FACING LIBERTY: THE VICTORY OF RATIONAL ARGUMENTATION AND ITS CONSEQUENCES

(ÖZGÜRLÜKLE YÜZLEŞMEK: RASYONEL TARTIŞMANIN ZAFERİ VE BUNUN SONUÇLARI)

Maxime GAUIN
Researcher at AVİM

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

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

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

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

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

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

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

Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Decision of the French Constitutional Council (2012)

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

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

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

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

HELD :

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

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

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

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

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

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

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

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

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

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The misuse of the Swiss anti-racist law

The failed attempts

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

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

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

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

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

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

The Perinçek case

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

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

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

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

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

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

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

The ECHR crushed the accusation of "racism"

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

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

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

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

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

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

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

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

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

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

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

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

The ECHR made a clear distinction with the Shoah

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

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

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

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

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

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

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30 Maxime Gauin and Pulat Tacar, "State Identity, Continuity, and Responsibility: The Ottoman Empire, the Republic of Turkey and the Armenian Genocide: A Reply to Vahagn Avedian," *European Journal of International Law*, XXIII-3, August 2012, pp. 821-835, http://ejil.org/pdfs/23/3/2308.pdf

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

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

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