstein (eds.), *Extreme Speech and Democracy*, OUP, Oxford, 2009, pp. 538-56; C. Tomuschat, *Prosecuting Denials of Past Alleged Genocides*, in *The UN Genocide Convention, A Commentary*, P. Gaeta (ed.), OUP, Oxford, 2009, pp. 513-30; M. Imbleau, *Denial of the Holocaust, Genocide, and Crimes Against Humanity: A Comparative Overview of* Ad Hoc *Statutes*, in L. Hennebel and T. Hochmann (eds.), *Genocide Denials and the Law*, OUP, Oxford, 2011, pp. 235-77; N. Droin, *État des lieux de la répression du négationnisme en France et en droit comparé*, RTDH 2014, no. 98, pp. 363-93; and P. Lobba, *A European Halt to Laws Against Genocide Denial?*, *European Criminal Law Review*, Volume 4, Number 1 (April 2014), pp. 59-77) that shed light on more recent developments in this area of the law. A perusal of those materials, complemented by the above-mentioned developments and more recent information available to the Grand Chamber, shows that among the High Contracting Parties there are now essentially four types of regimes in this domain, in terms of scope of the offence of genocide denial: (a) States, such as Austria, Belgium, France, Germany, the Netherlands and Romania, that only criminalise the denial of the Holocaust or more generally of Nazi crimes (Romania in addition criminalises the Nazi extermination of the Roma, and Greece criminalises, on top of the Holocaust and Nazi crimes, the denial of genocides recognised by an international court or its own Parliament); (b) States, such as the Czech Republic and Poland, that criminalise the denial of Nazi and communist crimes; (c) States, such as Andorra, Cyprus, Hungary, Latvia, Liechtenstein, Lithuania, Luxembourg, the former Yugoslav Republic of Macedonia, Malta, Slovakia, Slovenia and Switzerland, that criminalise the denial of any genocide (Lithuania in addition specifically criminalises denial of Soviet and Nazi crimes *vis-à-vis* the Lithuanians, but Cyprus only criminalises the denial of genocides recognised as such by a competent court); and (d) States, such as Finland, Italy, Spain (following the 2007 judgment of its Constitutional Court cited in paragraph 96 above), the United Kingdom and the Scandinavian States, that do not have special provisions criminalising such conduct.

THE LAW

I. SCOPE OF THE CASE

100. The Court considers it important to clarify from the outset the scope of its jurisdiction in this case, which arose pursuant to an individual application against Switzerland under Article 34 of the Convention (see paragraph 1 above).

101. By Article 19 of the Convention, the Court's task is limited to "ensur[ing] the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto", and by Article 32 § 1, its jurisdiction only extends to "matters concerning the interpretation and application of the Convention and the [P]rotocols thereto". Unlike the ICTY, the ICC or the ICJ, it does not have penal or other jurisdiction under the Genocide Convention or another international law instrument relating to such issues.

102. It follows that in the present case the Court is not only, as noted by the Chamber in paragraph 111 of its judgment, not required to determine whether the massacres and mass deportations suffered by the Armenian people at the hands of the Ottoman Empire from 1915 onwards can be characterised as genocide within the meaning of that term under international law, but has no authority to make legally binding pronouncements, one way or the other, on this point.

II. APPLICATION OF ARTICLE 17 OF THE CONVENTION

103. The first point for decision is whether the application should be rejected by reference to Article 17 of the Convention, which provides:

> "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."

A. The Chamber judgment

104. The Chamber considered of its own motion whether to reject the application under Article 17 of the Convention. Finding that the applicant's statements did not amount to incitement of hatred towards the Armenian people, that he had not expressed contempt towards the victims of the events of 1915 and the following years, and that he had not been prosecuted for seeking to justify a genocide, the Chamber concluded that the applicant had not used his freedom of expression for ends contrary to the text and spirit of the Convention. There was therefore no reason to reject his application under Article 17.

B. Submissions before the Grand Chamber

1. The parties

105. Neither the applicant nor the Swiss Government specifically dealt with this point in their submissions.

2. The third parties

106. The Turkish Government submitted that, unlike denial of the Holocaust, the applicant's statements that the events of 1915 and the following years had not constituted genocide did not amount to the denial of a clearly established historical fact. The applicant had not called into question the reality of the massacres and mass deportations, simply their legal characterisation, on which there was no international consensus. They were still the subject of a heated debate. This was evidenced by a declaration made by the British Government about six months before the applicant's statements, and by a report provided to members of the British Parliament in 2012. No mention was made of these events in the chapters on genocide in textbooks on public international law and international criminal law, and none of the commentaries on the Genocide Convention referred to these events as "genocide" or gave them as an example of one. Against this background, any attempt to draw a parallel with the Holocaust was unconvincing. The element that made the legal characterisation of the events of 1915 and the following years such a controversial issue was precisely the presence or absence of the special intent to destroy required for mass killings to fall within the legal definition of genocide. No such intent had been established by a national or an international court, which was not the case for the Holocaust, in respect of which the International Military Tribunal had, albeit without using the term "genocide", found such intent.

107. The Turkish Government further submitted that the applicant had simply expressed his opinion on this issue. Opinions could not be interfered with simply because the public authorities saw them as unfounded, emotional, worthless of dangerous. The applicant had not attempted to deny the mass killings of Armenians, call into doubt the suffering of the victims or express contempt for them, exonerate the culprits or approve of their actions, or justify a pro-genocidal policy.

108. The French Government submitted that genocide denial in itself amounted to incitement to hatred and racism, because it in effect instigated such conduct under the guise of questioning historical facts. To enjoy protection under Article 10 of the Convention, historical debate had to strive to find the truth rather than serve as a vehicle for ideological enterprises. This was not the case for opinions that displayed a lack of self-criticism and manifestly disregarded the testimony of persons who had taken part in the events, and were thus not in keeping with the historical method; their

authors were not driven by a concern for debate and the search for historical truth. Such statements in relation to a genocide offended the memory and honour of the victims, and fell within the ambit of Article 17 of the Convention.

109. The Switzerland-Armenia Association submitted that it was clear that under the Court's case-law the application could be rejected under Article 17 of the Convention.

110. The Federation of the Turkish Associations of French-speaking Switzerland submitted that it would be difficult to justify resort to Article 17 of the Convention with respect to statements denying the characterisation of the events of 1915 and the following years as genocide because, unlike Holocaust denial, such statements were not driven by racist or antidemocratic intent.

111. The *FIDH* submitted that, in view of its radical effects and the risk of subjective assessments, Article 17 of the Convention had to be applied with utmost caution. The Court's case-law on whether statements fell under this provision was inconsistent and the subject of intense debates. Such matters were therefore better dealt with under Article 10 § 2 of the Convention and the proportionality test.

112. The *LICRA* submitted that the trivialisation and denial of a genocide were an affront to human dignity and the values of the Convention. This could be seen from the wording of Article 261 *bis* § 4 of the Swiss Criminal Code. They were invariably intended to incite to hatred or at least violate human dignity.

C. The Court's assessment

113. In *Ždanoka v. Latvia* ([GC], no. 58278/00, § 99, ECHR 2006-IV), having reviewed the preparatory work on the Convention, the Court said that the reason why Article 17 had been included in it had been that it could not be ruled out that a person or a group of persons would attempt to rely on the rights enshrined in the Convention to derive the right to conduct activities intended to destroy these rights.

114. However, Article 17 is, as recently confirmed by the Court, only applicable on an exceptional basis and in extreme cases (see *Paksas v. Lithuania* [GC], no. 34932/04, § 87 *in fine*, ECHR 2011 (extracts)). Its effect is to negate the exercise of the Convention right that the applicant seeks to vindicate in the proceedings before the Court. In cases concerning Article 10 of the Convention, it should only be resorted to if it is immediately clear that the impugned statements sought to deflect this Article from its real purpose by employing the right to freedom of expression for ends clearly contrary to the values of the Convention (see, as recent examples, *Hizb ut-Tahrir and Others v. Germany* (dec.), no. 31098/08, §§ 73-74 and 78, 12 June 2012, and *Kasymakhunov and*

Saybatalov v. Russia, nos. 26261/05 and 26377/06, §§ 106-13, 14 March 2013).

115. Since the decisive point under Article 17 – whether the applicant's statements sought to stir up hatred or violence, and whether by making them he attempted to rely on the Convention to engage in an activity or perform acts aimed at the destruction of the rights and freedoms laid down in it – is not immediately clear and overlaps with the question whether the interference with the applicant's right to freedom of expression was "necessary in a democratic society", the Court finds that the question whether Article 17 is to be applied must be joined to the merits of the applicant's complaint under Article 10 of the Convention (see, *mutatis mutandis*, *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 32, *Reports of Judgments and Decisions* 1998-I; *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, § 96, ECHR 2003-II; *Soulas and Others v. France*, no. 15948/03, § 23, 10 July 2008; *Féret v. Belgium*, no. 15615/07, § 52, 16 July 2009; *Varela Geis v. Spain*, no. 61005/09, § 31, 5 March 2013; and *Vona v. Hungary*, no. 35943/10, § 38, ECHR 2013).

III. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

116. The applicant complained that his criminal conviction and punishment for having publicly stated that there had not been an Armenian genocide had been in breach of his right to freedom of expression. He relied on Article 10 of the Convention, which provides, in so far as relevant:

> "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. ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

117. It was not disputed that the applicant's conviction and punishment, coupled with the order to pay damages to the Switzerland-Armenia Association, constituted an interference with the exercise of his right to freedom of expression. Such interference will be in breach of Article 10 of the Convention if it does not satisfy the requirements of its second paragraph. The Court will however first examine whether Article 16 of the Convention is applicable in the present case.

A. Article 16 of the Convention

118. The first question for decision is whether, as suggested by the Swiss Government, the interference could be justified under Article 16 of the Convention on account of the fact that the applicant was an alien.

119. Article 16 of the Convention provides:

> "Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens."

120. The only case in which the Court has considered this Article is *Piermont v. France* (27 April 1995, § 64, Series A no. 314), in which the applicant, a German member of the European Parliament, had been expelled from French Polynesia as a result of a speech that she had given there. The Court held that since Ms Piermont was a national of another member State of the European Union and a member of the European Parliament, and therefore not an "alien", Article 16 could not be raised against her.

121. This is not the case here. However, the Court does not find that Article 16 can provide a justification for the interference in the present case. In its report in *Piermont*, the former Commission noted that this Article reflects an outdated understanding of international law (see *Piermont v. France*, nos. 15773/89 and 15774/89, Commission's report of 20 January 1994, unpublished, § 58). In point 10 (c) of its Recommendation 799 (1977) on the political rights and position of aliens, the Council of Europe's Parliamentary Assembly called for it to be repealed. It has never been applied by the former Commission or the Court, and unbridled reliance on it to restrain the possibility for aliens to exercise their right to freedom of expression would run against the Court's rulings in cases in which aliens have been found entitled to exercise this right without any suggestion that it could be curtailed by reference to Article 16 (see *Women On Waves and Others v. Portugal*, no. 31276/05, §§ 28-44, 3 February 2009, and *Cox v. Turkey*, no. 2933/03, §§ 27-45, 20 May 2010). Indeed, in *Cox* (cited above, § 31) the Court specifically noted that, since the right to freedom of expression was guaranteed by Article 10 § 1 of the Convention "regardless of frontiers", no distinction could be drawn between its exercise by nationals and foreigners.

122. Bearing in mind that clauses that permit interference with Convention rights must be interpreted restrictively (see, among other authorities, *Vogt v. Germany*, 26 September 1995, § 52, Series A no. 323; *Rekvényi v. Hungary* [GC], no. 25390/94, § 42, ECHR 1999-III; and *Stoll v. Switzerland* [GC], no. 69698/01, § 61, ECHR 2007-V), the Court finds that Article 16 should be construed as only capable of authorising restrictions on "activities" that directly affect the political process. This not being the case, it cannot be prayed in aid by the Swiss Government.

123. In conclusion, Article 16 of the Convention did not authorise the Swiss authorities to restrict the applicant's exercise of the right to freedom of expression in this case.

B. Justification under Article 10 § 2 of the Convention

124. To be justified under Article 10 § 2 of the Convention, an interference with the right to freedom of expression must have been "prescribed by law", intended for one or more of the legitimate aims set out in that paragraph, and "necessary in a democratic society" to achieve that aim or aims. The Court will examine these points in turn.

1. Lawfulness of the interference

(a) The Chamber judgment

125. The Chamber, taking into account the manner in which the Swiss Federal Court had construed Article 261 *bis* § 4 of the Swiss Criminal Code in the case at hand, found that the precision of the term "a genocide" in this Article could give rise to doubts. However, it went on to say that the applicant, being a lawyer and a well-informed politician, could have suspected that his statements could result in criminal liability because the Swiss National Council had recognised the Armenian genocide and because the applicant had later acknowledged that when making his statements he had been aware that the public denial of genocide had been criminalised in Switzerland. The applicant could not have therefore been "unaware that by describing the Armenian genocide as an 'international lie', he was liable to face a criminal penalty in Swiss territory" (see paragraph 71 of the Chamber judgment). The interference with his right to freedom of expression could therefore be regarded as "prescribed by law".

(b) Submissions before the Grand Chamber

(i) The parties

126. The applicant did not make submissions on this point under Article 10 of the Convention; he pleaded it by reference to Article 7 instead (see paragraph 286 below).

127. The Swiss Government referred to the developments that had led to the enactment of Article 261 *bis* § 4 of the Swiss Criminal Code in its current form. According to them, these developments showed that when drawing up this provision the Swiss legislature had clearly defined its intended scope. The previous case in which it had been applied to statements relating to the events of 1915 and the following years – the one resulting in the judgment of the Bern-Laupen District Court of 14 September 2001 – had left open the question whether the massacres and

atrocities against the Armenian people were to be characterised as genocide. The Swiss Government also pointed out that Article 261 *bis* § 4 made it an offence to deny both genocide and crimes against humanity, adding that there could be little dispute that the atrocities against the Armenians had constituted such crimes. On this basis, they concluded that that Article was formulated with sufficient precision.

(ii) The third parties

128. The Turkish Government submitted that Article 261 *bis* § 4 of the Swiss Criminal Code did not live up to the high level of foreseeability required of criminal law rules that could result in severe penalties, and that the applicant could not have expected that he would be convicted under that provision on the basis of his statements.

129. The Turkish Government went on to submit that while recognising that "genocide" was a well-defined legal concept, the Swiss courts had sought to determine whether the events of 1915 and the following years had constituted genocide by reference to the large consensus on that point in Swiss society. The salient point for these courts had thus been not whether these events had indeed amounted to a genocide but whether Swiss society so believed. This could perhaps be explained by the practical impossibility, noted by the doctrine, for domestic courts to decide in such cases whether historical events qualified as genocide within the meaning of international and domestic law. However, the problem with determining that point by reference to societal consensus, which could be a fast-changing thing, was that there were no legal criteria providing guidance in this respect. Such vagueness was incompatible with legal certainty. The fact that the Swiss Government and many other governments did not refer to the events of 1915 and the following years as "genocide", and that a number of historians had taken the view that they had not amounted to one could have led the applicant to think that this issue was not yet settled in Switzerland. Being a doctor of law, he conceived of "genocide" as a strictly defined legal concept, and could not have foreseen that it would be determined by reference to mere societal consensus. The difference between the strict legal notion and the looser use of the word "genocide" outside legal circles had been noted in the doctrine with reference to the atrocities that had taken place in Cambodia, Bosnia and Darfur. Reliance on societal consensus in that respect could enable politically active interest groups to widen the ambit of Article 261 *bis* § 4 of the Swiss Criminal Code by lobbying for parliamentary recognition of certain events as genocides without regard for the legal definition of the term. The Swiss courts' approach thus meant that the interference with the applicant's right to freedom of expression had not been prescribed "by law" but "by public opinion".

(c) The Court's assessment

130. It was not disputed that the interference with the applicant's right to freedom of expression had a legal basis in Swiss law – Article 261 *bis* § 4 of the Criminal Code (see paragraph 32 above) – and that the relevant law was accessible. The arguments made by the parties and the third parties were confined to the point whether that law was sufficiently foreseeable for the purposes of Article 10 § 2 of the Convention.

(i) General principles

131. In the first case in which it had to define the meaning of the phrase "prescribed by law" in Article 10 § 2 of the Convention, The Sunday Times *v. the United Kingdom (no. 1)* (26 April 1979, §§ 48-49, Series A no. 30), the Court held that, among other things, it entailed a requirement of foreseeability. A norm could not be regarded as a "law" unless it was formulated with sufficient precision to enable the person concerned to regulate his or her conduct: he or she needed to be able – if need be with appropriate advice – to foresee, to a degree that was reasonable in the circumstances, the consequences that a given action could entail. However, the Court went on to say that these consequences did not need to be foreseeable with absolute certainty, as experience showed that to be unattainable.

132. In its subsequent case-law under Article 10 § 2, the Court has, with minor variations in the formulation, consistently adhered to this position (see, among other authorities, *Rekvényi*, cited above, § 34; *Öztürk v. Turkey* [GC], no. 22479/93, § 54, ECHR 1999-VI; and *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 41, ECHR 2007-IV).

133. Even in cases in which the interference with the applicants' right to freedom of expression had taken the form of a criminal "penalty", the Court has recognised the impossibility of attaining absolute precision in the framing of laws, especially in fields in which the situation changes according to the prevailing views of society, and has accepted that the need to avoid rigidity and keep pace with changing circumstances means that many laws are couched in terms which are to some extent vague and whose interpretation and application are questions of practice (see, among other authorities, *Müller and Others v. Switzerland*, 24 May 1988, § 29, Series A no. 133; *Tammer v. Estonia*, no. 41205/98, § 37, ECHR 2001-I; and *Chauvy and Others v. France*, no. 64915/01, § 43, ECHR 2004-VI).

134. Naturally, when speaking of "law", Article 10 § 2 denotes the same concept to which the Convention refers elsewhere when using that term, for instance – as especially relevant for the purposes of this case – in Article 7 (see *Grigoriades v. Greece*, 25 November 1997, § 50, *Reports* 1997-VII; *Başkaya and Okçuoğlu v. Turkey* [GC], nos. 23536/94 and 24408/94, § 49, ECHR 1999-IV; and *Erdoğdu and İnce v. Turkey* [GC], nos. 25067/94 and

25068/94, § 59, ECHR 1999-IV). In the context of Article 7, the Court has consistently held that the requirement that offences be clearly defined in law is satisfied where a person can know from the wording of the relevant provision – if need be, with the assistance of the courts' interpretation of it – what acts and omissions will render him or her criminally liable (see generally, as recent authorities, *Kononov v. Latvia* [GC], no. 36376/04, § 185, ECHR 2010; *Del Río Prada v. Spain* [GC], no. 42750/09, § 79, ECHR 2013; and *Rohlena v. the Czech Republic* [GC], no. 59552/08, § 50, ECHR 2015, and, in the context of a case that concerned both Articles 7 and 10 of the Convention, *Radio France and Others v. France*, no. 53984/00, § 20, ECHR 2004-II). Article 7 does not prohibit the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, if the resultant development is consistent with the essence of the offence and can reasonably be foreseen (see *Kononov*, § 185; *Del Río Prada*, § 93; and *Rohlena*, § 50, all cited above).

135. The Court has also held, by reference to Articles 9, 10 and 11 of the Convention, that the mere fact that a legal provision is capable of more than one construction does not mean that it does not meet the requirement of foreseeability (see *Leyla Şahin v. Turkey* [GC], no. 44774/98, § 91, ECHR 2005-XI, as regards Article 9; *Vogt*, cited above, § 48 *in fine*, as regards Article 10; and *Gorzelik and Others v. Poland* [GC], no. 44158/98, § 65, ECHR 2004-I, as regards Article 11). In the context of Articles 7 and 10, it has noted that when new offences are created by legislation, there will always be an element of uncertainty about the meaning of this legislation until it is interpreted and applied by the criminal courts (see *Jobe v. the United Kingdom* (dec.), no. 48278/09, 14 June 2011).

136. In examining these points in the present case, the Court is mindful that under its well-established case-law, in proceedings originating in an individual application under Article 34 of the Convention its task is not to review domestic law in the abstract but to determine whether the way in which it was applied to the applicant gave rise to a breach of the Convention (see, among other authorities, *Golder v. the United Kingdom*, 21 February 1975, § 39 *in fine*, Series A no. 18; *Minelli v. Switzerland*, 25 March 1983, § 35, Series A no. 62; and *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, § 116, ECHR 2012).

(ii) Application of these principles in the present case

137. It follows from the above principles that the salient issue in this case is not whether Article 261 *bis* § 4 of the Swiss Criminal Code is in principle sufficiently foreseeable in its application, in particular in its use of the term "a genocide", but whether when making the statements in respect of which he was convicted the applicant knew or ought to have known – if need be, after taking appropriate legal advice – that these statements could render him criminally liable under this provision.

138. The Lausanne District Police Court and the Federal Court found, based on the record of the applicant's interviews with the prosecuting authorities, that he knew that the Swiss National Council had recognised the events of 1915 and the following years as genocide, and had acted out of a desire to help it "rectify the error" (see paragraphs 22 and 26 above). In view of this, and of the wording of Article 261 *bis* § 4 of the Swiss Criminal Code – seen in particular in the light of its drafting history (see paragraphs 33-38 above and, *mutatis mutandis*, *Olsson v. Sweden (no. 1)*, 24 March 1988, § 62, Series A no. 130) – the Court finds that the applicant, despite his protestations to the contrary, could reasonably have foreseen that his statements in relation to these events might result in criminal liability under that provision. The fact that an earlier prosecution in relation to similar statements had resulted in an acquittal does not alter that, especially bearing in mind that the Bern-Laupen District Court decided to give a judgment of acquittal because it found that the accused had not acted with a racist motive – a point that could vary from case to case depending on the person concerned and the exact content of his or her statements – while at the same time leaving open the question whether the events of 1915 and the following years could be regarded as "a genocide" for the purposes of Article 261 *bis* § 4 (see paragraph 44 above). The applicant could have found out about this by obtaining appropriate legal advice. It is true that in the absence of more ample case-law on that point, it was not entirely clear how the Swiss courts would go about determining whether these events had amounted to "a genocide" within the meaning of Article 261 *bis* § 4 in a subsequent case. However, these courts cannot be blamed for that state of affairs, which was by all appearances due to the fact that they had not often had the occasion to be confronted with acts such as that committed by the applicant (see, *mutatis mutandis*, *Soros v. France*, no. 50425/06, § 58, 6 October 2011). Their approach in the applicant's case could reasonably be expected, especially in view of the intervening adoption by the Swiss National Council of the motion recognising the events of 1915 and the following years as genocide (see paragraphs 48-50 above). This approach did not amount to a sudden and unforeseeable change in case-law (see *mutatis mutandis*, *Jorgic v. Germany*, no. 74613/01, §§ 109-13, ECHR 2007-III, and contrast *Pessino v. France*, no. 40403/02, §§ 34-36, 10 October 2006), and could not be regarded as an extension of the scope of a criminal statute by analogy (contrast *Karademirci and Others v. Turkey*, nos. 37096/97 and 37101/97, § 42, ECHR 2005-I).

139. The question whether the Swiss courts' approach to the question of what constituted "a genocide" for the purposes of Article 261 *bis* § 4 of the Swiss Criminal Code was acceptable in terms of the Convention relates to the relevance and sufficiency of the grounds given by them to justify the applicant's conviction, and will be examined below under the heading of

necessity (see, *mutatis mutandis*, *Lindon, Otchakovsky-Laurens and July*, cited above, § 42 *in fine*).

140. The interference with the applicant's right to freedom of expression was thus sufficiently foreseeable, and therefore "prescribed by law" within the meaning of Article 10 § 2 of the Convention.

2. Legitimate aim

(a) The Chamber judgment

141. The Chamber accepted that the interference with the applicant's right to freedom of expression had been intended to protect the "rights of others", namely the honour of the relatives of the victims of the atrocities perpetrated by the Ottoman Empire against the Armenian people from 1915 onwards. However, it found that the Swiss Government's assertion that the applicant's comments had in addition posed a serious risk to public order was not sufficiently substantiated.

(b) Submissions before the Grand Chamber

(i) The parties

142. The applicant did not specifically deal with this point in his submissions.

143. The Swiss Government submitted that the interference with the applicant's right to freedom of expression had sought to protect the rights of others: the victims of the events of 1915 and the following years and their descendants. The applicant's views were a threat to the identity of the Armenian community. The interference had also sought to protect public order. On 24 July 2004, the applicant had addressed a rally in Lausanne to mark the Treaty of Lausanne, which had been attended by about 2,000 people from Switzerland and abroad, and which had presented a certain risk because it had coincided with another rally. The Swiss Government also pointed out that the place of Article 261 *bis* in the Swiss Criminal Code was in the chapter dealing with "offences against public peace" and that, according to the Swiss Federal Court's case-law, the purpose of that Article was not only to protect the members of a particular ethnic or religious group but also to maintain public order. This was also evident from Switzerland's obligations under Article 4 (b) of the CERD and Article 20 § 2 of the ICCPR, as interpreted by the UN Human Rights Committee.

(ii) The third parties

144. The Turkish Government submitted that no link had been established between the applicant's conviction and the maintenance of public safety, and that no reference had been made to a specific threat to public safety. They drew attention to the difference between the wording of

Article 10 § 2 of the Convention, which spoke of the "prevention of disorder" and that of Article 19 § 3 (b) of the ICCPR, which used the terms "the protection ... of public order", and pointed out that there was no indication that the applicant's statements had been likely to cause disorder or had in fact caused disorder. Similar statements had been made before and after those in issue in this case without giving rise to any reported disorder.

(c) The Court's assessment

145. The Swiss Government argued that the interference with the applicant's right to freedom of expression had sought to attain two of the legitimate aims under Article 10 § 2 of the Convention: "the prevention of disorder" and "the protection of the ... rights of others". The Court will deal with each of these contentions in turn.

(i) "[T]he prevention of disorder"

146. When setting forth the various legitimate aims that may justify interferences with the rights enshrined in the Convention and its Protocols, the various Articles in the English text of the Convention and its Protocols use different formulations. Article 10 § 2 of the Convention, as well as Articles 8 § 2 and 11 § 2, contain the term "prevention of disorder", whereas Article 6 § 1 of the Convention and Article 1 § 2 of Protocol No. 7 speak of the "interests of public order", Article 9 § 2 of the Convention uses the formula "protection of public order", and Article 2 § 3 of Protocol No. 4 refers to the "maintenance of *ordre public*". While, as noted in paragraph 134 above, when using the same term the Convention and its Protocols must in principle be taken to refer to the same concept, differences in the terms used must normally be presumed to denote a variation in meaning. Seen in this context, the latter formulas appear to bear a wider meaning, based on the extensive notion of public order (*ordre public*) used in continental countries (see paragraph 16 of the Explanatory Report to Protocol No. 4) – where it is often taken to refer to the body of political, economic and moral principles essential to the maintenance of the social structure, and in some jurisdictions even encompasses human dignity – whereas the former appears to convey a narrower significance, understood in essence in cases of this type as riots or other forms of public disturbance.

147. On the other hand, the French text of Article 10 § 2 of the Convention, as well as those of Articles 8 § 2 and 11 § 2, speak of "*la défense de l'ordre*", which might be perceived as having a wider meaning than the term "prevention of disorder" in the English text. Yet here also, there is a difference in the formulation, for the French text of Article 6 § 1 of the Convention, as well as those of Article 2 § 3 of Protocol No. 4 and Article 1 § 2 of Protocol No. 7, refer to "*ordre public*".

148. Indeed, the Court recently noted the difference between the term "prevention of disorder" ("*défense de ordre*" in the French text) in Article 8 § 2 of the Convention and the term "public order" ("*ordre public*") (see *S.A.S. v. France* [GC], no. 43835/11, § 117, ECHR 2014 (extracts)).

149. By Article 33 § 1 of the 1969 Vienna Convention on the Law of Treaties, treaties are to be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". By Article 33 § 3 of that Convention, which deals with the interpretation of treaties which, like the Convention, are authenticated in two or more languages, the terms of a treaty are "presumed to have the same meaning in each authentic text". Article 33 § 4 of that Convention says that when a comparison of the authentic texts discloses a difference of meaning that the application of the other rules of interpretation does not remove, the meaning that must be adopted is the one that "best reconciles the texts, having regard to the object and purpose of the treaty". These latter rules must be read as elements of the general rule of interpretation laid down in Article 31 § 1 of that Convention (see *Golder*, cited above, § 30, and *Witold Litwa v. Poland*, no. 26629/95, § 58, ECHR 2000-III).

150. The Court has already had occasion to say that these rules – which reflect generally accepted principles of international law (see *Golder*, cited above, § 29) that have already acquired the status of customary law (see *LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001*, p. 466, §§ 99 and 101) – require it to interpret the relevant texts in a way that reconciles them as far as possible and is most appropriate to realise the object and purpose of the Convention (see *Wemhoff v. Germany*, 27 June 1968, p. 23, § 8, Series A no. 7; The Sunday Times, cited above, § 48; *Brogan and Others v. the United Kingdom*, 29 November 1988, § 59, Series A no. 145-B; and *Stoll*, cited above, §§ 59-60).

151. Bearing in mind that the context in which the terms at issue were used is a treaty for the effective protection of individual human rights (see *Saadi v. the United Kingdom* [GC], no. 13229/03, § 62, ECHR 2008), that clauses, such as Article 10 § 2, that permit interference with Convention rights must be interpreted restrictively (see, among other authorities, *Vogt*, § 52; *Rekvényi*, § 42; and especially *Stoll*, § 61, all cited above), and that, more generally, exceptions to a general rule cannot be given a broad interpretation (see *Witold Litwa*, cited above, § 59), the Court finds that, since the words used in the English text appear to be only capable of a narrower meaning, the expressions "the prevention of disorder" and "*la défense de l'ordre*" in the English and French texts of Article 10 § 2 can best be reconciled by being read as having the less extensive meaning.

152. The Swiss Government's arguments relating to the systematic place of Article 261 *bis* in the Swiss Criminal Code and the legal interests that it is intended to protect under Swiss law relate to the broader meaning and are

therefore of little relevance in the present context. What must rather be demonstrated is that the applicant's statements were capable of leading or actually led to disorder – for instance in the form of public disturbances – and that in acting to penalise them, the Swiss authorities had that in mind.

153. However, the only argument that the Swiss Government put forward in support of their assertion that this was the case was the reference to two opposing rallies held in Lausanne on 24 July 2004 – about a year before the events in respect of which the applicant was convicted – and the applicant's participation in one of them as a speaker. The Swiss Government did not provide any details in respect of that, and there is no evidence that confrontations had in fact taken place at those rallies (contrast, *mutatis mutandis*, *Plattform "Ärzte für das Leben" v. Austria*, 21 June 1988, §§ 12-13, 19 and 37-38, Series A no. 139, and *Chorherr v. Austria*, 25 August 1993, §§ 7-8 and 28, Series A no. 266-B). More importantly, none of those matters were mentioned by the Swiss courts in their decisions in the criminal case against the applicant, which was opened pursuant to a complaint by the Switzerland-Armenia Association rather than of the authorities' own motion (see paragraph 17 above). Lastly, there is no evidence that at the time of the public events at which the applicant made his statements the Swiss authorities perceived those events as capable of leading to public disturbances and attempted to regulate them on that basis. Nor is there any evidence that, in spite of the presence of both Armenian and Turkish communities in Switzerland, this kind of statements could risk unleashing serious tensions and giving rise to clashes (contrast *Castells v. Spain*, 23 April 1992, § 39, Series A no. 236).

154. The Court is therefore not satisfied that the interference with the applicant's right to freedom of expression pursued the "prevention of disorder".

(ii) "[T]he protection of the ... rights of others"

155. With regard to this legitimate aim, a distinction needs to be drawn between, on the one hand, the dignity of the deceased and surviving victims of the events of 1915 and the following years and, on the other, the dignity, including the identity, of present-day Armenians as their descendants.

156. As noted by the Swiss Federal Court in point 5.2 of its judgment, many of the descendants of the victims of the events of 1915 and the following years – especially those in the Armenian diaspora – construct that identity around the perception that their community has been the victim of genocide (see paragraph 26 above). In view of that, the Court accepts that the interference with the applicant's statements, in which he denied that the Armenians had suffered genocide, was intended to protect that identity, and thus the dignity of present-day Armenians. At the same time, it can hardly be said that by disputing the legal qualification of the events, the applicant cast the victims in a negative light, deprived them of their dignity, or

diminished their humanity. Nor does it appear that he directed his accusation that the idea of the Armenian genocide was an "international lie" towards those persons or their descendants; the overall tenor of his statements shows that this accusation was rather aimed at the "imperialists" of "England, France and Tsarist Russia" and "the [United States of America] and [the European Union]" (see paragraph 13 above). On the other hand, it cannot be overlooked that in his statements made in Köniz the applicant referred to the Armenians involved in the events as "instruments" of the "imperialist powers", and accused them of "carr[ying] out massacres of the Turks and Muslims" (see paragraph 16 above). In these circumstances, the Court can agree that the interference was also intended to protect the dignity of those persons and thus the dignity of their descendants.

157. The interference with the applicant's right to freedom of expression can thus be regarded as having been intended "for the protection of the ... rights of others". It remains to be seen whether a criminal "penalty" was "necessary in a democratic society" to that end.

3. Necessity of the interference in a democratic society

(a) The Chamber judgment

158. The Chamber, having examined the applicant's statements in the context in which they had been made, and having regard to the applicant's position, found that they had been of "a historical, legal and political nature" and relating to a debate of public interest, and on this basis concluded that the Swiss authorities' margin of appreciation in respect of them had been reduced. It found it problematic that the Swiss courts had relied on the notion of "general consensus" on the legal characterisation of the events of 1915 and the following years to justify the applicant's conviction. It went on to say that there was no indication that the applicant's statements had been likely to stir up hatred or violence, and drew a distinction between them and statements denying the Holocaust on the basis that they did not carry the same implications and were not likely to have the same repercussions. The Chamber also had regard to recent comparative law developments and the position of the UN Human Rights Committee. On this basis, it expressed doubts that the applicant's conviction had been required by a pressing social need. It also took into account the severity of the penalty imposed on the applicant, and came to the conclusion that his criminal conviction and sentence had not been "necessary in a democratic society" for the protection of the honour and feelings of the descendants of the victims of the events of 1915 and the following years.

(b) Submissions before the Grand Chamber

(i) The parties

(α) The applicant

159. The applicant submitted that his statements were entitled to heightened protection under Article 10 of the Convention because they had provoked debates not only about the events of 1915 and the following years but also about the propriety of criminalising diverging opinions on controversial historical events; both were issues of public interest. The imposition of a criminal penalty on account of these statements had sought to stifle that debate and prevent the public from being presented with different interpretations of historical events, and had in effect created an official historiography of the suffering of the Armenians in the Ottoman Empire. This was antithetical to open debate and freedom of inquiry, which were essential in a democratic society. He had not denied the events as such, simply their characterisation as genocide within the meaning of that term in international law, in particular in view of the lack of proof of a specific intent on the part of the Ottoman Government to destroy Armenians as a group. His contention found further support in the lack of retroactive application of the Genocide Convention and the fact that the events at issue had not been recognised as genocide by a competent court. This marked a distinction between his statements and statements denying the Holocaust, which bore on concrete historical facts, not just their categorisation. Moreover, the Holocaust had been clearly established by an international court on the basis of clear legal rules, such that the primary facts and their legal characterisation were now indistinguishable. This Court had in effect only countenanced the criminalisation of Holocaust denial on account of the anti-Semitic and antidemocratic intent of those who engaged in it. In view of the social climate in modern-day Europe, that denial was a unique phenomenon capable of rationalising a similar crime and representing a sign of racial hatred. By contrast, there was no history of persecution of the Armenians in Europe. In this connection, the applicant highlighted a number of features that in his view distinguished the Holocaust from the events of 1915 and the following years, and said that it was one thing to recognise an event as genocide and quite another to outlaw the expression of different opinions on that.

160. The applicant also submitted that historical research on the events of 1915 and the following years was ongoing and that no consensus among scholars existed in relation to them. The Swiss authorities' claim in that respect was belied by the statements of many distinguished historians and political figures. Moreover, in 2009, following mediation by the Swiss Government, the Armenian and Turkish Governments had agreed to set up a joint commission to research the historical record and formulate

recommendations; it had however not come into existence as a result of the failure of the respective parliaments to ratify the agreement. It also had to be borne in mind that the term genocide as defined in international law did not fully match the notion devised by Raphael Lemkin, whose statements on that point showed that in coining the term he had drawn inspiration from a vast array of historical events.

161. The applicant further argued that his statements had not represented an extreme opinion, and had not seriously undermined the identity of the Armenians. He had not expressed himself in a way inciting to hatred or promoting racial discrimination. There had therefore been no need to criminalise his statements under Article 4 of the CERD. His refusal to change his views even in the face of the findings of a neutral committee did not alter that; being a trained lawyer, he could not agree that such a committee could supplant the competent court envisaged in Article VI of the Genocide Convention. His statements had not been driven by racist motives, but by legal and historical considerations. Being a lawyer, he insisted on the need to adhere to legal principles in the definition of genocide and disavowed the political use of the term by interest groups. His convictions as a socialist politician had led him to accuse what he considered imperialist powers, rather than the Armenians, of spreading an "international lie". He had thus not accused the victims of falsifying history, but simply highlighted that the "Armenian question" in the Ottoman Empire remained a major part of hegemonistic discourse. His work as a historian had led him to see that there was no consensus among historians on that issue. Contrary to what had been found by the Swiss authorities, his mere mention of Talaat Pasha did not mean that he supported his every act and speech.

162. According to the applicant, in as much as they had touched upon a topic whose discussion was banned under Swiss law, his statements had concerned a domestic dispute in Switzerland. Article 261 *bis* of the Criminal Code was very controversial there, even drawing criticism from a former Minister of Justice. For their part, the debates across Europe over the legal characterisation of the events of 1915 and the following years showed that this was a matter of public concern not only in Turkey but also internationally, including in Switzerland, in particular due to the concerns of the Turkish community there in relation to that issue.

163. The applicant further submitted that he was a leading activist against racism who had been invited to speak on such issues by the *LICRA* and the European Parliament. He had also spent thirteen years in prison in Turkey as punishment for his struggle for the equality of all of its citizens, including marginalised groups such as the Alevis, the Kurds and the Christian minorities; the Court had twice found breaches of his rights under the Convention in connection with that. It was thus absurd to brand him as a racist.

164. Lastly, the applicant pointed out that in a case in which two persons who had denied the Srebrenica genocide – which had taken place much more recently and has been recognised as such by the ICJ – the Swiss authorities had decided not to press charges, finding that those persons had not acted with a racist motive. That showed that Article 261 *bis* § 4 of the Swiss Criminal Code was being applied in an uneven and politicised way.

(β) The Swiss Government

165. The Swiss Government submitted that, in as much as the Swiss Federal Court had found, in point 7 of its judgment, that the massacres and mass deportations of Armenians in 1915 and the following years had constituted crimes against humanity, whose justification also came within the ambit of Article 261 *bis* § 4 of the Swiss Criminal Code, the legal characterisation of these events was of limited relevance only. They went on to disagree with the Chamber that the applicant had only been convicted of denying the legal characterisation of these events. They pointed out in this connection that the applicant had alleged that the Armenians had been the aggressors of the Turkish people and that the use of the term genocide to describe the atrocities against them was an "international lie", and had claimed to be a follower of Talaat Pasha, a protagonist in these events. His views were therefore not confined to disputing the legal characterisation of the events. In describing the Armenians as aggressors, he had sought to justify the acts committed against them, in a manner likely to violate the dignity of the victims and their relatives. Indeed, according to the Swiss Federal Court, the applicant's statements had been a serious threat to the identity of members of the Armenian community, which identified itself in particular through its history, marked by the events of 1915 and the following years. By only looking at the applicant's prosecution for genocide denial, the Chamber had failed to take account of that context and of the firmness with which he had stated that he would never change his opinion of these events.

166. The Swiss Government took issue with the Chamber's description of the applicant's statements as being of a "historical, legal and political nature", and its consequent ruling that the domestic authorities' margin of appreciation had been reduced. In their view, freedom of historical debate only covered statements which were concerned with seeking historical truth and whose authors sought to debate openly and dispassionately rather than spark off a gratuitous controversy. The applicant had repeated several times that he would never change his opinion, and had never sought a real debate. The tenor of his statements showed that he had not followed the basic rules of the historical method. In these circumstances, the authorities were to be accorded a broad margin of appreciation.

167. The applicant's statements could not be afforded the degree of protection normally given to political speech because they did not relate to

Swiss domestic policy or a debate within Swiss society. He had not attempted to challenge Article 261 *bis* of the Swiss Criminal Code or discuss another aspect of Swiss political life, but spoken on an issue relating to the policies of his country of origin. He could not be placed on an equal footing with a person expressing him- or herself in a domestic political debate, because this would fail to take sufficient account of the purpose of the right to freedom of expression. This point also flowed from Article 16 of the Convention, under which the High Contracting Parties could impose restrictions on the political activity of aliens. By holding that the applicant's statements qualified as political speech, the Chamber had prevented Switzerland from reacting to a political dispute over which it had no influence, even though the Swiss authorities could have a legitimate interest in ensuring application of the principle that the exercise of the right to freedom of expression carried with it duties and responsibilities.

168. The Swiss Federal Court had found that it had not been arbitrary for the cantonal authorities to establish the existence of a general consensus on the legal characterisation of the atrocities committed by the Ottoman Empire against the Armenian people. In rejecting the applicant's arguments, that court had stated that consensus did not mean unanimity. The Swiss courts had not simply accepted political declarations on this point, but considered whether the authorities' views that had given rise to these declarations had been based on the advice of qualified experts or cogent and substantiated reports, and had reviewed the literature on international criminal law and genocide. In upholding the lower courts' rulings on this point as not arbitrary, the Swiss Federal Court had chosen not to adjudicate on questions of history. In as much as the Chamber had found that the Swiss courts had erred by accepting the existence of such a general consensus, it had to be noted, firstly, that according to the Chamber the applicant had taken issue with the legal characterisation of the events but not with their actual taking place, and, secondly, that the events would come under Article 261 *bis* § 4 even if they were to be characterised as crimes against humanity rather than genocide. A High Contracting Party had to be able criminalise their denial even if this was only the subject of a general consensus, irrespective of the number of States taking such an approach.

169. It had to be borne in mind that Article 261 *bis* § 4 of the Swiss Criminal Code did not prohibit the mere denial, trivialisation or justification of a genocide or crimes against humanity; it in addition required that these acts be carried out on the grounds of race, ethnic origin or religion in a manner that violated human dignity. In the applicant's case, the Swiss courts had had ample reason to find that his statements had been motivated by racism. He had sought to vindicate the acts committed against the Armenians and to accuse them of such acts and their descendants of falsifying history. The Swiss courts could not therefore be faulted for finding that the applicant's statements had not been intended to contribute to

a historical debate. In finding that the applicant had not expressed contempt for the victims of the events of 1915 and the following years, the Chamber had departed from the findings of fact of the domestic courts, acting as a court of fourth instance, and had assessed the statements in isolation, without putting them in their proper context. The applicant's obduracy showed that his ideas were not the fruit of historical research; they threatened the values underpinning the fight against racism and intolerance, infringed the rights of the victims' relatives, and were incompatible with the values of the Convention. These considerations were relevant not only in the context of Article 17, but also in that of Article 10 § 2, and called for a wide margin of appreciation to be afforded to the national courts and authorities.

170. Combatting racism was an important aspect of the protection of human rights. This was shown by the work of the ECRI, whose latest report on Switzerland had recommended that administrative and civil law be strengthened to combat racial discrimination, and by the Committee of Ministers' Recommendation 97(20) on hate speech, which condemned all forms of expression inciting to racial hatred, xenophobia, anti-Semitism and intolerance. The Swiss Government also made reference to the recent comparative law developments in this regard, and said that European trends, exemplified by ECRI's Policy Recommendation no. 7 and EU Framework Decision 2008/913/JHA, also pointed in this direction. The lack of complete consensus on this issue meant that the High Contracting Parties were to be granted a wide margin of appreciation. The Chamber's ruling to the contrary was unconvincing. Moreover, while there had been many attempts to have Article 261 *bis* § 4 of the Swiss Criminal Code repealed, none of these had been successful, which meant that this provision had acquired strong and continuing democratic legitimacy in Switzerland.

171. While not wishing to dispute the unique nature of the Holocaust, the Swiss Government considered that the High Contracting Parties had to be granted leeway in their efforts to counter the denial of other genocides or crimes against humanity. In either case, accusing victims of falsifying history was one of the most serious forms of racial discrimination.

172. Lastly, the Swiss Government submitted that the penalty imposed on the applicant had not been overly harsh, since it had not prevented him from expressing his views in public, and since he had not contributed to the discussion of issues affecting the life of the community.

(ii) The third parties

(α) The Turkish Government

173. The Turkish Government submitted that the applicant's statements qualified as political speech, and that this concept, which encompassed speech relating to any matter of public concern, was not confined to statements touching exclusively upon domestic issues or to mainstream

speech. These statements had been intended to influence debate in Switzerland in relation to the recognition of the events of 1915 and the following years as genocide and the criminalisation of its denial, and had been calculated to have an impact on Swiss domestic policy. The fact that this issue was also a Swiss domestic controversy was shown by the fact that two Swiss associations – the Switzerland-Armenia Association and the Federation of Turkish Associations of French-speaking Switzerland – had intervened as third parties in this case. The Swiss authorities had therefore only had a limited margin of appreciation to decide whether to act against the applicant; that margin had been further circumscribed by the fact that the applicant had criticised the Swiss legislature.

174. The applicant's aim had not been racially to discriminate against Armenians but to criticise and challenge the Swiss National Council's decision to recognise the events of 1915 and the following years as genocide. This was clear from the content of his statements, the declarations that he had made in the course of the criminal proceedings against him, and the reasons given by the Swiss courts. He had not sought to spark off a gratuitous controversy but to contribute to an ongoing debate. This was shown by the opposing views of the historians called by the applicant and those called by the Switzerland-Armenia Association in the domestic proceedings. The applicant had not questioned the existence of massacres and deportations but merely opposed their characterisation as genocide. His case was thus different from those concerning denial of the Holocaust, in which the deniers disputed the reality of the historical facts. The applicant was not alone in his position, which had at the time been shared by the British Government.

175. It was true that the applicant had been provocative with respect to a subject that was a source of deep grief for the Armenian people. However, he had not done this to denigrate the victims of the events of 1915 and the following years or the Armenians in Switzerland, but to trigger a public debate. Freedom of expression encompassed a degree of provocation. It applied to ideas that shocked and offended and to the form in which they were conveyed, even when it included a virulent style. The fact that the applicant had expressed support for the ideas of Talaat Pasha, had said that he would never change his position, and had put the United States and the European Union on a par with Hitler was not relevant, as he had been convicted for racially discriminating by denying "a genocide", not by making other utterances. The applicant's statements could not be equated with statements inciting violence, hostility or racial hatred towards the Armenians. Rejecting the legal characterisation of the events of 1915 and the following years was not an implicit attack on the dignity of the group or a continuation of the discriminatory treatment inflicted upon it at that time. The Swiss Government had not duly showed that this rejection had promoted racial discrimination of the Armenian community in Switzerland,

and there was no basis automatically to infer from it racist and nationalistic motives or an intention to discriminate. The main difference in this respect with statements relating to the Holocaust, whose denial today was one of the main vehicles of anti-Semitism, was the lack of connection between past and present hate.

176. In terms of context, in no other Member State of the Council of Europe had there been a criminal conviction for denying the characterisation of the events of 1915 and the following years as genocide. This suggested that democratic societies saw no need to do so. The example of France in particular showed that there was a difference between official recognition of certain events as genocide and criminalisation of the denial that this was the case. The German Government had also taken the position that such criminalisation was not appropriate. The position of the competent UN bodies was to the same effect. It had to be also borne in mind that statements similar to these of the applicant could lawfully be made in other countries and were widely available on the Internet and in historical and legal treatises that could lawfully be imported in Switzerland. Unlike the position in relation to the Holocaust in cases against Germany and Austria, it could not be said that the events of 1915 and the following years were part of Swiss historical experience. The mere presence of a community of about 5,000 Armenians on Swiss soil was not in itself sufficient in this respect, especially bearing in mind that these events had taken place almost one hundred years ago. It was also significant that the Swiss authorities had not tried to prevent the applicant from uttering his statements; it was difficult to see how there could exist a pressing social need to penalise them but not prevent them from being made. It had been disproportionate, and not required under Switzerland's international law obligations, to impose criminal penalties in relation to these statements.

(β) The Armenian Government

177. The Armenian Government submitted that Article 261 *bis* of the Swiss Criminal Code, which was based on Article 20 of the ICCPR and Article 4 of the CERD, was compatible with the Convention because it only outlawed statements made with the intention to arouse racial ill-feeling or likely to have socially dangerous consequences. Under the Court's case-law, laws against hate speech had to take account of whether the impugned statements were of a real public interest, which was not the case for the applicant. He was an incorrigible genocide denier who had not given any reasoning or scholarly validation in support of his crude and gratuitously offensive statements. The Chamber's conclusion that these statements – which had been no more than a racially motivated insult to Armenians and an invitation to Turks to believe them to be liars – had been of a historical, legal and political nature had been jejune in the extreme. The Swiss courts had therefore had the usual margin of appreciation to decide whether the

statements could harm social harmony by infringing the dignity of the Armenians. The statements had not been part of a proper historical debate, and the Chamber's apparent suggestion that there could be no objective truth in historical research was nonsense, for the atrocities against the Armenians had been all too real. Distinguishing the Armenian genocide from the Holocaust on the basis that allegations made by Holocaust deniers sometimes concerned very precise facts, that the qualification of the Nazi crimes had had a well-defined legal basis, and that the Holocaust had been established by an international court, was invidious and attempted to set up the Holocaust as the only modern genocide capable of clear proof. Contrary to what had been suggested by the Chamber, genocidal intent was not difficult to prove when it was an obvious inference from the evidence or had been admitted by the perpetrators. The massacres and mass deportations of Armenians in 1915 and the following years had clearly amounted to genocide. By describing them as a mere "tragedy", the Chamber had insulted all Armenians. Just like Holocaust denial was the main driver of anti-Semitism, denial of the Armenian genocide was the main driver of anti-Armenianism; this was how genocide denial worked. The Chamber's reliance on the position in Spain and France and the views of the UN Human Rights Committee had been erroneous, because these presented serious differences with Article 261 *bis* of the Swiss Criminal Code.

178. The real vice of the Chamber judgment was that it had been seen by genocide deniers as authority for the proposition that there was doubt about the reality of the Armenian genocide. For a human rights court to send such a message was deeply hurtful and unfair. It had been based on mistaken or misleading evidence produced by the applicant on this point, on which there could be no doubt. There was a broad scholarly consensus about this, and those who denied it were mostly historians with no legal qualifications and a poor understanding of the way in which genocidal intent could be proved under international law; many of them were also in the pay of the Turkish Government. In this connection, the Armenian Government referred to a number of enquiries, analyses, reports, acts of official recognition and other evidence.

(γ) The French Government

179. The French Government submitted that States had to be able to resort to criminal penalties to respond to racism and denialism in a sufficiently dissuasive way. When the right to freedom of expression was being exercised in a manner that threatened the basic tenets of a democratic society, the legislature had to be able to react by ordaining criminal law sanctions. This was confirmed by the positions taken by the ECRI and by Article 1 § 1 (c) of EU Framework Decision 2008/913/JHA. Genocide denial was a programme of falsification that tended to promote intolerance. In view of that threat that it carried, laws that made it a criminal offence

were in line with Article 10 of the Convention. These laws did not seek to stifle historical debate or research but to combat denialist statements that led to damaging consequences. Their application in appropriate cases was within the national courts' margin of appreciation. The purpose of that margin of appreciation was to enable the High Contracting Parties to combat such conduct even in the absence of a general consensus on this issue.

(δ) Switzerland-Armenia Association

180. The Switzerland-Armenia Association submitted that the case concerned not only the applicant's right to freedom of expression but also the honour, reputation and memory of the victims of the atrocities perpetrated by the Ottoman Empire in 1915 and the following years and their descendants, which were entitled to protection under Article 8 of the Convention. The Court had recently recognised that ethnic identity engaged that Article. The case thus entailed a conflict between two Convention rights that deserved equal protection. The High Contracting Parties enjoyed a broad margin of appreciation in balancing these rights. The Swiss courts' judgments in the applicant's case were therefore entitled to considerable deference, especially as regards their findings in relation to the "general consensus" on the legal qualification of the events of 1915 and the following years. It was not the Court's task to make pronouncements on this issue.

181. The applicant had made his statements deliberately, having specifically come to Switzerland for that purpose. These statements had not been limited to the legal characterisation of the events of 1915 and the following years; they had in effect denied their reality. The applicant's resultant criminal conviction was therefore not incompatible with the Convention. The Chamber's attempt to distinguish this conviction from those relating to Holocaust denial was very disturbing because it implied an inequality of treatment between genocide victims. In any event, the applicant had also sought to justify the massacres, which had undoubtedly constituted crimes against humanity. There was no reason to pay more heed to the Spanish and French constitutional courts rather than to the Swiss Federal Court. Lastly, the penalty imposed on the applicant had been highly symbolic, given the seriousness of his acts.

(ε) Federation of the Turkish Associations of French-speaking Switzerland

182. The Federation of the Turkish Associations of French-speaking Switzerland submitted that only a minority of democratic States had chosen to criminalise genocide denial, especially before the adoption of EU Framework Decision 2008/913/JHA. They referred to the position in the United States of America, and noted that Germany and France had only outlawed denial of the Holocaust. No other historical event had thus far

been included in the category of "clearly established historical facts" whose denial did not under the Court's case-law merit the protection of Article 10 of the Convention. Such an extension, entailing an official interpretation of the past backed up by criminal penalties, was impossible to reconcile with freedom of expression, especially in the light of the reasons given by the French and Spanish constitutional courts on that point. Expression on such issues could only be criminalised if clearly prompted by racist or antidemocratic motives or giving rise to an imminent threat to public order. The High Contracting Parties' wider margin of appreciation in this respect only extended to events that had taken part on their territory.

183. The Federation drew attention to the provisions of the EU Framework Decision 2008/913/JHA, especially to its limiting clauses and its emphasis on the need to punish denial only if it was likely to incite to violence or hatred. It concluded that, properly construed, European Union law did not require the criminalisation of denial that the events of 1915 and the following years had amounted to genocide that was not accompanied by denial or condoning of the primary facts. It also drew attention to the recent report on the Framework Decision's implementation, saying that it showed the continuing lack of consensus on the need for criminal law measures in this domain. The third party submitted that the applicable international law contained no such requirement either. Lastly, it said that freedom of expression on this point was important to the 130,000 Turks living in Switzerland, who wished to be able to discuss controversial issues in a spirit of openness.

(ζ) CCAF

184. The *CCAF* said that it acted on behalf of the 600,000-strong Armenian community in France, the third-largest in the Armenian diaspora. They were all aware that they belonged to a people which had suffered extermination, and time had not erased their memories. The *CCAF* illustrated that point by describing in detail the various public and private ways in which Armenians in France commemorated the victims. It went on to say that under international law, genocide was recognised as an attack on human dignity, which the French courts saw as a component of *ordre public*. Its denial likewise infringed that dignity; it affected not only history but memory, which was an integral aspect of the right to dignity. Outlawing denial was the only way to protect that right. Moreover, denial affected public order, at least in countries which, like France, were home to sizeable Armenian communities. This was demonstrated by the number of acts of vandalism and desecration, as well as insults and threats that Armenians became victim to, especially in localities where they cohabited with persons of Turkish origin, and on the Internet. Public rallies organised by genocide deniers from both within and outside France, which could easily degenerate into clashes, were a particular source of anxiety in that respect.

185. The *CCAF* also claimed that, should the Grand Chamber uphold the Chamber judgment, its ruling would make it potentially impossible to outlaw denial of the Armenian genocide or other genocides and harden Turkey's attitude with respect to that issue. By contrast, if the Grand Chamber overturned the Chamber judgment, its ruling would enable the High Contracting Parties to combat denialism by criminal law measures and deter would-be genocide deniers, offer Armenians in the diaspora a form of moral reparation, and perhaps even encourage Turkey to abandon its policy of denial.

(η) Turkish Human Rights Association, Truth Justice Memory Centre and the International Institute for Genocide and Human Rights Studies

186. The Turkish Human Rights Association, the Truth Justice Memory Centre and the International Institute for Genocide and Human Rights Studies, which made joint submissions, argued that the conduct in respect of which the applicant had been convicted had been incitement to discrimination, not mere genocide denial. They also disputed the Chamber's finding that the applicant had only denied the legal characterisation of the events of 1915 and the following years, pointing out that the Lausanne District Police Court had found that he had attempted to justify the massacres and described the Armenians as "aggressors" and "traitors", and that the Chamber had itself noted that he claimed to be a follower of Talaat Pasha. They also said that the applicant had deliberately chosen the places where he had made his statements. However, the factor that was most telling of the applicant's racist motives was his leadership of the Talaat Pasha Committee, condemned by the European Parliament as "xenophobic and racist". All of this had to be seen chiefly in the context of Turkey, not Switzerland, and its effect on the Armenian minority there. The applicant had been convicted in Turkey, in the so-called Ergenekon proceedings, *inter alia* in connection with his activities in the Talaat Pasha Committee, which the Istanbul Court of Assize had found established for the purpose of "refuting the Armenian genocide allegations" and part of a "nationalist" and "chauvinist" organisation that stirred up hatred and enmity among peoples. Indeed, the portrayal of the notion that the events of 1915 and the following years had constituted genocide as a "lie" could be linked to the assassination in January 2007 of the Turkish-Armenian journalist Hrant Dink at the instigation of Turkish ultranationalist groups.

187. In this connection, the third party referred to – but did not submit a copy of – an open letter that the applicant had addressed in the wake of that assassination to the Armenian Patriarch in Istanbul, and anonymous letters addressed to Armenian schools in Turkey in May 2007. Instead, references were given to the web-versions of two articles in Turkish newspapers (see paragraph 28 above). The third party also referred to the judgment of the

Istanbul Court of Assize in the so-called Ergenekon proceedings and other documents in the case file of those proceedings.

188. Lastly, the third party argued that in Turkey, xenophobic and racist propaganda about the events of 1915 and the following years was the only and constant narrative. The applicant's statements on the characterisation of these events could thus be directly linked to the climate of hostility against Armenians in Turkey, which had been documented by, *inter alia*, the ECRI.

(θ) FIDH

189. The *FIDH* submitted that the case highlighted the conflict between the need to ensure freedom of expression and debate, particularly on historical issues, and the importance of combatting hate speech, especially when it took the form of denialism. Both of those were equally important under the Convention. The Court's recent case-law in this domain was somewhat inconsistent, and in need of clarification by the Grand Chamber, which had to lay down clear principles and strike a proper balance between these competing values. In doing so, the Grand Chamber had to make clear three points. First, neither of these values automatically trumped the other. Secondly, freedom of expression was the principle and its restriction the exception. Thirdly, in this domain there was little scope for affording the High Contracting Parties a margin of appreciation.

190. The *FIDH* criticised the Chamber for unhesitantly accepting that statements denying that the events of 1915 and the following years had amounted to genocide could not, as such, encourage hatred or violence towards the Armenians. In its view, the point was much more nuanced, and could only be decided on the basis of a careful examination of the context in which the statements had been made. In Turkey, such denial could, in view of the prevailing atmosphere, lead to hatred and violence; this was borne out by several cases before this Court. While the context that mattered most was that of the country in which the statements had been made, in view of the new means of communication and their capacity to give such statements a global impact the Court could not avoid taking into account a much wider context.

191. The *FIDH* took issue with the Chamber's drawing a distinction between statements relating to the legal characterisation of the events of 1915 and the following years and statements denying the Holocaust on the basis that the latter, unlike the former, had been clearly established by an international court. This approach did not in its view provide a proper yardstick because it was somewhat specious to detach the historical reality of events from their legal characterisation. Moreover, it entailed the risk of creating a "hierarchy of genocides" as the judicial recognition of a genocide depended on many historical factors. On the other hand, judicial recognition could not preclude further discussion about a genocide. A much better way to deal with this issue – and one that would avoid treating the Holocaust as a

special case and yield much more predictable outcomes – was to focus on whether the statements at issue had been intended to incite to hatred or discrimination and find that their penalisation could be justified not because they amounted to the simple denial of a historical fact but because they were driven by such an intent, which was often at the heart of the denialist cause. This was demonstrated by the case-law relating to Holocaust denial, where such intent was almost irrebuttably presumed, and was the real basis for refusing such statements protection under the Convention. It was highly likely that such intent likewise underlay denials of the Armenian genocide, which were often prompted by a desire to rehabilitate the Ottoman regime of that period or justify the acts that took place. But that had to be determined by the Court case by case.

(ι) LICRA

192. The *LICRA* submitted that outlawing genocide denial was not only compatible with freedom of expression but indeed required under the European system of human rights protection. It referred in this connection to, in particular, Article 6 § 1 of the Additional Protocol to the Convention on Cybercrime.

(κ) Centre for International Protection

193. The Centre for International Protection submitted that statements relating to national identity called for a wider margin of appreciation to be left to the national authorities. It had to be borne in mind in this connection that the Armenian diaspora had come into existence largely as a result of the events of 1915 and the following years. The appropriate test was whether the statements contributed to public debate or were, on the contrary, gratuitously offensive, which could only be determined on the basis of a broad examination of the statements and their context. A statement could only be considered legal or historical if it really contributed to the underlying debate, and could not hide under the cloak of political expression if it in fact amounted to hate speech. A contextual assessment was likewise necessary to assess whether a statement had destructive aims and called for the application of Article 17 of the Convention. The use of the word "lie" was of special importance in this connection, because it impugned the integrity of the victims and their descendants, and attempted to redefine the events that they had experienced as something much less serious and turn them from victims into perpetrators ultimately responsible for their fate.

194. The existence of a pressing social need for the interference had to be gauged by reference to the conditions obtaining in the State concerned, for instance the diversity of its population and the values and principles underpinning its society. The mere fact that other States had made different choices in this domain was not determinative. Such pressing social need could also flow from that State's international law obligations: in this case,

those under Article 4 of the CERD and Article 20 § 2 of the ICCPR, as interpreted by the competent UN bodies. Lastly, States had to be allowed a margin of appreciation in classifying certain events as genocides for the purposes of outlawing their denial and imposing proportionate penalties on such denial.

(λ) Group of French and Belgian academics

195. The group of French and Belgian academics submitted that hate speech was not confined to statements that openly called to violence; genocide denial or justification also fell in that category. The factors to be taken into account in this respect included the nature of the statement, seen in its proper context, which was not confined to its literal meaning or the purported profession of its author. What ultimately mattered was the meaning that could be ascribed to the statement, taken as a whole, by a reasonable member of the public. This flowed from the case-law of the German courts in such cases and the criteria laid down by the UN Committee on the Elimination of Racial Discrimination. A statement could only benefit from the protection bestowed upon historical research if its author had acted in line with the methods of that research. As for virulent political statements, under the Court's case-law they appeared to be afforded a heightened degree of protection only if they concerned domestic controversies. In any event, hate speech could never benefit from the protection granted to political speech. This was confirmed by the criminalisation of hate speech in international and European law, which saw it as necessary in the fight for peace and justice and against discrimination, racism and xenophobia. The applicable international instruments did not differentiate in this respect between genocide, crimes against humanity and war crimes, and left the States free to determine how these should be established. In particular, those instruments did not necessarily tie the possibility to outlaw the denial of such crimes to their being officially recognised by an international court, which was consonant with the principle of complementarity underlying the work of the ICC, under which it was as a matter of principle for the national courts to punish international crimes.

(c) The Court's assessment

(i) General principles

(α) On the application of the requirement in Article 10 § 2 of the Convention that an interference be "necessary in a democratic society"

196. The general principles for assessing whether an interference with the exercise of the right to freedom of expression is "necessary in a democratic society" within the meaning of Article 10 § 2 of the Convention are well-settled in the Court's case-law. As noted by the Chamber, they

were recently restated in *Mouvement raëlien suisse v. Switzerland* ([GC], no. 16354/06, § 48, ECHR 2012) and *Animal Defenders International v. the United Kingdom* ([GC], no. 48876/08, § 100, ECHR 2013), and can be summarised in this way:

(i) Freedom of expression is one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to Article 10 § 2, it applies not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society". As set forth in Article 10, this freedom is subject to exceptions, but these must be construed strictly, and the need for any restrictions must be established convincingly.

(ii) The adjective "necessary" in Article 10 § 2 implies the existence of a pressing social need. The High Contracting Parties have a margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the law and the decisions that apply it, even those given by independent courts. The Court is therefore empowered to give the final ruling on whether a "restriction" can be reconciled with freedom of expression.

(iii) The Court's task is not to take the place of the competent national authorities but to review the decisions that they made under Article 10. This does not mean that the Court's supervision is limited to ascertaining whether these authorities exercised their discretion reasonably, carefully and in good faith. The Court must rather examine the interference in the light of the case as a whole and determine whether it was proportionate to the legitimate aim pursued and whether the reasons adduced by the national authorities to justify it were relevant and sufficient. In doing so, the Court has to satisfy itself that these authorities applied standards which were in conformity with the principles embodied in Article 10 and relied on an acceptable assessment of the relevant facts.

197. Another principle that has been consistently emphasised in the Court's case-law is that there is little scope under Article 10 § 2 of the Convention for restrictions on political expression or on debate on questions of public interest (see, among many other authorities, *Wingrove v. the United Kingdom*, 25 November 1996, § 58, *Reports* 1996-V; *Ceylan v. Turkey* [GC], no. 23556/94, § 34, ECHR 1999-IV; and *Animal Defenders International*, cited above, § 102).

(β) On the balancing of Article 10 and Article 8 of the Convention

198. The general principles applicable to cases in which the right to freedom of expression under Article 10 of the Convention has to be balanced against the right to respect for private life under Article 8 of the

Convention were set out by the Court's Grand Chamber in *Von Hannover v. Germany (no. 2)* ([GC], nos. 40660/08 and 60641/08, §§ 104-07, ECHR 2012) and *Axel Springer AG v. Germany* ([GC], no. 39954/08, §§ 85-88, 7 February 2012). They can be summarised as follows:

(i) In such cases, the outcome should not vary depending on whether the application was brought under Article 8 by the person who was the subject of the statement or under Article 10 by the person who has made it, because in principle the rights under these Articles deserve equal respect.

(ii) The choice of the means to secure compliance with Article 8 in the sphere of the relations of individuals between themselves is in principle a matter that falls within the High Contracting Party's margin of appreciation, whether the obligations on it are positive or negative. There are different ways of ensuring respect for private life and the nature of the obligation will depend on the particular aspect of private life that is at issue.

(iii) Likewise, under Article 10 of the Convention, the High Contracting Parties have a margin of appreciation in assessing whether and to what extent an interference with the right to freedom of expression is necessary.

(iv) The margin of appreciation, however, goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by independent courts. In exercising its supervisory function, the Court's does not have to take the place of the national courts but to review, in the light of the case as a whole, whether their decisions were compatible with the provisions of the Convention relied on.

(v) If the balancing exercise has been carried out by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for theirs.

199. More recently, in *Aksu v. Turkey* ([GC], nos. 4149/04 and 41029/04, § 67, ECHR 2012), the Court's Grand Chamber elaborated further on this latter requirement, holding that if the balance struck by the national authorities was unsatisfactory, in particular because the importance or scope of one of the rights at stake was not duly considered, the margin of appreciation would be a narrow one.

(ii) Relevant case-law of the Court

(α) Group identity and the reputation of ancestors

200. In *Aksu* (cited above, §§ 58-61 and 81), the Court held, *inter alia*, that the negative stereotyping of an ethnic group was capable, when reaching a certain level, of having an impact on the group's sense of identity and on its members' feelings of self-worth and self-confidence. It could thus affect their "private life" within the meaning of Article 8 § 1 of the Convention. On this basis, the Court found that proceedings in which a person of Roma origin who had felt offended by passages in a book and

dictionary entries about Roma in Turkey had sought redress had engaged that Article.

201. In *Putistin v. Ukraine* (no. 16882/03, §§ 33 and 36-41, 21 November 2013), the Court accepted that the reputation of an ancestor could in some circumstances affect a person's "private life" and identity, and thus come within the scope of Article 8 § 1 of the Convention. On that basis, it found that a newspaper article about a famous football match in Kiev during the Second World War that could be regarded as suggesting that Mr Putistin's late father, a well-known footballer who had taken part in that match, had collaborated with the Gestapo had, albeit in an indirect manner and marginally, affected Mr Putistin's rights under Article 8 § 1.

202. In *Jelševar and Others v. Slovenia* ((dec.), no. 47318/07, § 37, 11 March 2014), the Court likewise accepted that an attack on the reputation of an ancestor coming in the form of a work of literary fiction could affect a person's rights under Article 8 § 1 of the Convention.

203. In *Dzhugashvili v. Russia* ((dec.), no. 41123/10, §§ 26-35, 9 December 2014), the Court proceeded from the premise that two newspaper articles dealing with the historical role of the applicant's grandfather, Joseph Stalin, had affected his own rights under Article 8 § 1 of the Convention.

(β) Calls to violence and "hate speech"

204. The Court has been called upon to consider the application of Article 10 of the Convention in a number of cases concerning statements, verbal or non-verbal, alleged to stir up or justify violence, hatred or intolerance. In assessing whether the interferences with the exercise of the right to freedom of expression of the authors, or sometimes publishers, of such statements were "necessary in a democratic society" in the light of the general principles formulated in its case-law (see paragraphs 196 and 197 above), the Court has had regard to several factors.

205. One of them has been whether the statements were made against a tense political or social background; the presence of such a background has generally led the Court to accept that some form of interference with such statements was justified. Examples include the tense climate surrounding the armed clashes between the PKK (Workers' Party of Kurdistan, an illegal armed organisation) and the Turkish security forces in south-east Turkey in the 1980s and 1990s (see *Zana v. Turkey*, 25 November 1997, §§ 57-60, *Reports* 1997-VII; *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, §§ 52 and 62, ECHR 1999-IV; and *Sürek v. Turkey (no. 3)* [GC], no. 24735/94, § 40, 8 July 1999), the atmosphere engendered by deadly prison riots in Turkey in December 2000 (see *Falakaoğlu and Saygılı v. Turkey*, nos. 22147/02 and 24972/03, § 33, 23 January 2007, and *Saygılı and Falakaoğlu v. Turkey (no. 2)*, no. 38991/02, § 28, 17 February 2009), problems relating to the integration of non-European and especially Muslim

immigrants in France (see *Soulas and Others*, cited above, §§ 38-39, and *Le Pen v. France* (dec.), no. 18788/09, 20 April 2010), and the relations with national minorities in Lithuania shortly after the re-establishment of its independence in 1990 (see *Balsytė-Lideikienė v. Lithuania*, no. 72596/01, § 78, 4 November 2008).

206. Another factor has been whether the statements, fairly construed and seen in their immediate or wider context, could be seen as a direct or indirect call for violence or as a justification of violence, hatred or intolerance (see, among other authorities, *Incal v. Turkey*, 9 June 1998, § 50, *Reports* 1998-IV; *Sürek (no. 1)*, cited above, § 62; Özgür Gündem *v. Turkey*, no. 23144/93, § 64, ECHR 2000-III; *Gündüz v. Turkey*, no. 35071/97, §§ 48 and 51, ECHR 2003-XI; *Soulas and Others*, cited above, §§ 39-41 and 43; *Balsytė-Lideikienė*, cited above, §§ 79-80; *Féret*, cited above, §§ 69-73 and 78; *Hizb ut-Tahrir and Others*, cited above, § 73; *Kasymakhunov and Saybatalov*, cited above, §§ 107-12; *Fáber v. Hungary*, no. 40721/08, §§ 52 and 56-58, 24 July 2012; and *Vona*, cited above, §§ 64-67). In assessing that point, the Court has been particularly sensitive towards sweeping statements attacking or casting in a negative light entire ethnic, religious or other groups (see *Seurot v. France* (dec.), no. 57383/00, 18 May 2004, *Soulas and Others*, cited above, §§ 40 and 43; and *Le Pen*, cited above, all of which concerned generalised negative statements about non-European and in particular Muslim immigrants in France; *Norwood v. the United Kingdom* (dec.), no. 23131/03, ECHR 2004-XI, which concerned statements linking all Muslims in the United Kingdom with the terrorist acts in the United States of America on 11 September 2001; *W.P. and Others v. Poland* (dec.), no. 42264/98, 2 September 2004, and *Pavel Ivanov v. Russia* (dec.), no. 35222/04, 20 February 2007, both of which concerned vehement anti-Semitic statements; *Féret*, cited above, § 71, which concerned statements portraying non-European immigrant communities in Belgium as criminally-minded; *Hizb ut-Tahrir and Others*, § 73, and *Kasymakhunov and Saybatalov*, § 107, both cited above, which concerned direct calls for violence against Jews, the State of Israel, and the West in general; and *Vejdeland and Others v. Sweden*, no. 1813/07, § 54, 9 February 2012, which concerned allegations that homosexuals were attempting to play down paedophilia and were responsible for the spread of HIV and AIDS).

207. The Court has also paid attention to the manner in which the statements were made, and their capacity – direct or indirect – to lead to harmful consequences. Examples include *Karataş v. Turkey* ([GC], no. 23168/94, §§ 51-52, ECHR 1999-IV), where the fact that the statements had been made through poetry rather than in the mass media led to the conclusion that the interference could not be justified by the special security context otherwise existing in the case; *Féret* (cited above, § 76), where the statements had been made on electoral leaflets, which had enhanced the

effect of the discriminatory and hateful message that they were conveying; *Gündüz* (cited above, §§ 43-44), where the statements had been made in the course of a deliberately pluralistic televised debate, which had reduced their negative effect; *Fáber* (cited above, §§ 44-45), where the statement had consisted in the mere peaceful holding of a flag next to a rally, which had had a very limited, in any, effect on the course of that rally; *Vona* (cited above, §§ 64-69), where the statement had consisted in military-style marches in villages with large Roma populations, which, given the historical context in Hungary, had carried sinister connotations; and *Vejdeland and Others* (cited above, § 56), where the statements had been made on leaflets left in the lockers of secondary school students.

208. In all of the above cases, it was the interplay between the various factors rather than any one of them taken in isolation that determined the outcome of the case. The Court's approach to that type of case can thus be described as highly context-specific.

(γ) Denial of the Holocaust and other statements relating to Nazi Crimes

209. The former Commission has dealt with a number of cases under Article 10 of the Convention concerning denial of the Holocaust and other statements relating to Nazi crimes. It declared the applications in all of them inadmissible (see *X. v. the Federal Republic of Germany*, no. 9235/81, Commission decision of 16 July 1982, Decisions and Reports (DR) 29, p. 194; *T. v. Belgium*, no. 9777/82, Commission decision of 14 July 1983, DR 34, p. 158; *H., W., P. and K. v. Austria*, no. 12774/87, Commission decision of 12 October 1989, DR 62, p. 216; *Ochensberger v. Austria*, no. 21318/93, Commission decision of 2 September 1994, unreported; *Walendy v. Germany*, no. 21128/92, Commission decision of 11 January 1995, DR 80-A, p. 94; *Remer v. Germany*, no. 25096/94, Commission decision of 6 September 1995, DR 82-A, p. 117; *Honsik v. Austria*, no. 25062/94, Commission decision of 18 October 1995, DR 83-A, p. 77; *Nationaldemokratische Partei Deutschlands Bezirksverband München-Oberbayern v. Germany*, no. 25992/94, Commission decision of 29 November 1995, DR 84-A, p. 149; *Rebhandl v. Austria*, no. 24398/94, Commission decision of 16 January 1996, unreported; *Marais v. France*, no. 31159/96, Commission decision of 24 June 1996, DR 86-B, p. 184; *D.I. v. Germany*, no. 26551/95, Commission decision of 26 June 1996, unreported; and *Nachtmann v. Austria*, no. 36773/97, Commission decision of 9 September 1998, unreported). In those cases the Commission was faced with statements, almost invariably emanating from persons professing Nazi-like views or linked with Nazi-inspired movements, that cast doubt on the reality of the persecution and extermination of millions of Jews under the Nazi regime; claimed that the Holocaust was an "unacceptable lie" and a "Zionistic swindle", contrived as a means of political extortion; denied the existence of the concentration camps or justified it; or claimed either that

the gas chambers in those camps had never existed or that the number of persons killed in them was being highly exaggerated and technically impossible. The Commission, frequently referring to the historical experience of the States concerned, described such statements as attacks on the Jewish community and intrinsically linked to Nazi ideology, which was antidemocratic and inimical to human rights. It regarded them as inciting to racial hatred, anti-Semitism and xenophobia, and was on that basis satisfied that the criminal convictions in respect of them had been "necessary in a democratic society". In some of those cases the Commission relied on Article 17 as an aid in the interpretation of Article 10 § 2 of the Convention, and used it to reinforce its conclusion on the necessity of the interference.

210. After 1 November 1998 the Court also dealt with several such cases and likewise declared the applications in all of them inadmissible (see *Witzsch v. Germany (no. 1)* (dec.), no. 41448/98, 20 April 1999; *Schimanek v. Austria* (dec.), no. 32307/96, 1 February 2000; *Garaudy v. France* (dec.), no. 65831/01, ECHR 2003-IX; *Witzsch v. Germany (no. 2)* (dec.), no. 7485/03, 13 December 2005; and *Gollnisch v. France* (dec.), no. 48135/08, 7 June 2011). Those cases equally concerned statements that variously denied the existence of the gas chambers; described them as a "sham" and the Holocaust as a "myth"; called their depiction the "Shoah business", "mystifications for political ends" or "propaganda"; or called into question the number of dead and in ambiguous terms expressed the view that the gas chambers were a matter for the historians. In one of them the statement had been limited to the assertion that it was false that Hitler and the NSDAP had planned, initiated and organised the mass killing of Jews (see *Witzsch (no. 2)*, cited above).

211. In three cases the Court, applying reasoning similar to that of the former Commission, found that the interferences with the applicants' right to freedom of expression had been "necessary in a democratic society" (see *Schimanek*; *Witzsch (no. 1)*; and *Gollnisch*, all cited above).

212. However, in the other two it relied on Article 17 to declare the complaints under Article 10 incompatible *ratione materiae* with the provisions of the Convention. In *Garaudy* (cited above) it found that by questioning the reality, extent and seriousness of the Holocaust, which was not the subject of debate between historians but on the contrary clearly established, Mr Garaudy had sought to rehabilitate the Nazi regime and accuse the victims of falsifying history. Such acts were incompatible with democracy and human rights, and amounting to the use of the right to freedom of expression for ends contrary to the text and spirit of the Convention. In *Witzsch (no. 2)* (cited above), the Court agreed with the German courts that Mr Witzsch's statements showed his disdain towards the victims of the Holocaust.

(δ) Historical debates

213. The Court has been confronted with a number of cases concerning historical debates.

214. In many of those cases the Court expressly stated that it was not its role to arbitrate such debates (see *Chauvy and Others*, cited above, § 69; *Monnat v. Switzerland*, no. 73604/01, § 57, ECHR 2006-X; *Fatullayev v. Azerbaijan*, no. 40984/07, § 87, 22 April 2010; and *Giniewski v. France*, no. 64016/00, § 51 *in fine*, ECHR 2006-I).

215. In determining whether the interferences with the exercise of the right to freedom of expression of the authors, or sometimes publishers, of statements touching upon historical issues were "necessary in a democratic society", the Court has had regard to several factors.

216. One of them has been the manner in which the impugned statements were phrased and the way in which they could be construed. Examples include *Lehideux and Isorni v. France* (23 September 1998, § 53, *Reports* 1998-VII), where the statements could not be read as a justification of pro-Nazi policies; *Stankov and the United Macedonian Organisation Ilinden* (nos. 29221/95 and 29225/95, §§ 102 and 106, ECHR 2001-IX), where the statements, although consisting in "fierce anti-Bulgarian declarations", could be regarded as containing an element of exaggeration designed merely to attract attention; *Radio France and Others* (cited above, § 38), where the statements, which contained serious defamatory allegations, were marked by their categorical tone; and *Orban and Others v. France* (no. 20985/05, §§ 46, 49 and 51, 15 January 2009), where the statements were simply a witness account by a first-hand participant in the Algerian War, not justification of torture or glorification of its perpetrators.

217. Another factor has been the specific interest or right affected by the statements. For instance, in *Stankov and the United Macedonian Organisation Ilinden* (cited above, § 106), this had been the national symbols of Bulgarians. In *Radio France and Others* (cited above, §§ 31 and 34-39) and *Chauvy and Others* (cited above, §§ 52 and 69), this had been the reputations of living persons, which had been affected by serious accusations of wrongdoing contained in the statements. In *Monnat* (cited above, § 60), the statements had not been directed against the reputation or personality rights of the persons complaining of them or against the Swiss people, but against the leaders of the country during the Second World War. In *Association of Citizens Radko and Paunkovski v. the former Yugoslav Republic of Macedonia* (no. 74651/01, §§ 69 and 74, ECHR 2009 (extracts)), the statements had affected the national and ethnic identity of all Macedonians. In *Orban and Others* (cited above, § 52) the statements had been capable of reviving the painful memories of the victims of torture.

218. A related factor has been the statements' impact. For instance, in *Stankov and the United Macedonian Organisation Ilinden* (cited above, §§ 102-03 and 110) the Court took into account that the group making the

statements had no real influence, even locally, and that its rallies were not likely to become a platform for the propagation of violence or intolerance; it also adverted to that in the related case of *United Macedonian Organisation Ilinden – PIRIN and Others v. Bulgaria* (no. 59489/00, § 61, 20 October 2005). By contrast, in *Radio France and Others* (cited above, §§ 35 and 39), the Court noted that the statement, which had contained serious defamatory allegations against a living person, had been broadcast on national radio sixty-two times.

219. Lastly, the Court has taken account of the lapse of time since the historical events to which the statements related: forty years in *Lehideux and Isorni* (cited above, § 55); fifty years in *Monnat* (cited above, § 64), and again forty years in *Orban and Others* (cited above, § 52).

220. The above cases thus illustrate that, similar to the position in relation to "hate speech", the Court's assessment of the necessity of interferences with statements relating to historical events has also been quite case-specific and has depended on the interplay between the nature and potential effects of such statements and the context in which they were made.

(ε) Cases against Turkey concerning statements relating to the events of 1915 and the following years

221. In *Güçlü v. Turkey* (no. 27690/03, 10 February 2009) the applicant, a lawyer and politician, said in the course of a press conference that for him personally the events of 1915 and the following years had amounted to genocide and that Turkey needed to come to terms with this and engage in an open debate on this issue. He was then convicted under a legal provision proscribing propaganda against Turkey's territorial integrity, and sentenced to a year's imprisonment for this statement and other statements made in the course of same press conference in relation to the Kurdish issue. He had served a little more than three months of that sentence when the provision under which he was convicted was repealed. As a result, his conviction was annulled and he was released. The Court found that the Mr Güçlü's statement had clearly concerned a debate on a question of public interest. It went on to say that the expression of such opinions, even if they did not match those of the public authorities and could offend or shock others, was entitled to protection under Article 10 of the Convention, and that debate by definition consisted in the expression of divergent points of view. The Court also noted that by making his statement Mr Güçlü had sought to provoke a debate on historical and political questions. In view of this, and of the severity of the penalty imposed on him, it found a breach of Article 10 (ibid., §§ 33-42).

222. In *Dink v. Turkey* (nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, 14 September 2010) the applicant, a prominent Turkish-Armenian writer and journalist who was later assassinated, had been convicted of

denigrating "Turkishness" (*Türklük*), a criminal offence under Article 159 of the Turkish Criminal Code as then in force (superseded by Article 301 of the Turkish Criminal Code of 2005). Examining that conviction under Article 10 of the Convention, the Court noted that an examination of the articles in which Mr Dink had made the impugned statements showed clearly that his use of the term "poison" denoted the "perception of Turks" among Armenians and the "obsessive" nature of the Armenian diaspora's campaign to secure recognition of the events of 1915 and the following years as genocide. Mr Dink had in effect asserted that this obsession, which meant that Armenians still viewed themselves as "victims", had poisoned the lives of members of the Armenian diaspora and had prevented them from developing their identity on a healthy basis. These assertions could not be regarded as hate speech (ibid., § 128).

223. The Court also took into account the fact that Mr Dink had been writing in his capacity as a journalist and editor of a Turkish-Armenian newspaper, commenting on issues concerning the Armenian minority from the position of an actor on the Turkish political scene. When expressing his resentment at attitudes which in his view amounted to denial of the incidents of 1915 and the following years, Mr Dink had conveyed his opinions on an issue of indisputable public concern in a democratic society. It was essential in such societies that debates surrounding historical events of a particularly serious nature should be able to take place freely. It was an integral part of freedom of expression to seek historical truth and it was not the Court's role to arbitrate on an underlying historical matter forming part of an ongoing public debate. Furthermore, the Mr Dink's articles had not been gratuitously offensive or insulting, and had not fostered disrespect or hatred (ibid., § 135). There had therefore been no pressing social need to find him guilty of denigrating "Turkishness".

224. In *Cox* (cited above) a United States national who had taught at two Turkish universities in the 1980s was deported from Turkey in 1986 and banned from re-entering the country for saying in front of students and colleagues that "the Turks [had] assimilated Kurds" and "expelled and massacred Armenians". She was deported on two further occasions. In 1996 she brought proceedings seeking to have the re-entry ban lifted, but was unsuccessful. The Court noted, in particular, that Ms Cox's statements had concerned the Kurdish and Armenian questions, which were still the subject of "heated debate, not only within Turkey but also in the international arena, with all those involved voicing their views and counter-views". It acknowledged that "opinions expressed on these issues by one side [could] sometime offend the other side" but emphasised that "a democratic society require[d] tolerance and broadmindedness in the face of controversial expressions" (ibid., §§ 41-42). It concluded that the ban on the Ms Cox's re-entry into Turkey had been designed to repress the exercise of her freedom of expression and stifle the spreading of ideas. The interference with her

right to freedom of expression had therefore not been "necessary in a democratic society" (ibid., §§ 44-45).

225. In *Altuğ Taner Akçam v. Turkey* (no. 27520/07, 25 October 2011) the applicant, a professor of history who published extensively on the events of 1915 and the following years and had been the subject of several criminal investigations – all discontinued – in connection with newspaper articles in which he had criticised the prosecution of Hrant Dink (see paragraph 222 above), complained of the existence of Article 301 of the Turkish Criminal Code, which he alleged made it possible for him to be prosecuted at any time for scholarly work on the Armenian issue. On the basis of the criminal investigations against Mr Akçam and the stance of the Turkish courts on the Armenian issue in their application of that Article, as well as a public campaign against Mr Akçam in connection with the investigations, the Court found that there existed a real risk that he could be prosecuted for "unfavourable" opinions on this matter (ibid., §§ 62-82). It went on to say that the terms used in that Article, as interpreted by the Turkish authorities, were too broad and vague, despite the safeguards put in place by the legislature. The number of investigations and prosecutions brought under it showed that any opinion regarded as offensive, shocking or disturbing could easily be targeted (ibid., §§ 89-94). That Article did not therefore meet the requirement of foreseeability.

(iii) Application of the above principles and case-law in the present case

226. In the present case, the Court is not required to determine whether the criminalisation of the denial of genocides or other historical facts may in principle be justified. Unlike the constitutional courts of France and Spain, which were entitled to – and indeed duty-bound – to examine the legislative provisions in this respect in the abstract (see paragraphs 95 and 97 above), in a case which has its origin in an individual application the Court is constrained by the facts of the case (see *T. v. Belgium*, cited above, at p. 169). It can thus only review whether or not the application of Article 261 *bis* § 4 of the Swiss Criminal Code in the case of the applicant was "necessary in a democratic society" within the meaning of Article 10 § 2 of the Convention (see *National Union of Rail, Maritime and Transport Workers v. the United Kingdom*, no. 31045/10, § 98, ECHR 2014).

227. The answer to the question whether such a necessity exists depends on the need to protect the "rights of others" at issue by way of criminal law measures. As noted in paragraph 156 above, these were the rights of Armenians to respect for their and their ancestors' dignity, including their right to respect for their identity constructed around the understanding that their community has suffered genocide. In the light of the case-law in which the Court has accepted that both ethnic identity and the reputation of ancestors may engage Article 8 of the Convention under its "private life"

heading (see paragraphs 200-03 above), the Court agrees that these were rights protected under that Article.

228. The Court is thus faced with the need to strike a balance between two Convention rights: the right to freedom of expression under Article 10 of the Convention and the right to respect for private life under Article 8 of the Convention; it will therefore take into account the principles set out in its case-law in relation to that balancing exercise (see paragraph 198 above). The salient question is what relative weight should be ascribed to these two rights, which are in principle entitled to equal respect, in the specific circumstances of this case. It requires the Court to examine the comparative importance of the concrete aspects of the two rights that were at stake, the need to interfere with, respectively protect, each of them, and the proportionality between the means used and the aim sought to be achieved. The Court will do so by looking at the nature of the applicant's statements; the context in which they were interfered with; the extent to which they affected the Armenians' rights; the existence or lack of consensus among the High Contracting Parties on the need to resort to criminal law sanctions in respect of such statements; the existence of any international law rules bearing on this issue; the method employed by the Swiss courts to justify the applicant's conviction; and the severity of the interference.

(α) Nature of the applicant's statements

229. To assess the weight of the applicant's interest in the exercise of his right to freedom of expression, the Court must first examine the nature of his statements. In doing so, it will not seek to establish whether they could properly be characterised as genocide denial or justification for the purposes of Article 261 *bis* § 4 of the Swiss Criminal Code, or were made "on the grounds" of "race, ethnic origin or religion" within the meaning of that Article. These points concern the interpretation and application of Swiss law, and were for the Swiss courts to determine (see, among many other authorities, *Lehideux and Isorni*, cited above, § 50). The relevant question is rather whether the statements belonged to a type of expression entitled to heightened or reduced protection under Article 10 of the Convention, which is ultimately for the Court to decide, while having regard to the findings of the Swiss courts in this respect (see paragraph 196 (iii) above).

230. Under the Court's case-law, expression on matters of public interest is in principle entitled to strong protection, whereas expression that promotes or justifies violence, hatred, xenophobia or another form of intolerance cannot normally claim protection (see the cases cited in paragraphs 197 and 204-07 above). Statements on historical issues, whether made at public rallies or in media such as books, newspapers, or radio or television programmes are as a rule seen as touching upon matters of public interest (see *Stankov and the United Macedonian Organisation Ilinden*, §§ 79, 85 and 97 (statements at rallies); *Chauvy and Others*, §§ 68 and 71,

and *Orban and Others*, § 45 (books); *Lehideux and Isorni*, §§ 10-11 (newspaper publication); *Radio France and Others*, §§ 34-35 (radio broadcast); and *Monnat*, § 56 (television programme)).

231. The Chamber found that the applicant's statements had been of a historical, legal and political nature. The Swiss Government and some of the third parties disagreed, essentially on the basis that the applicant had not proceeded in a scholarly and dispassionate manner and in the spirit of open-mindedness characteristic of proper historical debate. The Grand Chamber cannot accept this argument. Even though the applicant's statements touched upon historical and legal issues, the context in which they were made – at public events where the applicant was speaking to like-minded supporters – shows that he spoke as a politician, not as a historical or legal scholar. He took part in a long-standing controversy that the Court has, in a number of cases against Turkey, already accepted as relating to an issue of public concern (see paragraphs 221 and 223 above), and described as a "heated debate, not only within Turkey but also in the international arena" (see paragraph 224 above). Indeed, the issue had been debated in the Swiss Parliament in 2002-03, not long before the applicant's statements (see paragraphs 48-50 above). The fact that it did not concern the mainstream of Swiss politics does not detract from its public interest. Nor does the fact that the applicant expressed himself in strong terms (see *Morice v. France* [GC], no. 29369/10, § 125 *in fine*, 23 April 2015). It is in the nature of political speech to be controversial and often virulent (compare with *Erbakan v. Turkey*, no. 59405/00, § 59, 6 July 2006; *Faruk Temel v. Turkey*, no. 16853/05, §§ 8 and 60, 1 February 2011; and *Otegi Mondragon v. Spain*, no. 2034/07, §§ 10 and 53-54, ECHR 2011). That does not diminish its public interest, provided of course that it does not cross the line and turn into a call for violence, hatred or intolerance, which is the point that the Court will now examine.

232. The Swiss courts found that the applicant had spoken with a racist motive. They did so on the basis of his assertion that the Armenians had been aggressors of the Turks and his professed affiliation with Talaat Pasha, the Ottoman Minister of Internal Affairs at the time of the events of 1915 and the following years, but also on the basis of the mere, albeit obstinate, denial that those events had constituted genocide (see paragraphs 22, 24 and 26 above). The Chamber disagreed, noting that the applicant had not been prosecuted for incitement to hatred, which was a separate offence under Swiss law, and that he had not expressed contempt for the victims (see paragraphs 51-53 and 119 of the Chamber judgment).

233. While being fully aware of the acute sensitivities attached by the Armenian community to the issue in relation to which the applicant spoke, the Court, taking into account the overall thrust of his statements, does not perceive them as a form of incitement to hatred or intolerance. The applicant did not express contempt or hatred for the victims of the events of

1915 and the following years, noting that Turks and Armenians had lived in peace for centuries, and suggesting – whether that was in fact so is immaterial in the present context – that both had fallen victim to "imperialist" machinations. He did not call the Armenians liars, use abusive terms with respect to them, or attempt to stereotype them (contrast *Seurot*; *Soulas and Others*, § 40; *Balsytė-Lideikienė*, § 79; *Féret*, §§ 12-16 and 69-71; and *Le Pen*, all cited above). His strongly worded allegations were directed against the "imperialists" and their allegedly insidious designs with respect to the Ottoman Empire and Turkey (compare, *mutatis mutandis*, with *Giniewski*, cited above, §§ 45-49, where the Court, departing from the domestic courts' findings, held that by condemning a papal encyclical and hence the Pope's position, a journalist had not sought to criticise Christianity as a whole, and with *Klein v. Slovakia*, no. 72208/01, § 51, 31 October 2006, where the Court, likewise departing from the domestic courts' findings, held that very strongly worded statements made by a journalist with respect to a Roman Catholic Archbishop in Slovakia could not be seen as disparaging the adherents of the Catholic Church in that country).

234. The next question is whether the statements could nevertheless be seen as a form of incitement to hatred or intolerance towards the Armenians on account of the applicant's position and the wider context in which they were made. In the cases concerning statements in relation to the Holocaust that have come before the former Commission and the Court, this has, for historical and contextual reasons, invariably been presumed (see paragraphs 209 and 211 above). However, the Court does not consider that the same can be done in this case, where the applicant spoke in Switzerland about events which had taken place on the territory of the Ottoman Empire about ninety years previously. While it cannot be excluded that statements relating to those events could likewise promote a racist and antidemocratic agenda, and do so through innuendo rather than directly, the context does not require this to be automatically presumed, and there is not enough evidence that this was so in the present case. The only element that could denote such an agenda was the applicant's self-professed affiliation with Talaat Pasha. However, the Swiss courts did not elaborate on this point, and there is no evidence that the applicant's membership in the so-called Talaat Pasha Committee was driven by a wish to vilify the Armenians and spread hatred for them rather than his desire to contest the idea that the events of 1915 and the following years had constituted genocide (see, *mutatis mutandis*, *Lehideux and Isorni*, cited above, § 53).

235. Seeking to show that this was the case, the third party *Turkish Human Rights Association, Truth Justice Memory Centre and the International Institute for Genocide and Human Rights Studies* referred to materials taken from the so-called Ergenekon proceedings (see paragraphs 186 and 187 above). However, it did not produce the originals or

full translations of these materials, instead selectively quoting from them. More importantly, those proceedings are still pending on appeal before the Turkish Court of Cassation (see paragraph 27 above), and have given rise to a number of complaints with respect to their fairness, rejected as premature in view of their pendency (see *Özkan v. Turkey* (dec.), no. 15869/09, 13 December 2011; *Göktaş v. Turkey* (dec.), no. 59374/10, 13 December 2011; *Kireçtepe and Others v. Turkey* (dec.), no. 59194/10, 7 February 2012; *Güder v. Turkey* (dec.), no. 24695/09, §§ 64-65, 30 April 2013; *Karabulut v. Turkey* (dec.), no. 32197/09, §§ 64-65, 17 September 2013, *Tekin*, cited above, §§ 64-65; and *Yıldırım*, cited above, §§ 43-44). These materials cannot therefore be taken into account in the present case.

236. Nor can an anti-Armenian agenda on the part of the applicant be derived from the two newspaper articles to which that third party referred (see paragraph 187 above). The first, from the daily *Vatan*, says that after the assassination of Hrant Dink in 2007 the applicant, condemning the assassination, had invited the Armenian Patriarch of Istanbul to recognise that it had been the result of an insidious plot by the United States of America. The second, from the daily *Milliyet*, concerned anonymous threats to Armenian schools in Istanbul and did not at all mention the applicant (see paragraph 28 above).

237. More generally, the Swiss Government and some of the third parties sought to portray the applicant as an extremist wont to exercise his right to freedom of expression in an irresponsible and dangerous manner. In the Court's view, this cannot be reconciled with the fact that interferences with the exercise of this right by the applicant have twice given rise to judgments of violation in cases brought against him against Turkey. The first of those judgments, given pursuant to an application lodged in 1992, was *Socialist Party and Others v. Turkey* (25 May 1998, *Reports* 1998-III). There, the Court found a breach of Article 11 of the Convention in relation to the dissolution of a political party of which the applicant was then chairman. The Court found that the applicant's statements which had prompted the dissolution had contained an invitation to people of Kurdish origin to rally together and assert certain political claims, but no calls to use violence, rebel or otherwise reject democratic principles. They could not have therefore justified the dissolution. The second judgment, given pursuant to an application lodged in 1999, was *Perinçek v. Turkey* (no. 46669/99, 21 June 2005). There, the Court found that the applicant's criminal conviction in Turkey in relation to similar statements that could not be characterised as hate speech had not been necessary in a democratic society and had therefore given rise to a breach of Article 10 of the Convention.

238. The fact that the applicant's statements concerned the Armenians as a group cannot in itself serve as a basis to infer a racist agenda either, since, in view of the definition of the term "genocide" in international law (see

paragraphs 52 and 54 above), any statements relating to the propriety of classifying a historical event as one are bound to concern a particular national, ethnical, racial or religious group.

239. For the Court, the applicant's statements, read as a whole and taken in their immediate and wider context, cannot be seen as a call for hatred, violence or intolerance towards the Armenians. It is true that they were virulent and that his position was intransigent, but it should be recognised that they apparently included an element of exaggeration as they sought to attract attention (see, *mutatis mutandis*, *Stankov and the United Macedonian Organisation Ilinden*, cited above, § 102, which concerned "fierce anti-Bulgarian declarations" made by members and supporters of an association in the course of rallies organised by it).

240. The Chamber found that the applicant had not been prosecuted or convicted for attempting to justify a genocide, but merely for denying one. The Swiss Government took issue with that assessment, pointing out that the Swiss Federal Court had, in point 7 of its judgment, found that the massacres and mass deportations of Armenians in 1915 and the following years had constituted crimes against humanity, whose justification also came within the ambit of Article 261 *bis* § 4 of the Swiss Criminal Code. The Court notes that, as borne out by the Court's judgment in *Varela Geis v. Spain* (no. 61005/09, §§ 45-53, 5 March 2013) – which, incidentally, concerns the case that gave rise to the Spanish Constitutional Court judgment cited in paragraph 96 above – the two charges can be quite different. However, as already noted, the salient issue here is not the legal qualification given to the applicant's statements by the Swiss courts, but whether those statements could, when read as a whole and in their context, be seen as a call for violence, hatred or intolerance. The Court already found that they cannot. It would here just add that, as explained by the Spanish Constitutional Court, genocide justification does not consist in assertions that a particular event did not constitute a genocide, but in statements which express a value judgment about it, relativising its gravity or presenting it as right (see paragraph 97 above). The Court does not consider that the applicant's statements could be regarded as bearing this meaning; nor could they be regarded as justifying any other crimes against humanity.

241. It follows that the applicant's statements, which concerned a matter of public interest, were entitled to heightened protection under Article 10 of the Convention, and that the Swiss authorities only had a limited margin of appreciation to interfere with them.

(β) The context of the interference

The geographical and historical factors

242. In reviewing whether there exists a pressing social need for interference with rights under the Convention, the Court has always been

sensitive to the historical context of the High Contracting Party concerned. For instance, in *Vogt* (cited above, §§ 51 and 59) it took into account "Germany's experience under the Weimar Republic and during the bitter period that followed the collapse of that regime up to the adoption of the Basic Law in 1949", and its consequent desire to "avoid a repetition of those experiences by founding its new State on the idea that it should be a 'democracy capable of defending itself'". The respective State's historical experience has been a weighty factor in the assessment of the existence of a pressing social need in many other cases as well (see *Rekvényi*, cited above, §§ 41 and 47; *Refah Partisi (the Welfare Party) and Others*, cited above, §§ 124-25; *Jahn and Others v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, § 116, ECHR 2005-VI; *Leyla Şahin*, cited above, § 115; *Ždanoka*, cited above, § 119-21; *Fáber*, cited above, § 58; and *Vona*, cited above, § 66).

243. This is particularly relevant with regard to the Holocaust. For the Court, the justification for making its denial a criminal offence lies not so much in that it is a clearly established historical fact but in that, in view of the historical context in the States concerned – the cases examined by the former Commission and the Court have thus far concerned Austria, Belgium, Germany and France (see paragraphs 209-10 above, and contrast *Varela Geis*, cited above, § 59, where the Court did not examine the complaint under Article 10 of the Convention) –, its denial, even if dressed up as impartial historical research, must invariably be seen as connoting an antidemocratic ideology and anti-Semitism. Holocaust denial is thus doubly dangerous, especially in States which have experienced the Nazi horrors, and which may be regarded as having a special moral responsibility to distance themselves from the mass atrocities that they have perpetrated or abetted by, among other things, outlawing their denial.

244. By contrast, it has not been argued that there was a direct link between Switzerland and the events that took place in the Ottoman Empire in 1915 and the following years. The only such link may come from the presence of an Armenian community on Swiss soil, but it is a tenuous one. This is borne out by the Swiss Government's submissions, which clearly convey the idea that the controversy sparked by the applicant was external to Swiss political life, and, to an extent, by the judgment of the Lausanne District Police Court, which, in deciding to suspend part of the applicant's sentence, noted that he was a foreigner and would return to his country (see paragraph 22 above). There is moreover no evidence that at the time when the applicant made his statements the atmosphere in Switzerland was tense and could result in serious friction between Turks and Armenians there (contrast *Zana*, §§ 57-60, and *Sürek (no. 1)*, § 62, both cited above, which concerned the tense situation in south-east Turkey in the 1980s and 1990s, as well as *Falakaoğlu and Saygılı*, § 33, and *Saygılı and Falakaoğlu (no. 2)*, § 28 *in fine*, both cited above, which concerned the publication of strongly

worded declarations made at a time when clashes had taken place in several prisons in Turkey between security forces and detainees, resulting in deaths and injuries on both sides). Indeed, the earlier case in which a criminal prosecution had been brought under Article 261 *bis* § 4 of the Swiss Criminal Code in relation to such statements shows that while the Armenian and Turkish communities in Switzerland have expressed their strong disagreement about the legal characterisation of the events of 1915 and the following years, this has not resulted in consequences other than legal proceedings (see paragraphs 41-46 above). Nor could a failure to prosecute the applicant realistically have been perceived as a form of legitimation of his views on the part of the Swiss authorities (contrast, *mutatis mutandis*, *Vona*, cited above, § 71).

245. The question is, then, whether the applicant's criminal conviction in Switzerland can be justified by the situation in Turkey, whose Armenian minority is alleged to suffer from hostility and discrimination (see paragraphs 186 and 188 above). For the Court, the answer must be in the negative. When convicting the applicant, the Swiss courts did not refer to the Turkish context. Nor did the Swiss Government in their observations. On the contrary, their attempt to justify the interference by reference to Article 16 of the Convention shows that they were chiefly concerned with their domestic political context.

246. It is true that at present, especially with the use of electronic means of communication, no message may be regarded as purely local. It is also laudable, and consonant with the spirit of universal protection of human rights, for Switzerland to seek to vindicate the rights of victims of mass atrocities regardless of the place where they took place. However, the broader concept of proportionality inherent in the phrase "necessary in a democratic society" requires a rational connection between the measures taken by the authorities and the aim that they sought to realise through these measures, in the sense that the measures were reasonably capable of producing the desired result (see, *mutatis mutandis*, *Weber v. Switzerland*, 22 May 1990, § 51, Series A no. 177, and Observer *and* Guardian *v. the United Kingdom*, 26 November 1991, § 68, Series A no. 216). It can hardly be said that any hostility that exists towards the Armenian minority in Turkey is the product of the applicant's statements in Switzerland (see, *mutatis mutandis*, *Incal*, cited above, § 58), or that the applicant's criminal conviction in Switzerland protected that minority's rights in any real way or made it feel safer. There is moreover no evidence that the applicant's statements have in themselves provoked hatred towards the Armenians in Turkey, or that he has on other occasions attempted to instil hatred against Armenians there. As already noted, the two newspaper articles to which the third party *Turkish Human Rights Association, Truth Justice Memory Centre and the International Institute for Genocide and Human Rights Studies* referred to back its assertion that the applicant had done so simply

do not appear to support it. The other materials on which the third party sought to rely were taken from the so-called Ergenekon proceedings and, as already explained, cannot be taken into account.

247. While the hostility of some ultranationalist circles in Turkey towards the Armenians in that country cannot be denied, in particular in view of the assassination of the Turkish-Armenian writer and journalist Hrant Dink in January 2007, possibly on account of his views about the events of 1915 and the following years (see *Dink*, cited above, § 66 *in fine*), this can hardly be regarded as a result of the applicant's statements in Switzerland.

248. There is no reason to take into account other domestic contexts, such as the French one, as suggested by the third party *CCAF*. It is true that France is home to the third-largest community in the Armenian diaspora, and that the events of 1915 and the following years have been topical issues there for years (see paragraphs 93 and 94 above). But there is no evidence that the applicant's statements had a direct effect in that country, or that the Swiss authorities had that context in mind when acting against him.

The time factor

249. In *Lehideux and Isorni* (cited above, § 55), the Court said that while controversial remarks about traumatic historical events were always likely to reopen the controversy and bring back memories of past sufferings, a lapse of time of some forty years made it inappropriate to deal with them with the same severity as ten or twenty years previously. The Court has taken up that line of reasoning in other cases as well (see *Editions Plon v. France*, no. 58148/00, § 53, ECHR 2004-IV; *Monnat*, cited above, § 64; *Vajnai v. Hungary*, no. 33629/06, § 49, ECHR 2008; *Orban and Others*, cited above, § 52; and *Smolorz v. Poland*, no. 17446/07, § 38, 16 October 2012; and also, *mutatis mutandis*, *Hachette Filipacchi Associés v. France*, no. 71111/01, § 47, 14 June 2007).

250. In the present case, the lapse of time between the applicant's statements and the tragic events to which he was referring was considerably longer, about ninety years, and at the time when he made the statements there were surely very few, if any, survivors of these events. While in their submissions some of the third parties emphasised that this was still a live issue for many Armenians, especially those in the diaspora, the time element cannot be disregarded. Whereas events of relatively recent vintage may be so traumatic as to warrant, for a period of time, an enhanced degree of regulation of statements relating to them, the need for such regulation is bound to recede with the passage of time.

(γ) Extent to which the applicant's statements affected the rights of the members of the Armenian community

251. Having accepted that the "rights of others" sought to be protected by the interference with the applicant's right to freedom of expression are rights that enjoy protection under Article 8 of the Convention (see paragraph 227 above), the Court must now, for the purposes of the balancing exercise, measure the extent to which the applicant's statements affected those rights.

252. The Court is aware of the immense importance attached by the Armenian community to the question whether the tragic events of 1915 and the following years are to be regarded as genocide, and of that community's acute sensitivity to any statements bearing on that point. However, it cannot accept that the applicant's statements at issue in this case were so wounding to the dignity of the Armenians who suffered and perished in these events and to the dignity and identity of their descendants as to require criminal law measures in Switzerland. As already noted, the sting of the applicant's statements was not directed towards those persons but towards the "imperialists" whom he regarded as responsible for the atrocities. The parts of his statements that could in some way be seen as offensive for the Armenians were those in which he referred to them as "instruments" of the "imperialist powers" and accused them of "carr[ying] out massacres of the Turks and Muslims". However, as can be seen from the overall tenor of the applicant's remarks, he did not draw from this the conclusion that they had deserved to be subjected to atrocities or annihilation; he rather accused the "imperialists" of stirring up violence between Turks and Armenians (see paragraphs 13 and 16 above). This, coupled with the amount of time that had elapsed since the events to which the applicant was referring, leads the Court to the conclusion that his statements cannot be seen as having the significantly upsetting effect sought to be attributed to them (see, *mutatis mutandis*, *Vajnai*, § 57; *Orban and Others*, § 52, *Putistin*, § 38, and *Jelševar and Others*, § 39, all cited above, as well as *John Anthony Mizzi v. Malta*, no. 17320/10, § 39, 22 November 2011).

253. Nor is the Court persuaded that the applicant's statements – in which he denied that the events of 1915 and the following years could be classified as genocide but did not dispute the reality of the massacres and mass deportations – could have a severe impact on the Armenians' identity as a group. The Court has already held, albeit in different circumstances, that statements that contest, even in virulent terms, the significance of historical events that carry a special sensitivity for a country and touch on its national identity cannot in themselves be regarded as seriously affecting their addressees (see *Stankov and the United Macedonian Organisation Ilinden*, cited above, §§ 104-07). It has come to the same conclusion with respect to statements contesting the very identity of a national group (see *Association of Citizens Radko and Paunkovski*, cited above, §§ 70-75). The

Court would not exclude that there might exist circumstances in which, in view of the particular context, statements relating to traumatic historical events could result in significant damage for the dignity of groups affected by such events: for instance, if they are particularly virulent and disseminated in a form that is impossible to ignore. The Court notes in this connection that in *Vejdeland and Others* (cited above, §§ 8, 56 and 57), where virulently homophobic leaflets had been left in students' lockers at an upper secondary school, in finding no breach of Article 10 of the Convention it attached particular significance to the fact that the leaflets had been imposed on persons who were "at an impressionable and sensitive age" and who had no possibility not to accept them. But it cannot be said that there were such circumstances in the present case. The only cases in which the former Commission and the Court have accepted the opposite without specific evidence were those relating to Holocaust denial. But, as already noted, this can be regarded as stemming from the very particular context in which those cases unfolded, which has caused the former Commission and the Court to accept that Holocaust denial, even if dressed up as impartial historical research, must invariably be seen as connoting an antidemocratic ideology and anti-Semitism (see paragraphs 234 and 243 above), and must thus, at this stage, be regarded as particularly upsetting for the persons concerned.

254. Lastly, the Court notes that the applicant's statements were made at three public events. Their impact was thus bound to be rather limited (see, *mutatis mutandis*, *Fáber*, cited above, §§ 44-45, and contrast *Féret*, cited above, § 76, where the Court attached particular significance to the fact that the statements at issue, consisting of stereotyped formulas vilifying a sector of the population, had been made on leaflets distributed in the course of an electoral campaign, thus reaching the entire population of the country).

(δ) The existence or lack of consensus among the High Contracting Parties

255. The comparative law data available to the Court shows that in the past few years there have been fluctuating developments in this domain in the legal systems of the High Contracting Parties. In some – France and Spain – these have been influenced by constitutional case-law (see paragraphs 95-97 above). In others, the impetus behind the developments was the EU Framework Decision 2008/913/JHA (see paragraphs 82-90 above).

256. The available data thus reveals a spectrum of national positions. Some High Contracting Parties – such as Denmark, Finland, Spain (since the 2007 judgment of its Constitutional Court), Sweden and the United Kingdom – do not criminalise the denial of historical events. Others – such as Austria, Belgium, France, Germany, the Netherlands and Romania – only criminalise, by using different methods, the denial of the Holocaust and Nazi crimes. A third group – such as the Czech Republic and Poland –

criminalise the denial of Nazi and communist crimes. A fourth group – such as Andorra, Cyprus, Hungary, Latvia, Liechtenstein, Lithuania, Luxembourg, the former Yugoslav Republic of Macedonia, Malta, Slovakia, Slovenia and Switzerland – criminalise the denial of any genocide (see paragraph 99 above). At the European Union level, the applicable provisions have a wide scope but at the same time link the requirement to criminalise genocide denial to the need for it to be capable of producing tangible negative consequences (see paragraph 85 above).

257. The Swiss Government and some of the third parties expressed doubts about the significance of the comparative perspective, emphasising the different national contexts and perceptions of the need to legislate in this area. The Court acknowledges this diversity. It is nevertheless clear that, with its criminalisation of the denial of any genocide, without the requirement that it be carried out in a manner likely to incite to violence or hatred, Switzerland stands at one end of the comparative spectrum. In these circumstances, and given that in the present case there are other factors which have a significant bearing on the breadth of the applicable margin of appreciation (see paragraphs 241-54 above and 274-78 below), the comparative law position cannot play a weighty part in the Court's conclusion with regard to this issue.

(ε) Could the interference be regarded as required under Switzerland's international law obligations?

258. The next point to be determined is whether, as argued by some of the third parties, the interference was justified because it was required under Switzerland's international law obligations (see, *mutatis mutandis*, *Jersild v. Denmark*, 23 September 1994, §§ 28, 30 and 31 *in fine*, Series A no. 298, with regard to an interference said to be required under Article 4 of the CERD; *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, §§ 56, 57 and 60-66, ECHR 2001-XI; *Cudak v. Lithuania* [GC], no. 15869/02, §§ 57 and 63-67, ECHR 2010; and *Jones and Others v. the United Kingdom*, nos. 34356/06 and 40528/06, §§ 189, 196-98 and 201-15, ECHR 2014, with regard to denial of access to court required under the international law relating to foreign State immunities; and *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, §§ 149-51, ECHR 2005-VI, with regard to obligations flowing from a State's membership in the European Union). The principles that govern the examination of a putative conflict between the obligations that a High Contracting Party has under the Convention and its other international law obligations were set out in detail in *Nada v. Switzerland* ([GC], no. 10593/08, §§ 168-72, ECHR 2012); there is no need to repeat them here, except to emphasise that apparent contradictions should, as far as possible, be avoided by construing the simultaneously applicable provisions in a way that coordinates their effects and avoids opposition between them.

259. In this case, the Court, having established that the applicant's statements could not be seen as form of incitement to hatred or discrimination, must only determine whether Switzerland was required under its international law obligations to criminalise genocide denial as such. It is not persuaded that this was the case.

260. In particular, it does not appear that this was made necessary by Switzerland's accession to the CERD. It is true that Article 261 *bis* of the Swiss Criminal Code was enacted in connection with that accession (see paragraphs 33-37 above and the explanations in this respect contained in point 3.2 of the Swiss Federal Court's judgment, cited in paragraph 26 above). However, that Article outlaws many acts apart from genocide denial, and there is no indication that the second clause of its paragraph 4 – the one dealing with genocide denial and serving as a basis for the applicant's conviction – was specifically required under the CERD. Suffice it to note in this connection that the Vaud Cantonal Court said, in paragraph 2 (b) *in fine* of its judgment, that Article 261 *bis* § 4 had gone beyond Switzerland's obligations under the CERD (see paragraph 24 above). The same view was taken in the Switzerland's initial report to the UN Committee on the Elimination of Racial Discrimination (see paragraph 64 above).

261. A perusal of the text of Article 4 of the CERD shows that it does not directly or in terms give expression to a requirement that genocide denial be criminalised as such. It merely says that the States Parties to it undertake to criminalise "all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin", and this – as noted by the Swiss Government at the time when it considered whether Switzerland should accede to the CERD (see paragraph 34 above) – with "due regard to ... the rights expressly set forth in [A]rticle 5 of [the CERD]", which include "[t]he right to freedom of opinion and expression" (see paragraph 62 above). Moreover, when acceding to the CERD, Switzerland, acting in line with the recommendation made in Resolution 68 (30) of the Committee of Ministers of the Council of Europe (see paragraph 77 above), reserved the right to take "due account of freedom of opinion" when adopting the legislative measures necessary for the implementation of its Article 4 (see paragraph 63 above). The international body that monitors the CERD's implementation, the UN Committee on the Elimination of Racial Discrimination, recommended that "public denials or attempts to justify crimes of genocide and crimes against humanity ... be declared as offences punishable by law, provided that they clearly constitute incitement to racial violence or hatred", but at the same time underlined that " 'the expression of opinions about historical facts' should not be prohibited or punished" (see paragraph 66 above).

262. The Court is not persuaded that Switzerland was required to criminalise genocide denial as such under its other international law obligations either.

263. The only treaty provision that directly calls for such criminalisation is Article 6 § 1 of the Additional Protocol to the Convention on Cybercrime, which Switzerland has signed but not ratified, and which is not in force in respect of it (see paragraphs 74 and 75 above).

264. Article III (c) of the Genocide Convention requires States Parties to make punishable the "[d]irect and public incitement to commit genocide". However, the ICTR's case-law on this point shows that while the distinction may, depending on the context, not be watertight, there is nonetheless a considerable difference between direct incitement to genocide and "hate speech" (see paragraphs 57 and 58 above). Nor does it appear that the obligation under Article I of the Genocide Convention to prevent genocide has been interpreted as extending, without qualification, to criminalising "hate speech". In any event, it was already established that the applicant's statements could not be regarded as amounting to an incitement to hatred or discrimination. It cannot therefore be concluded that Switzerland had an obligation to criminalise them under these provisions.

265. Article 20 § 2 of the ICCPR, which has been in force in respect of Switzerland since 1992, does not in terms and unambiguously call for the criminalisation of genocide denial as such. It requires the prohibition of "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence" (see paragraph 67 above). In 2011 the international body that monitors the ICCPR's implementation, the UN Human Rights Committee, expressed the views that "[l]aws that penali[s]e the expression of opinions about historical facts are incompatible with the obligations that the Covenant imposes on States [P]arties in relation to the respect for freedom of opinion and expression", that the ICCPR "does not permit general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events", that "[r]estrictions on the right of freedom of opinion should never be imposed and, with regard to freedom of expression, they should not go beyond what is permitted in paragraph 3 [of Article 19] or required under [A]rticle 20", and that "a limitation that is justified on the basis of [A]rticle 20 must also comply with [A]rticle 19 [§] 3" (see paragraph 71 above).

266. Nor does it appear that there existed a customary international law rule requiring Switzerland to criminalise genocide denial. State practice, as can be seen from paragraphs 87-97 above, is far from generalised and consistent (see, *mutatis mutandis*, *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. the Netherlands), Judgment, I.C.J. Reports 1969*, p. 43, § 74). Article 6 § 1 of the above-mentioned Additional Protocol to the Convention on Cybercrime is only applicable to genocide denial committed "through a

computer system" and relating to a genocide "recognised as such by [a] final and binding decision" of a competent "international court" (see paragraph 75 above); the explanatory report to the Protocol says that this refers to "other international courts set up since 1945 by relevant international legal instruments", such as the ICTY, the ICTR and the ICC (see paragraph 76 above). Moreover, the second paragraph of that Article allows the States Parties to the Protocol to reserve the right not to apply, in whole or in part, its first paragraph (see, *mutatis mutandis*, *North Sea Continental Shelf Cases*, cited above, § 72). The Protocol has to date only been ratified by twenty-four out of the forty-seven Member States of the Council of Europe, and three of those have availed themselves of the possibility not to apply Article 6 § 1 (see paragraph 74 above). It can thus hardly be regarded as enunciating a rule which has attained the status of customary international law (see, *mutatis mutandis*, *X and Others v. Austria* [GC], no. 19010/07, § 150, ECHR 2013, and the *North Sea Continental Shelf Cases*, cited above, § 73, and contrast *Van Anraat v. the Netherlands* (dec.), no. 65389/09, §§ 90-92, 6 July 2010, where it was found that the rule against the use of mustard gas as a weapon of war in an international conflict, having first been set out in a 1925 treaty, had gone on to attain the status of customary law). The same goes for the rules laid down in EU Framework Decision 2008/913/JHA, which has thus far not been fully implemented by a number of Member States of the European Union (see paragraph 90 above).

267. It is also noteworthy that most international bodies which have dealt with the point – the UN Human Rights Committee, the UN Committee on the Elimination of Racial Discrimination, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, and the UN Independent Expert on the promotion of a democratic and equitable international order – have made inconclusive pronouncements and recommendations in this regard (see paragraphs 66, 71, 72 and 73 above). The ECRI appears to be the only such body that has unequivocally called for the criminalisation of genocide denial: it recommended that the law should penalise, if committed intentionally, "the public denial, trivialisation, justification or condoning, with a racist aim, of crimes of genocide, crimes against humanity or war crimes" (see paragraph 80 above). This was, as clear from its title, a policy recommendation which, however important, is not binding international law.

268. In sum, there were no international treaties in force with respect to Switzerland that required in clear and explicit language the imposition of criminal penalties on genocide denial as such. Nor does it appear that it was compelled to do so under customary international law. It cannot therefore be said that the interference with the applicant's right to freedom of expression was required under, and could hence be justified by, Switzerland's

international law obligations (see, *mutatis mutandis*, *Al-Jedda v. the United Kingdom* [GC], no. 27021/08, §§ 100-06, ECHR 2011, and *Capital Bank AD v. Bulgaria*, no. 49429/99, § 110, 24 November 2005, and contrast *Nada*, cited above, § 172).

(ζ) Method employed by the Swiss courts to justify the applicant's conviction

269. The Court does not consider that it has to review in detail the way in which the Swiss courts arrived at the conclusion that the events of 1915 and the following years had constituted "a genocide" within the meaning of Article 261 *bis* § 4 of the Swiss Criminal Code. As already noted, this is a point concerning the interpretation and application of Swiss law.

270. However, the Court is empowered to review the effect that the Swiss courts' rulings on this point had on the applicant's rights under the Convention.

271. It notes in this connection that in concluding that the events of 1915 and the following years had constituted "a genocide", the Lausanne District Police Court did not analyse the point by reference to the rules of Swiss or international law that define that term, such as Article 264 of the Swiss Criminal Code, Article II of the Genocide Convention and Article 6 of the Rome Statute (see paragraphs 47, 52 and 54 above). It merely referred to a number of acts of official recognition by Swiss, foreign and international bodies, expert reports, legal treatises and textbooks (see paragraph 22 above). For its part, the Vaud Cantonal Court cited the legal provisions which define genocide but found, in points 2 (c) *in fine* and (d) of its judgment, that the view of the Swiss Parliament on whether the events of 1915 and the following years had constituted one was conclusive (see paragraph 24 above). The Swiss Federal Court overturned this ruling in point 3.4 of its judgment, endorsing, in point 4, the approach taken by the Lausanne District Police Court, and holding that the applicant's arguments relating to the appropriateness of classifying the events as a genocide within the meaning of Article 264 of the Swiss Criminal Code were irrelevant (see paragraph 26 above). As result, it remained unclear whether the applicant was penalised for disagreeing with the legal qualification ascribed to the events of 1915 and the following years or with the prevailing views in Swiss society on this point. In the latter case, the applicant's conviction must be seen as inimical to the possibility, in a "democratic society", to express opinions that diverge from those the authorities or any sector of the population.

(η) Severity of the interference

272. In two recent cases under Article 10 of the Convention, the Court upheld the proportionality of interferences which consisted in regulatory schemes limiting the technical means through which freedom of expression may be exercised in the public sphere (see *Mouvement raëlien*

suisse, §§ 49-77, and *Animal Defenders International*, §§ 106-25, both cited above). By contrast, the form of interference at issue in this case – a criminal conviction that could even result in a term of imprisonment – was much more serious in terms of its consequences for the applicant, and calls for stricter scrutiny.

273. In *Lehideux and Isorni* (cited above, § 57), the Court noted, as it has done in many other cases under Article 10 of the Convention, that a criminal conviction was a serious sanction, having regard to the existence of other means of intervention and rebuttal, particularly through civil remedies. The same applies here: what matters is not so much the severity of the applicant's sentence but the very fact that he was criminally convicted, which is one of the most serious forms of interference with the right to freedom of expression.

(θ) Balancing the applicant's right to freedom of expression against the Armenians' right to respect for their private life

274. The Court must now, taking into account all of the above factors, determine whether the Swiss authorities struck a proper balance between the applicant's right to freedom of expression and the Armenians' right to the protection of their dignity. As noted in paragraphs 198 and 199 above, the High Contracting Parties are afforded a margin of appreciation in that respect, but only if their authorities have undertaken the balancing exercise in conformity with the criteria laid down in the Court's case-law and have duly considered the importance and scope of the rights at stake.

275. When proposing the enactment of what would later become Article 261 *bis* § 4 of the Criminal Code, the Swiss Government referred to the potential conflict between, on the one hand, the imposition of criminal penalties for the conduct outlawed under the intended provision and, on the other, the rights to freedom of opinion and association guaranteed under the Swiss Constitution of 1874, then in force, explaining that the two needed to be balanced in individual situations in such a way that only truly blameworthy cases would result in penalties (see paragraph 34 above). These concerns demonstrated that in applying that provision in individual cases the Swiss courts needed carefully to weigh the countervailing interests. Indeed, an interference with the right to freedom of expression that takes the form of a criminal conviction inevitably requires detailed judicial assessment of the specific conduct sought to be punished. In this type of case, it is normally not sufficient that the interference was imposed because its subject-matter fell within a particular category or was caught by a legal rule formulated in general terms; what is rather required is that it was necessary in the specific circumstances (see, *mutatis mutandis*, The Sunday Times, cited above, § 65 *in fine*).

276. However, a perusal of the reasons for Swiss courts' judgments in the applicant's case does not show that they paid any particular heed to this balance.

277. The Vaud cantonal courts did not even mention, let alone discuss at any length, the effect of the conviction on the applicant's rights under Article 10 of the Convention or its domestic-law equivalent, Articles 16 and 36 of the 1999 Constitution of the Swiss Confederation (see paragraphs 30 and 31 above).

278. For its part, the Swiss Federal Court was content to say, in point 5.1 of its judgment (cited in paragraph 26 above), that by section 106(2) of the Federal Court Act 2005 (see paragraph 51 above) it was not required to consider whether the lower courts had breached the applicant's rights under the Swiss Constitution or the Convention as the applicant had not pleaded the point in sufficient detail. This is hard to reconcile with point 6 of that judgment, in which that court found that the applicant had relied on his right to freedom of expression under Article 10 of the Convention, and proceeded to examine whether his conviction had been compatible with that Article. However, in discussing that point it only analysed the conviction's foreseeability and aim: to protect the rights of the Armenians. It said nothing about the conviction's necessity in a democratic society, and did not engage in any discussion of the various factors that bear on that point.

279. In view of this, the Court finds that it must carry out that balancing exercise itself.

280. Taking into account all the elements analysed above – that the applicant's statements bore on a matter of public interest and did not amount to a call for hatred or intolerance, that the context in which they were made was not marked by heightened tensions or special historical overtones in Switzerland, that the statements cannot be regarded as affecting the dignity of the members of the Armenian community to the point of requiring a criminal law response in Switzerland, that there is no international law obligation for Switzerland to criminalise such statements, that the Swiss courts appear to have censured the applicant for voicing an opinion that diverged from the established ones in Switzerland, and that the interference took the serious form of a criminal conviction – the Court concludes that it was not necessary, in a democratic society, to subject the applicant to a criminal penalty in order to protect the rights of the Armenian community at stake in the present case.

281. There has therefore been a breach of Article 10 of the Convention.

282. It also follows that there are no grounds to apply Article 17 of the Convention (see, *mutatis mutandis*, *United Communist Party of Turkey and Others*, § 60; *Soulas and Others*, § 48; and *Féret*, § 82, all cited above).

IV. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

283. The applicant complained that the wording of Article 261 *bis* § 4 of the Swiss Criminal Code was too vague. He relied on Article 7 § 1 of the Convention, which provides, in so far as relevant:

> "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. ..."

284. The Chamber found that the complaint under Article 7 of the Convention did not raise any separate issue from those examined by it in connection with the complaint under Article 10. There was therefore no need to examine separately its admissibility or merits.

285. The applicant argued that this ruling was erroneous. While he did benefit from the protection of Article 10 of the Convention, a separate finding under Article 7 that genocide denial did not amount to a criminal offence would be of great significance as a matter of principle.

286. With regard to the merits of the complaint, the applicant noted that a previous case concerning statements similar to his had resulted in an acquittal. Bearing in mind that the Swiss Council of States had not come to an agreement on whether the events of 1915 and the following years had constituted genocide, and that there did not exist a decision by a competent court finding that these events had amounted to one, the applicant, with his legally-oriented mind, could not have predicted that denying that this was the case would be an offence under Swiss law and that he could be convicted of such acts.

287. The Swiss Government agreed with the Chamber's ruling on this point, and referred to their submissions regarding the lawfulness of the interference with the applicant's right to freedom of expression.

288. None of the third parties made submissions on this point.

289. The Court finds that the complaint under Article 7 of the Convention amounts to a re-statement of the claim under Article 10 that the law serving as basis of the applicant's conviction was not sufficiently foreseeable, with which it dealt at length (see paragraphs 137-40 above). It does not therefore require separate examination.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

290. Article 41 of the Convention provides:

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

A. Damage

291. In the Chamber proceedings, the applicant claimed 20,000 euros (EUR) in respect of pecuniary damage, without specifying the nature of the damage. He also sought EUR 100,000 in respect of non-pecuniary damage. The Swiss Government argued that the applicant had not proved that he had sustained any pecuniary damage, particularly as he had not showed that he had paid the fine of 3,000 Swiss francs (CHF) or the sum of CHF 1,000 that he had been ordered to pay to the Switzerland-Armenia Association. As regards non-pecuniary damage, the Swiss Government submitted that the finding of a breach of Article 10 would in itself constitute just satisfaction.

292. The Chamber held that the claim in respect of pecuniary damage had not been sufficiently substantiated and that the finding of a violation of Article 10 of the Convention was sufficient to remedy any non-pecuniary harm that the applicant's conviction could have caused him.

293. Before the Grand Chamber, the applicant reiterated the claims that he had made in the Chamber proceedings.

294. The Swiss Government referred to the arguments that they had put forward in the Chamber proceedings and invited the Grand Chamber to uphold the Chamber's ruling on this point.

295. The Grand Chamber fully agrees with the Chamber's assessment. Accordingly, it finds that the applicant's claim in respect of pecuniary damage must be rejected in full and that the finding of a breach of Article 10 of the Convention constitutes sufficient just satisfaction for any non-pecuniary damage suffered by the applicant.

B. Costs and expenses

296. In the Chamber proceedings, the applicant sought reimbursement of EUR 20,000 allegedly incurred in travel expenses by himself, his lawyer and his experts. The Swiss Government contended that no award was to be made to the applicant under this head, since his claim was not sufficiently substantiated. In the alternative, they argued that a sum of CHF 9,000 would cover all costs and expenses for the proceedings before the domestic courts and the Court.

297. The Chamber, having regard to the documents in its possession and the Court's well-established case-law on this point, found that the applicant's claim was not sufficiently substantiated and dismissed it.

298. Before the Grand Chamber, the applicant reiterated his initial claim and sought an additional EUR 15,000 in respect of counsel's fees and transportation and accommodation costs allegedly incurred in connection with the hearing before the Grand Chamber.

299. The Swiss Government referred to the arguments that they had put forward in the Chamber proceedings and invited the Grand Chamber to uphold the Chamber's ruling on this point. They went on to note that the applicant had not submitted any documents in support of his claim for costs and expenses for the Grand Chamber proceedings, and invited the Grand Chamber to reject it.

300. The Grand Chamber fully agrees with the Chamber's ruling in respect of the claim for costs and expenses in the Chamber proceedings. It further notes that the applicant has neither provided a proper breakdown of his claim for costs and expenses in respect of the Grand Chamber proceedings nor submitted any documents in support of this claim. Having regard to the terms of Rule 60 § 2 of the Rules of Court and paragraph 21 of the Practice Direction on Just Satisfaction Claims, and noting that under the Court's case-law an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred (see, as a recent authority, *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 166, ECHR 2014), the Grand Chamber rejects these claims in full.

FOR THESE REASONS, THE COURT

1. *Joins*, by fourteen votes to three, the question whether Article 17 of the Convention is to be applied to the merits of the complaint under Article 10 of the Convention;

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

3. *Holds*, by thirteen votes to four, that there are no grounds to apply Article 17 of the Convention;

4. *Holds*, by sixteen votes to one, that there is no need to examine separately the admissibility or merits of the complaint under Article 7 of the Convention;

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

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

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 15 October 2015.

Johan Callewaert	Dean Spielmann
Deputy to the Registrar	President

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

(a) Partly concurring and partly dissenting opinion of Judge Nußberger;

(b) Joint dissenting opinion of Judges Spielmann, Casadevall, Berro, De Gaetano, Sicilianos, Silvis and Kūris;

(c) Additional dissenting opinion of Judge Silvis, joined by Judges Casadevall, Berro and Kūris.

D.S.
J.C.

PARTLY CONCURRING AND PARTLY DISSENTING OPINION OF JUDGE NUSSBERGER

Debates on history as part of freedom of expression

Assessing, evaluating and commenting on historical events are prerequisites for living peacefully together in society, being conscious of what has happened in the past and assuming responsibility where necessary. There is not one historical truth that could remain permanently immutable. On the contrary, new research and new discoveries of documents and evidence may shed new light on what has been deemed to be an uncontested view. Therefore, debate and discussion about history is an essential part of freedom of expression and should in principle never be curtailed in a democratic society, especially not by defining taboos on what events have to be excluded from free assessment in public debate or by establishing certain "official views" that must not be contested.

Nevertheless, limits may be necessary if debate on history degenerates into the incitement of hatred against a specific group and is used exclusively in order to attack the dignity of others and to violate their most intimate feelings. The most famous example is Holocaust denial, which has been made a criminal offence in several jurisdictions (compare, for instance, the legislation in Germany, Austria and Belgium as outlined in paragraph 91 of the judgment). Such measures have been generally accepted in the Court's case-law (see paragraphs 209-12 of the judgment).

Seen against this background the finding of a violation in the present case raises important questions about the consistency of the Court's case-law. Why should criminal sanctions for denial of the characterisation of the massacres of Armenians in Turkey in 1915 as "genocide" constitute a violation of freedom of expression, whereas criminal sanctions for Holocaust denial have been deemed compatible with the Convention?

Points of dissent with the majority's approach

I have voted in favour of finding a violation in this case. But concerning the crucial question of the distinction between Holocaust denial and denial of the genocide of the Armenian people in 1915, I can accept neither the answer given by the majority of the Chamber (paragraph 117 of the Chamber judgment) nor the answer given by the majority of the Grand Chamber (paragraphs 242-43 of the judgment).

I do not agree that there has been a substantive violation of freedom of expression in the present case. In my view there has only been a procedural violation, which is due to the lack of legal certainty and the lack of balancing of the rights involved (compare, as examples of procedural

violations of Article 10 of the Convention, *Association Ekin v. France*, no. 39288/98, § 58, ECHR 2001-VIII, and *Lombardi Vallauri v. Italy*, no. 39128/05, § 46, 20 October 2009). The conflict between the applicant's freedom to doubt the veracity of what is considered to be the "historical truth" and the protection of the Armenians' sense of their historical identity and their feelings should have been resolved in a clear and foreseeable way by the Swiss legislation. Article 261 *bis* § 4 of the Swiss Criminal Code, however, fails to do so. And the Swiss courts were unable to make up for this deficiency.

Distinction between the Court's case-law on Holocaust denial and the present case

The Chamber and the Grand Chamber relied on different arguments in order to distinguish the present case from cases involving Holocaust denial. The Chamber expressed doubts as to the existence of a "general consensus" on the question whether the events that took place during 1915 and subsequent years in Turkey could be characterised as "genocide" of the Armenian people. On this basis it drew a distinction between the criminal sanctions imposed on account of the applicant's speeches and cases concerning denial of crimes relating to the Holocaust (see paragraph 117 of the Chamber judgment). Although the Chamber stated that it was not its task to evaluate historical events (see paragraph 99 of the Chamber judgment), its reasoning seems to be based on the assumption of a different degree of certainty about what happened in Turkey in 1915 and in Germany during the Nazi regime. This approach might be (mis-)understood as an assessment of the validity of knowledge about historical facts.

The majority of the Grand Chamber distance themselves from this approach and argue that "the justification for making [Holocaust denial] a criminal offence lies not so much in that it is a clearly established fact..." (paragraph 243 of the judgment). Instead, they see the context as the relevant element, referring to geographical and historical factors (paragraphs 242-48 of the judgment), as well as to the time factor (paragraphs 249-50 of the judgment). According to this view, the States where the prohibition of Holocaust denial has been deemed compatible with the Convention are those which have "experienced the Nazi horrors, and which may be regarded as having a special moral responsibility to distance themselves from the mass atrocities that they have perpetrated or abetted ..." (paragraph 243 of the judgment). The majority are unable to find such a link of responsibility between Switzerland and the events that took place in the Ottoman Empire (see paragraph 244 of the judgment). Furthermore, the majority refer to the time factor and argue that the lapse of time between the commission of atrocities and the resurgence of a controversial debate attenuates the effects of critical statements.

I cannot agree with this approach. For me it is not only "laudable, and consonant with the spirit of universal protection of human rights, ... to seek to vindicate the rights of victims of mass atrocities regardless of the place where they took place"(paragraph 246 of the judgment), but this is wholly sufficient to justify legislation of this kind. It is a "choice of society" (see *S.A.S. v. France* [GC], no. 43835/11, § 153, ECHR 2014 (extracts)) which the Court has to accept. Legislation expressing solidarity with victims of genocide and crimes against humanity must be possible everywhere, even if there are no direct links to the events or the victims, even if a long period of time has elapsed, and even if the legislation is not directly aimed at preventing conflicts. Each society must be free to settle the conflict between free and unrestricted debate on historical events and the personality rights of victims and their descendants in accordance with its vision of historical justice in the case of what is alleged to be a genocide.

The choice of society, however, has to be based on a transparent and open democratic debate in society and has to be laid down in law in such a way as to make it clearly foreseeable what statements are allowed and what statements are not only taboo, but attract criminal sanctions. Doubts about criminal responsibility may suffocate historical debate from the very outset, and may cause historians not to touch upon a certain subject any more. The legislation on Holocaust denial in Germany, Austria, and Belgium which the Court has assessed so far (see paragraphs 209-12 of the judgment) has been unequivocal in this context. All the relevant laws directly refer to the "National Socialist regime" (see the references to the relevant provisions in paragraph 91 of the judgment). In France the legislation refers to denial of crimes against humanity, as defined in Article 6 of the Charter of the International Military Tribunal, annexed to the London Agreement of 8 August 1945 (see paragraph 91 of the judgment), thus likewise making it clear which historical events are meant.

Procedural violation of Article 10 of the Convention

Contrary to the situations referred to above, the legislative process in Switzerland was not focused on the "Armenian question". Instead, it took the form of a general debate on prohibiting denial of genocide and crimes against humanity, in which this aspect was only mentioned as an example (compare the documents on the legislative process in paragraphs 37-38 of the judgment, as well as the explicit analysis of the legislative process by the Swiss courts in paragraphs 22-26 of the judgment). Neither was the example of the Armenian genocide taken up in the text of Article 261 *bis* § 4 of the Swiss Criminal Code.

The criminal provision of Article 261 *bis* § 4 is worded in such a way that it is unclear whether the courts applying the provision have to decide themselves on the characterisation of a historical event as "genocide" and, if

so, on what basis. This insurmountable difficulty is amply illustrated by the decisions of the Swiss courts. While international law and Swiss national law provide a clear definition of "genocide" (see paragraphs 47 and 52-54 of the judgment) on which the courts can rely, they struggle to determine which methodology to use in order to reach a decision on the legal characterisation of an event dating so far back in history (reference to scientific literature, reference to political statements by State bodies and international institutions, and so on – see paragraphs 22-26 of the judgment). They are confronted with the problem that there is neither a judgment of an international court nor unanimity in the debate at national and international level, be it among academics or politicians. Thus, the Swiss Federal Court cannot but refer to what it calls "enough of a general consensus, especially among historians" (point 4.3. of the Swiss Federal Court's judgment, quoted in paragraph 26 of the judgment). Can that be sufficient for a criminal conviction for an opinion which doubts the characterisation of "genocide"?

In my view this illustrates that the Swiss legislature has failed to balance the rights protected under Article 8 and those protected under Article 10 as far as the debate on the events in Turkey in 1915 is concerned. In such a sensitive area it cannot be sufficient to legislate on the conflicting rights in the abstract without reference to the specific historical case. This is the relevant difference between the present case and the cases involving Holocaust denial, where the limits of historical debate were clearly defined on the basis of national legislation and where the courts could therefore take the legal characterisation of the Holocaust as "genocide" as the starting-point for their assessment of criminal responsibility. Leaving substantial doubts in such an important debate endangers freedom of expression more than is necessary in a democratic society.

Therefore I have voted in favour of finding a (procedural) violation of Article 10 of the Convention, and also in favour of carrying out a separate examination of the case under Article 7 of the Convention.

JOINT DISSENTING OPINION OF JUDGES SPIELMANN, CASADEVALL, BERRO, DE GAETANO, SICILIANOS, SILVIS AND KŪRIS

(Translation)

1. We are unable to agree with the conclusion that there has been a violation of Article 10 of the Convention in the present case.

2. First of all, we note the decidedly timid approach on the Court's part in reiterating the Chamber's position that it is not required to determine whether the massacres and deportations suffered by the Armenian people at the hands of the Ottoman Empire can be characterised as genocide within the meaning of that term in international law, but also that it has no authority to make legally binding pronouncements, one way or the other, on this point (see paragraph 102 of the judgment). That the massacres and deportations suffered by the Armenian people constituted genocide is self-evident. The Armenian genocide is a clearly established historical fact.[1] To deny it is to deny the obvious. But that is not the question here. The case is not about the historical truth, or the legal characterisation of the events of 1915. The real issue at stake here is whether it is possible for a State, without overstepping its margin of appreciation, to make it a criminal offence to insult the memory of a people that has suffered genocide. In our view, this is indeed possible.

3. That being so, we are unable to follow the majority's approach as regards the assessment of the applicant's statements (I). The same applies to the impact of geographical and historical factors (II), the implications of the time factor (III) and of the lack of consensus (IV), the lack of an obligation to criminalise such statements (V), and the assessment of the balancing exercise performed by the national authorities (VI).

I. Assessment of the applicant's statements

4. Our dissent mainly concerns the majority's understanding of the applicant's statements (see paragraphs 229-41 of the judgment). His particularly pernicious speech and its consequences have been played down throughout the judgment. While the statements in issue do not necessarily constitute speech falling within the scope of Article 17 of the Convention –

1. For an in-depth analysis of both the existence of the crimes and the intentional element on the part of those who perpetrated them, see Hans-Lukas Kieser and Donald Bloxham, in *The Cambridge History of the First World War*, Cambridge, Cambridge University Press, 2015, Vol. I, "Global War", Ch. 22 (Genocide), pp. 585-614

although some of us are of the view that they do – such statements, as we understand them, amount to a distortion of historical facts going well beyond mere denial of the Armenian genocide in terms of its legal characterisation. The statements in question contain an intent (*animus*) to insult a whole people. They are a gross misrepresentation, being directed at Armenians as a group, attempting to justify the actions of the Ottoman authorities by portraying them almost as acts of self-defence, and containing racist overtones denigrating the memory of the victims, as the Federal Court rightly found. To the extent that it sought to discredit the "obvious", the speech in question – as was unequivocally confirmed by the applicant at the hearing – can even be said to constitute a call, if not for hatred and violence, at least for intolerance towards Armenians. Far from being historical, legal and political in nature, the applicant's speech depicted the Armenians as the aggressors of the Turkish people and described as an "international lie" the use of the term "genocide" to refer to the atrocities committed against the Armenians. Furthermore, the applicant claimed to be a follower of Talaat Pasha, one of the protagonists in these events, who was described at the hearing as "the best friend of the Armenians" (*sic*). These statements, in our view, overstep the limits of what might be acceptable under Article 10 of the Convention.

5. In this way, the case concerns quite simply the limits of freedom of expression. Applying in turn the various requirements of Article 10 of the Convention, we have no difficulty in finding that there was an interference and that it was lawful. In its decision of 9 March 2007 the Lausanne District Police Court found that the applicant had denied the Armenian genocide by justifying the massacres. The Federal Court, in its judgment of 12 December 2007, dealt at length with the *mens rea* of the offence (motives of racial discrimination – points 5.1 and 5.2), concluding that the findings of fact "provide sufficient evidence of the existence of motives which, above and beyond nationalism, can only be viewed as racial, or ethnic, discrimination". The applicant was prosecuted under Article 261 *bis* of the Criminal Code, a provision that does not in itself raise any issues in terms of its content and its legitimacy in relation to the values safeguarded by the Convention. The courts examined the facts and assessed the applicant's statements. The applicant was aware that making the offending statements rendered him liable to punishment under Article 261 *bis* of the Code. This Article, moreover, pursues the legitimate aims of protecting the rights of others and preventing disorder.

II. Impact of geographical and historical factors

6. Beyond this aspect, we believe that the methodology applied by the majority is problematic in places. This is especially true of the "geographical and historical factors" discussed in detail in

paragraphs 242-48 of the judgment. Minimising the significance of the applicant's statements by seeking to limit their geographical reach amounts to seriously watering down the universal, *erga omnes* scope of human rights – their quintessential defining factor today. As has been forcefully asserted by the Institute of International Law, the obligation for States to ensure the observance of human rights is an *erga omnes* obligation; "it is incumbent upon every State in relation to the international community as a whole, and every State has a legal interest in the protection of human rights" (Resolution on "The Protection of Human Rights and the Principle of Non-intervention in Internal Affairs of States", *Yearbook of the Institute of International Law*, 1989, vol. II, p. 341, Article 1). In a similar vein, the Declaration and Programme of Action adopted by the World Conference on Human Rights in Vienna states that "the promotion and protection of all human rights is a legitimate concern of the international community" (UN doc. A/CONF/123, I, paragraph 4, 1993).

7. Clearly, this universalist approach contrasts with that adopted by the majority in the present judgment. Drawing all the logical inferences from the geographically restricted approach apparently adopted by the majority, one might come to the view that denial in Europe of genocides perpetrated in other continents, such as the Rwandan genocide or the genocide carried out by the Khmer Rouge regime in Cambodia, would be protected by freedom of expression without any limits, or with scarcely any. We do not believe that such a vision reflects the universal values enshrined in the Convention.

III. Impact of the time factor

8. Similar problems are raised, in our view, by the emphasis on the time factor (see paragraphs 249-54 of the judgment). Are we to infer that in twenty or thirty years' time, Holocaust denial itself might be acceptable in terms of freedom of expression? How can this factor be squared with the principle that statutory limitations are not applicable to war crimes and crimes against humanity?

IV. Lack of consensus

9. The lack of consensus on which the majority base their findings in paragraphs 255-57 could at the very most be seen as a further factor broadening the Swiss authorities' margin of appreciation. At the risk of repeating ourselves, we consider that a legislature is perfectly entitled to criminalise statements such as those made by the applicant. The question of consensus, as a limit to the national authorities' margin of appreciation, would arise only if there were a consensus that criminalising such conduct was explicitly forbidden. That is not the case, however.

V. Lack of an obligation to make a criminal offence

10. With regard to the finding that there was no obligation on Switzerland to criminalise the applicant's statements (see paragraphs 258-68), we confess to having serious doubts as to the relevance of the reasoning. Can it not be maintained, on the contrary, that a (regional) custom is gradually emerging through the practice of States, the European Union (Framework Decision 2008/913/JHA) or ECRI (Policy Recommendation no. 7)? We would also note that beyond Europe, the United Nations Committee on the Elimination of Racial Discrimination has repeatedly recommended criminalising negationist discourse. Can all these developments be disregarded at a stroke by examining the case in terms of an alleged conflict of obligations?

11. Besides these developments, which point in the opposite direction to the approach pursued by the majority, it should be noted that the Court of Cassation of the Canton of Vaud emphasised in its judgment of 13 June 2007 that the particularity of Swiss anti-racism legislation was that the national parliament had decided that, in the case of genocide and other crimes against humanity in particular, the law should go beyond the minimum standards set by the 1965 International Convention on the Elimination of All Forms of Racial Discrimination. In our opinion, a legislature is perfectly entitled to criminalise statements such as those made by the applicant. The Swiss national parliament, following lengthy debates, took the view that speeches such as those given by the applicant deserved to attract criminal penalties. We consider that the need to criminalise such conduct in a democratic society is a matter falling within the State's margin of appreciation in the present case.

VI. Balancing of the rights at stake

12. Lastly, as regards the balance struck between the different rights at stake (see paragraphs 274-80 of the judgment), we consider that the Federal Court did an excellent job, producing a measured, detailed and reasoned judgment. It devoted point 6 to freedom of expression as enshrined in Article 10 of the Convention, holding as follows:

> "... the appellant is in essence seeking, by means of provocation, to have his assertions confirmed by the Swiss judicial authorities, to the detriment of the members of the Armenian community, for whom this question plays a central role in their identity. The applicant's conviction is thus intended to protect the human dignity of members of the Armenian community, who identify themselves through the memory of the 1915 genocide. Criminalisation of genocide denial is, lastly, a means of preventing genocides for the purposes of Article I of the Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature in New York on 9 December 1948 and approved by the Federal Assembly on 9 March 2000 ..."

13. There was therefore a proper balancing exercise in this case. Accordingly, there is no justification for the conclusion in paragraph 280.

14. In short, we are persuaded that there has been no violation of Article 10 of the Convention in the present case.

ADDITIONAL DISSENTING OPINION OF JUDGE SILVIS, JOINED BY JUDGES CASADEVALL, BERRO AND KŪRIS

1. This additional dissenting opinion concerns mainly the majority's vote in favour of not applying Article 17 of the Convention. As is stated in the joint dissenting opinion on the finding of a violation under Article 10 of the Convention, some of the judges subscribing to that dissent would have preferred the application of Article 17. I am among those judges respectfully in disagreement with the majority on this issue.

2. It is true that, in relation to genocide denial and (other) forms of hate speech, the Strasbourg approach to Article 17 has not been uniform. In his essay in honour of Sir Nicolas Bratza, Judge Villiger grouped the existing cases into four categories, with four different approaches.

3. The first of these consists of the direct application of Article 17 so that the application is there and then declared inadmissible. An illustration of this is the oft-cited decision of the Commission in the case of *Glimmerveen and Hagenbeek v. the Netherlands* (nos. 8348/78 and 8406/78, decision of 11 October 1979, Decisions and Reports (DR) 18, p. 187). The applicants were proponents of strongly racist views, with a political programme which the Commission considered contrary to the text and spirit of the Convention, and which would contribute to the destruction of human rights. By reason of Article 17, the applicants could not claim the protection of Article 10. The same approach has been taken by the Court in certain cases, notably *Norwood v. the United Kingdom* ((dec.), no. 23131/03, ECHR 2004-XI). *Garaudy v. France* ((dec.), no. 65831/01, ECHR 2003-IX) is another example of this approach, where the analysis stops short with the finding that Article 17 applies, and the complaint under Article 10 is rejected as inadmissible *ratione materiae*. This approach remains current, as is shown by recent case-law (for example, *Kasymakhurov and Saybatalov v. Russia*, nos. 26261/05 and 26377/06, 14 March 2013). It is worth noting that the *Kasymakhurov and Saybatalov* case can be seen as a response to the criticism that once Article 17 enters the scene, it signals the absence of any proper legal analysis. The Court set out its assessment of the applicants' political views (those of the fundamentalist group Hizb ut-Tahrir) in some detail, giving its reasons for withdrawing the protection of Articles 9, 10 and 11 through the application of Article 17.

4. The second approach is a combined approach, which has been used in a series of cases in which the applicant either engaged in Holocaust denial, and/or other anti-Semitic speech, and/or the propagation of Nazi-type ideas (see, for example, *Kühnen v. Germany*, no. 12194/86, Commission decision of 12 May 1988, DR 56, p. 205). Here Articles 10 and 17 are combined, in the sense that the case is subjected to the standard Article 10 § 2 analysis. At

the "necessity" stage, Article 17 is invoked, leading to the conclusion that the application is manifestly ill-founded (without merit, but not outside the scope of Article 10).

5. These two approaches are not mutually exclusive, though, as the case of *Molnar v. Romania* ((dec.), no. 16637/06, 23 October 2012) shows. Pursuing the first approach outlined above, the Court stated in that case that since the applicant's actions were incompatible with democracy and human rights, he could not rely on Article 10. That was not its final word, however. It completed its examination of the case on an "even assuming" basis: even assuming that there had been an interference with the applicant's freedom of expression, this had been justified under the second paragraph of Article 10.

6. The third group in this typology is made up of cases where Article 17 might have been applied, but was not, as is exemplified by the case of *Leroy v. France* (no. 36109/03, 2 October 2008). The applicant in that case had been convicted of condoning terrorism because of a cartoon that he had drawn based on the terrorist attacks on the World Trade Center and published two days later. Following his conviction for condoning terrorism, he complained under Article 10 of the Convention. The Court was not persuaded by the Government's argument that the case should be considered beyond the scope of Article 10 – in essence, it distinguished it from the more typical Article 17 cases already referred to, where the hateful, injurious intent of the person had been unequivocal. I should add that the Court ultimately held that the interference with the applicant's freedom of expression had been justified, and the sanction applied proportionate.

7. Finally, and even if this approach might not be genuinely different, in certain cases the Court's approach has been to leave open the question of Article 17 until it has examined the merits of the case, and then to decide. This can be seen in the case of *Soulas v. France* (no. 15948/03, 8 July 2008) and also *Féret v. Belgium* (no. 15615/07, 17 July 2009). Both cases involved restrictions on racist, Islamophobic speech that the Court ultimately held to be justified. Having reached this conclusion, it added that the expressions in question did not justify the application of Article 17, almost as an afterthought. This may be seen as somewhat putting the cart before the horse.

8. A characteristic aspect of the Strasbourg approaches to Article 17 is that the Court has kept its options open. There is more than one tool in the box, to be used as the need is seen to arise in an individual case. I think it can also be said that the Court has made rather sparing use of Article 17. Outside of what are recognised as the most egregious and odious forms of hate speech, the Court tends to find the answer to complaints of restrictions on freedom of expression within the boundaries of Article 10. In the present case the Court has found that the question whether Article 17 is to be applied must be joined to the merits of the applicant's complaint under Article 10 of the Convention, taking as the decisive point under Article 17

whether the applicant's statements *sought to stir up hatred or violence*. To my mind racist speech and genocide denial, combined with the intent to insult others or make others suffer, may as such be characterised as an activity aimed at the destruction of any of the rights and freedoms set forth in the Convention, within the meaning of Article 17. This was the position of the Court in *Hizb Ut-Tahrir and Others v. Germany* (no. 31098/08, § 72, 12 June 2012). The Court has held, in particular, that a "remark directed against the Convention's underlying values" is removed from the protection of Article 10 by Article 17 (see *Lehideux and Isorni v. France*, 23 September 1998, § 53, *Reports of Judgments and Decisions* 1998-VII, and *Garaudy*, cited above). Thus, in *Garaudy* (ibid.), which concerned, in particular, the conviction for denial of crimes against humanity of the author of a book that systematically denied such crimes perpetrated by the Nazis against the Jewish community, the Court found the applicant's Article 10 complaint incompatible *ratione materiae* with the provisions of the Convention.

9. I consider that the intent to insult the memory of the victims of the Armenian Genocide was manifest in this case and that the applicant's statements as such were directed against the Convention's underlying values. However, the specific procedural position of the Grand Chamber was that the Article 10 complaint had already been declared admissible by the Chamber. The application of Article 17 could therefore not have led to the inadmissibility of the Article 10 complaint. In that context I would have preferred an approach involving the application of Article 17 on the merits, before entering the domain of Article 10. Only after having dealt with Article 17 on the merits should the Court in my view have adopted the subsidiary approach of applying Article 17 as a guiding principle for the interpretation of Article 10 at the "necessity" stage of Article 10 § 2.

10. [Judge Silvis only:] Finally, having voted against finding a violation, I could not agree that the finding of a violation would sufficiently compensate the applicant. Admittedly, this position is merely a matter of taste; of course I do agree with the decision not to award the applicant any monetary compensation.