A LOOK AT THE PERİNÇEK V. SWITZERLAND CASE: EXAMINATION OF A LAWSUIT TO UNDERSTAND THE CURRENT STATE OF THE ARMENIAN-TURKISH DISPUTE AND PROSPECTIVE DEVELOPMENTS

(PERİNÇEK-İSVIÇRE DAVASI'NA BİR BAKIŞ: ERMENİ-TÜRK İHTİLAFININ GÜNCEL VE GELECEKTEKİ OLASI DURUMUNUN ANLAŞILMASI İÇİN BİR DAVA ANALİZİ)

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Abstract: *As the first 'genocide denial' case before the European Court of Human Rights (ECHR) other than those on the denial of Jewish Holocaust, Perinçek v. Switzerland is a case that unveils philosophical, legal and political complexities related to the subtle relationship between freedom of expression and what can be generically called hate-speech. It is a case that reveals the problem of legitimate limitation on freedom of expression that the recent trend of the legislation of memory laws brings with it. In addition, the verdict of the ECHR, and the arguments of the parties and the governments of Armenian and Turkey as the third parties in the ECHR Grand Chamber are important indicators of the current state of the Armenian-Turkish dispute that has evolved around 1915 events and the prospective developments. The final verdict of the ECHR Grand Chamber is likely to shape the future framework of the dispute. The examination of almost ten-year long legal process demonstrates that memory laws in their present form are imperfect and vulnerable to abuse. The Perinçek v. Switzerland case reveals the imprecise employment of the term genocide in popular and academic literature and discourse that results in ambiguities as well as misuses. The Case also constitutes an example of the 'genocide politics' notwithstanding the moral discourse that dominates the debates around 1915 events. Moreover, the ECHR verdict is an international document with outmost significance that serves as a corrective to the hegemonic 'myths' on the 1915 events that are effects of the employment of the 'Jewish Holocaust model'. Nevertheless, the ECHR Grand Chamber hearing displays that the Armenian side will continue impose the characterization of the 1915 events as the 'Armenian Holocaust'.*

Keywords: *Perinçek v. Switzerland case, European Court of Human Rights, 1915 events, genocide.*

Öz: *Avrupa İnsan Hakları Mahkemesi'nin (AİHM) baktığı, Yahudi Holokost'nun inkârı haricindeki, ilk 'soykırım inkârı' davası olan Peinçek-İsviçre Davası, ifade özgürlüğü ve nefret söylemi olarak adlandırılabilecek olgu arasındaki hassas ilişkiye dair felsefi, hukuki ve siyasi karmaşıklığı ortaya çıkarmıştır. Bu dava, güncel bir cereyan olan hafıza yasalarının mevzuatı ile birlikte beliren ifade özgürlüğünün meşru sınırları ile ilgili sorunsalı gündeme getirmiştir. Buna ilaveten, AİHM kararı, tarafların ve üçüncü taraflar olarak Ermeni ve Türk hükümetlerinin AİHM Büyük Daire'deki savları, 1915 olayları etrafında şekillenmiş olan Ermeni-Türk ihtilafının güncel hali ve müstakbel durumu hakkında önemli göstergelerdir. AİHM Büyük Daire'nin son kararı, ihtilafın gelecekte alacağı niteliği belirleyen etkenlerden olacaktır. Yaklaşık on seneye yayılmış olan dava süreci, şu anki halleriyle hafıza yasalarının kusurlu ve suiistimale açık olduklarını göstermektedir. Perinçek-İsviçre Davası, popüler ve akademik literatür ve söylemde soykırım kavramının özensiz kullanımının iltibas ve suiistimale neden olduğunu göstermektedir. Dava, aynı zamanda, 1915 olayları hakkındaki tartışmaları belirleyen ahlak temelli söyleme karşın, 'soykırım siyaseti'ne örnek teşkil eden bir olaydır. Bunun yanında, AİHM karar metni, 'Yahudi Holokostu modeli'nin 1915 olayları üzerine giydirilmesi sonucu ortaya çıkan hegemonik 'mit'lerin ortadan kaldırılmasına yarayacak çok önemli bir uluslararası belge niteliğindedir. Bununla birlikte, AİHM Büyük Daire görülen duruşma göstermektedir ki, Ermeni tarafı 1915 olaylarını 'Ermeni Holokostu' olarak nitelendirmeye devam edecektir.*

Anahtar Kelimeler: *Perinçek-İsviçre Davası, Avrupa İnsan Hakları Mahkemesi, 1915 olayları, soykırım.*

Introduction

In May, July and September 2005, Turkish citizen Doğu Perinçek[1] attended various conferences in Lausanne, Opfikon and Köniz in Switzerland. In these conferences, Perinçek publicly rejected the characterization of the 1915 events as genocide and labelled genocide allegations as an "international lie". He delivered similar speeches on various occasions in France and Germany during the same period. On 15 July 2005, Switzerland-Armenia Association sued Perinçek for publicly denying the 'Armenian genocide'. On 9 March 2007, the Laussane Police Court judged that Perinçek's "motives were of a racist tendency and did not contribute to the historical debate",[2] and found Perinçek guilty of racial discrimination within the meaning of the Swiss Penal Code Article 261bis, paragraph 4.[3]

Following the judgment of the Lausanne Police Court, Perinçek appealed first to Criminal Cassation Division of the Vaud Cantonal Court and then to Swiss Federal Court. His appeals were rejected by these courts. After no means were left in this country, Perinçek brought a case to the European Court of Human

1 Doğu Perinçek (born in 1942) is a Doctor of Law and a well-known political figure in Turkey. He began his political carrier in his university years in the Faculty of Law at Ankara University as one of the leaders of the left-wing student movement of the late-1960's. Since 1970's, he has been leading a Maoist socialist faction known as the *Aydınlıkçılar*. Because of his political activities, Perinçek has been subjected to numerous investigations. Perinçek was convicted eight times and served in the prison for a total of seventeen years. His latest criminal conviction was in 2008 for the alleged conspiracy for the over thrown of the Turkish government. He was released in 2014. He is currently the leader of the *Vatan Partisi* (Homeland Party). Besides his political activities, Perinçek is the author of numerous books.

It would not be wrong to define Perinçek as one of the most idiosyncratic political figures in the recent Turkish political history, who is admired by a small but a devoted group of people and, at the same time, is criticized by the followers of different political ideologies.

2 European Court of Human Rights, *Press Release issued by the Registrar of the Court 370 (2013)* (17 December 2013).

3 Swiss Penal Code Article 261bis on racial discrimination has been in force since 1 January 1995. This article states:

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

Rights (ECHR) against Switzerland. Turkish Government intervened to the case as a third party. On 17 December 2013, The ECHR judged that Swiss authorities had "overstepped the margin of appreciation afforded to them in the present case, which had arisen in the context of a debate of undeniable public interest" and violated Perinçek's right in the meaning of the Article 10 and Article 17 of the European Convention of Human Rights,[4] by five votes to two. The ECHR ruled that there was no "pressing social need" for Perinçek's conviction in a democratic society and therefore.[5] On 17 March 2014, Switzerland requested the ECHR Grand Chamber to take the case. On 2 June 2014, Grand Chamber accepted this request. This time, in addition to the Turkish Government, French and Armenia governments and eight non-governmental organizations also intervened as third parties. The latest hearing was held on 28 January 2015. The Grand Chamber is expected to declare its judgement not earlier than the first months of 2016.

The legal process that began in 2005 and which still has not been finalized is an important case for at least three reasons. As the first case of 'genocide denial' other than denial of Jewish Holocaust before the ECHR, Perinçek v. Switzerland case possesses a great significance with respect to the Articles 10 and 17 of the European Convention of Human Rights that regulate freedom of expression and legitimate restrictions on that freedom. It is a case that unveils philosophical, legal and political complications related to the subtle relationship between freedom of expression and what can be generically called hate-speech and the correlated matters including the limits of freedom of expression that legislation of memory laws brings with them. As an effect,

4 European Convention of Human Rights Article 10 states:

Freedom of expression

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

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

European Convention of Human Rights Article 17 states:

Prohibition of abuse of rights

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.

5 European Court of Human Rights, *Press Release issued by the Registrar of the Court 158 (2014)* (03 June 2014).

Perinçek v. Switzerland case also exposes several practical inconveniences in the laws of the European countries, particularly Switzerland, and their legislation and enforcement. In addition, the verdict of the ECHR and the arguments of the parties and the governments of Armenian and Turkey as the third parties in the courts are important displays of the current state of the Armenian-Turkish dispute on 1915 events and its prospective evolution. The case particularly exhibits different approaches of those who advocate indisputable factuality of the 'Armenian genocide' and of those who advocate a finer examination of the 1915 events and the inherent distinction between the historical and legal approaches.[6] Thirdly, the final judgement of the Grand Chamber is likely to be an important factor that would shape the future framework of the debates within this dispute. The ECHR's judgement in favor of Perinçek will undermine the validity of the attempts to restrict scholarly research and informed debates on the 1915 events. A reverse judgement will be a leverage for those who try to prevent the study and discussion of the 1915 events. The first possibility will have positive consequences for the scholarly exploration of these events, whereas the second possibility will mean further consolidation of the 'Armenian genocide' as an untouchable dogma. Surely, both results will have scholarly and political outcomes.

For the above mentioned repercussions of the Perinçek v. Switzerland case, this article examines the almost ten-year long legal process and the debates it initiated. It evaluates the judgment of the ECHR on 17 December 2013 and the ECHR Grand Chamber hearing on 28 January 2015. The article first reviews a similar trial that began by the appeal of the Switzerland-Armenia Association in 1997 and finalized in 2001 without any criminal conviction. Then, Perinçek's investigation by the Swiss courts, debates that this investigation initiated within Switzerland and the tension that erupted between Switzerland and Turkey are examined. Thirdly, the judgement of the ECHR issued on 17 December 2013 is assessed. Finally, speeches of the representatives of the parties and the third parties at the ECHR Grand Chamber hearing on 20 January 2015 are analyzed. The conclusion section is reserved for the discussion of the significant matters that the review of the legal process that Perinçek's investigation in Switzerland unveiled.

6 As to this point Donald Bloxham rightly states: "genocide is a legal term than a historical one, designed for the *ex post facto* judgments of the courtroom rather than the historian's attempt to understand events as they develop" (Donald Bloxham, "The First World War and the Development of the Armenian Genocide," in *A Question of Genocide: Armenians and Turks at the End of the Ottoman Empire*, eds. Grigor Suny, Fatma M. Göçek and M. Naimark (New York: Oxford University Press, 2011), p. 275. He says legal approach moralizes a conlict, searches for victims and victimizers and ignores causal connections. On the other hand, historical approach aims to understand the historical event, rather than making a judgement.

The Bern-Laupen Court in 2001 and the Swiss National Council's Resolution on the 'Armenian genocide' in 2003

As Perinçek insisted as one of the reasons of the unpredictability of his conviction in different Swiss courts and the ECHR, his case was not the first 'Armenian genocide denial' lawsuit in Switzerland. Approximately four years before Perinçek's case, a similar case was heard by the Bern-Laupen Court.

On 26 September 1995, a committee organized by the Switzerland-Armenia Association[7] deposited a petition to the Swiss Parliament requesting the recognition of the 1915 events as genocide. On 30 January 1996, Coordination of the Turkish Associations in Switzerland appealed to the Federal Chamber with another petition that pleaded not to consider the campaign of the Armenian organizations. On 24 April 1997, Association Switzerland-Armenia filed a criminal complaint against the signatories of this petition with the allegation of violating the Swiss Penal Code Article 261bis.

The District Court of Bern-Laupen asked the Swiss Federal Ministry of Foreign Affairs and then the Institute for Islamic and Middle Eastern Studies at the University of Bern to prepare a report on the state of teaching of the matters related to the Armenians in the Turkish schools to determine the general opinion in the Turkish society about the 'Armenian issue'. The District Court of Bern-Laupen also requested a report on Switzerland's position on the 'recognition of Armenian genocide' from the Swiss Federal Ministry of Foreign Affairs. The report of the Swiss Federal Ministry of Foreign Affairs revealed that there had been three failed attempts in the Swiss Parliament for the 'recognition of Armenian genocide' in 1995, 1998 and 2000. In 2001, the District Court of Bern-Laupen ruled that Turkish Associations in Switzerland did not violate the Swiss Penal Code Article 261bis.

The District Court of Bern-Laupen in its verdict noted that finding evidences to decide for cases based on historical events was not very possible and mentioned the importance of the decisions of the competent international courts for such cases. As such, District Court of Bern-Laupen implied that deciding on historical disputes was within the jurisdiction of the international courts rather than the national ones. The District Court of Bern-Laupen also drew attention to the subjective component of the crime defined by the Swiss Penal Code Article 261bis. By this way, the Court pointed out that the verification of the racist incentive was a must for the establishment of the crime defined by

7 For the official website of the Switzerland-Armenia Association visit, http://www.armenian.ch/index.php?id=1(latest access 06.03.2015).

the Swiss Penal Code Article 261bis. Association Switzerland-Armenia appealed to the higher court in 2002. This appeal was rejected.[8]

Notably, on 16 December 2003, between the trials in the District Court of Bern-Laupen and the Lausanne Police Court, the Swiss National Council accepted a resolution worded as "the National Council acknowledges the 1915 genocide of the Armenians. It requests the Federal Council to acknowledge this and to forward its position by the usual diplomatic channels" by 107 votes to 67 votes. However, the Swiss Federal Council refused to acknowledge the 1915 events as genocide. This disparity, discharging of the Lausanne Police Court's claim on the admission of the factuality of the Armenian genocide by Swiss official bodies, created an ambiguity that refutes the claim of consensus on the factuality of the 'Armenian genocide', as shall be discussed below.

The Lausanne Police Court

In 2005, Switzerland-Armenia Association filed a law suit against Perinçek for 'publicly denying the Armenian genocide'. The Lausanne Police Court took on the investigation of Perinçek for racial discrimination by means of denying the 'Armenian genocide'. In the trial, Perinçek requested an investigation on the alleged factuality of the 'Armenian genocide'. The Lausanne Police Court, however, refused such an investigation by attesting a consensus on the factuality of the 'Armenian genocide' in the Swiss society. It also alleged a wider consensus on this matter by referring to various parliamentary acts, legal publications, statements of Swiss federal and cantonal political authorities, and the resolutions of the Council of Europe and the European Parliament.[9]

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8 Pulat Tacar, *İnsan Hakları Mahkemesi'nde Doğu Perinçek-İsviçre Davası* (İstanbul: Kaynak Yayınları, 2012), pp. 21-28. For the account of the Switzerland-Armenia Association see http://www.armenian.ch/gsa/Pages/Genocide/lawsuit_en.html (latest access, 17.03.2015).

9 However, The European Court of Human Rights refuted Laussane Police Court's claim about Council of Europe's recognition of the Armenian genocide in the merits of its judgement on 17 December 2015 (see, European Court of Human Rights, *Matter of Perinçek v. Switzerland*, Application no. 27510/08, 17 December 2013, at para. 9). As a correction of Lausanne Police Court's manipulative mistake, the ECHR stated that "within the Council of Europe, the question of the atrocities committed against the Armenian people has been the subject of discussions many times", which is obviously different from recognition. The ECHR recalled that "in a declaration dated 24 April 2013 (no. 542, Doc. 13192), for example, some twenty members of the Parliamentary Assembly of the Council of Europe expressed themselves as follows:

Recognition of the Armenian genocide

"[This written declaration commits only those who have signed it]

> Recognition of genocides is an act which contributes to the respect for human dignity and the prevention of crimes against humanity.
>
> The fact of the Armenian Genocide by the Ottoman Empire has been documented, recognised, and affirmed in the form of media and eyewitness reports, laws, resolutions, and statements by the

Notably, the Lausanne Police Court claimed that the 'Armenian genocide' was comparable to the Jewish Holocaust. Eventually, the Lausanne Police Court ruled that Perinçek's speeches were not contributions to historical debate and his rejection of the 'Armenian genocide' was conditioned by a racist intention. Accordingly, the Lausanne Police Court found Perinçek guilty of racial discrimination within the meaning of Article 261bis, paragraph 4 of the Swiss Criminal Code. The Court penalized Perinçek with 90 days and a fine of 100 Swiss francs suspended for two years, with payment of a fine of 3,000 Swiss francs replaceable by 30 days incarceration, and payment of moral damages of 1,000 Swiss francs for the benefit of the Switzerland-Armenia Association.[10]

According to the swissinfo.ch-International Service of the Swiss Broadcasting Corporation,[11] Lausanne Police Court Judge Pierre-Henri Winzap accused Perinçek of being "a racist" and "an arrogant provocateur".[12] The same news portal reported that the co-president of the Swiss-Armenian Association Sarkis Shahinian assessed Lausanne Police Court's judgement as a "great relief" for the Armenian community.[13] Turkish community in Switzerland, on the other hand, showed restrained reaction to the court decision. Those Swiss-Turks interviewed by *Basler Zeitung* Daily stated that they were contended that the trial opened up debates about the Armenian issue. Most of the Turkish media raised criticisms about the judgement. Following the judgement, Turkish Ministry of Foreign Affairs issued a statement partially stating that "the court case was inappropriate, groundless and controversial in every sense... The verdict cannot be accepted by the Turkish people".[14]

United Nations, the European Parliament and Parliaments of the Council of Europe member States, including Sweden, Lithuania, Germany, Poland, the Netherlands, Slovakia, Switzerland, France, Italy, Belgium, Greece, Cyprus, the Russian Federation, as well as the US House of Representatives and 43 US States, Chile, Argentina, Venezuela, Canada, Uruguay and Lebanon.

The undersigned, members of the Parliamentary Assembly, call upon all members of the Parliamentary Assembly of the Council of Europe to take the necessary steps for the recognition of the genocide perpetrated against Armenians and other Christians in the Ottoman Empire at the beginning of the 20th century, which will strongly contribute to an eventual similar act of recognition by the Turkish authorities of this odious crime against humanity and, as a result, will lead to the normalisation of relations between Armenia and Turkey and thus contribute to regional peace, security and stability." (European Court of Human Rights, *Matter of Perinçek v. Switzerland*, Application no. 27510/08, 17 December 2013, at para 29.)

10 European Court of Human Rights, *Matter of Perinçek v. Switzerland*, Application no. 27510/08, 17 December 2013, at para. 9.

11 For the official website of the swissinfo.ch-International Service of the Swiss Broadcasting Corporation, visit http://www.swissinfo.ch/eng (latest access 06.03.2015).

12 "Turkish politician fined over genocide denial", *swissinfo.ch*, http://www.swissinfo.ch/eng/turkish-politician-fined-over-genocide-denial/977094 (latest access 06.03.2015).

13 Ibid.

14 "Swiss and Turkish press mull Perinçek verdict", *swissinfo.ch*, http://www.swissinfo.ch/eng/swiss-and-turkish-press-mull-perin%C3%A7ek-verdict/5772850 (latest access 06.03.2015).

Swiss media's treatment of the judgement was rather ambiguous. *Tages-Anzeiger* Daily, approving the judgement, accused Perinçek of being an arrogant person who deliberately sought provocation in Switzerland. The editorial of the *Le Temps* Daily stated that the Lausanne Police Court's judgement provided the Armenians with "a protection of [their] memory that ha[d] already been recognised for the Shoah victims". *Blick* Daily claimed the Swiss government had to recognize the 'Armenian genocide' after the Lausanne Police Court's "courageous" verdict. *Neue Zürcher Zeitung* Daily penned that the judgement of the Lausanne Police Court was correct. Nevertheless, it also stated that because Perinçek was a Turkish politician and the subject of the trial was relevant to Turkey, the trial was neither meaningful nor necessary in Switzerland. *Neue Zürcher Zeitung* Daily underlined the tension between Switzerland and Turkey caused by Perinçek's conviction. The editorialist of this daily wrote: "nevertheless, the [Swiss] government is still free to avoid using the world 'genocide' out of foreign (trade) considerations".[15] In brief, whereas some Swiss media organs approved the judgement of the Lausanne Police Court, others remained critical to the judgement particularly by calling attention to the negative effects of that judgement on the Swiss-Turkish political and economic relations

Perinçek's Dismissed Appeals to the Criminal Cassation Division of the Vaud Cantonal Court and the Swiss Federal Court

Perinçek brought the judgment of the Lausanne Police Court to the Criminal Cassation Division of the Vaud Cantonal Court. He demanded inquiry on the alleged consensus on the 'Armenian genocide'. On 13 June 2007, the Criminal Court of Cassation of the Cantonal Court of the Canton of Vaud dismissed Perinçek's appeal by stating that the 'Armenian genocide', similar to the Jewish Holocaust, was a proven historic fact that was recognized by the Swiss legislature on the date of the adoption of the Article 261bis of the Swiss Criminal Code. The Court decided that there was no need to refer to works of historians to verify the factuality of the 'Armenian genocide'.

Following this failed appeal, Perinçek appealed to the Swiss Federal Court, the highest court in Switzerland, as the last available Swiss legal authority. Perinçek complaint that the two previous courts did not perform an adequate investigation to determine whether the 1915 events could have been considered as genocide. The Federal Court admitted that Perinçek did not deny massacres and resettlement of the Armenians, however stated that Perinçek represented

15 Ibid.

them as necessary and excusable measures within the circumstances war and accused him of denying the genocidal character of these atrocities. The Federal Court also stated that the task of the Lausanne Police Court was not to conduct historical research, but to observe whether there was a consensus on the genocidal characteristic of the 1915 events in Swiss and wider public opinion. In other words, the Federal Court sustained that the matter was not whether the massacres and resettlement could be identified as genocide but whether these events were accepted as genocide by the public and the historians. Similar to the previous courts, the Federal Court sustained that the 'Armenian genocide' was an apparent and known fact like the Jewish Holocaust. The Federal Court highlighted that Perinçek had stated that he would never change his opinion about the 1915 events even if a non-party commission would decide that these events were genocide as a verification of Perinçek's racist intentions.[16] The Federal Court added that Perinçek was aware of the Swiss law that criminalized the denial of Armenian genocide hence his claim that his criminal conviction was not unforeseeable was not correct. An interesting statement of the Federal Court was that Armenians were a people that define and identify themselves with the 1915 events. Therefore, the Court claimed 'denial of the genocide' or presenting the Armenians as aggressors constituted an offense to the Armenians. Upon these sociological determinations, the Court stated that decision of the Swiss courts was to protect the dignity of the Armenians. Eventually, Federal Court dismissed Perinçek's appeal on 12 December 2007.[17]

Tension between Switzerland and Turkey and the Debates in Switzerland

The Swiss media that drew attention to the negative impact of the Lausanne Police Court judgement on the Swiss-Turkish relations, as mentioned above, was remarking a real situation between Switzerland and Turkey. Following Swiss public prosecutor of Winterthur's questioning of Perinçek on 23 July 2005 for his speech on the day before, the then Turkish Minister of Foreign Affairs Abdullah Gül expressed his protest to Turkish daily *Hürriyet*. Gül deemed the questioning of Perinçek as "unacceptable" and "absolutely contrary to the principle of free speech".[18] Likewise, the Turkish Ministry of Foreign Affairs expressed Turkey's discontent about the investigation of Perinçek to the Swiss authorities with absolute certainty. On 26 July 2005, Turkish MFA

16 Pulat Tacar, *İnsan Hakları Mahkemesi'nde Doğu Perinçek-İsviçre Davası.*

17 For the recount of the process see, see European Court of Human Rights, *Matter of Perinçek v. Switzerland*, Application no. 27510/08, 17 December 2013, at para. 3-9.

18 "Turkey rejects Swiss genocide-denial inquiry", *swissinfo.ch*, http://www.swissinfo.ch/eng/turkey-rejects-swiss-genocide-denial-inquiry/4635066 (latest access, 06.03.2015).

requested an explanation of the investigation of Perinçek from the Swiss Ambassador to Turkey Walter Gyger and presented him a protest note. In the meantime, the Turkish Embassy in Bern met with the Swiss MFA to express Turkey's regret. The press attaché of the Turkish Embassy in Bern told the swissinfo.ch-International Service of the Swiss Broadcasting Corporation (SBC) that Perinçek's investigation by the Swiss authorities was a cause of "discomfort and disappointment in Turkey, and such a measure falls short of freedom of speech and expression which is one of the most fundamental human rights". She added that it was "more regrettable that [the investigation of Perinçek] was launched by the authorities in a friendly country whose reputation for upholding human rights is well known". Few days later, Turkish Ambassador in Bern told the *Neue Zürcher Zeitung am Sonntag* Daily that Perinçek's investigation was "a serious signal to Turks who live or come to Switzerland" that meant that they had to "keep their mouths shut".[19]

As a response to the forceful reaction of Turkey, the Swiss President of the House of Representatives' Foreign-Policy Commission accused Turkey of overreacting and blackmailing Switzerland. He advised Turkey to recognize the 'Armenian genocide' once and for all. Notwithstanding his protest of Turkey for blackmailing Switzerland, he stated: "if Switzerland were to turn its back on Turkey, it would be a bad sign for EU entry" in a way that would threaten Turkey.[20] Nevertheless, his threats did not withhold Turkey from postponing Swiss Minister of Economy Minister Joseph Deiss' visit to Turkey that was scheduled for September. Although Turkey gave another explanation, Switzerland rightly related this postponement with the tension that grew between the two countries.[21] In fact, this was the second instance of the postponement of an official visit of the Swiss authorities by Turkey for the reasons related to Switzerland's stance on the 'Armenian genocide'. When in 2003 the parliament of a western Swiss canton recognized the 1915 events as genocide, Turkey withdrew its invitation to the then Swiss Foreign Minister Micheline Calmy-Rey. Similarly, in June 2005, a Turkish minister postponed his visit to Switzerland to protest a Swiss investigation of a Turkish historian, Yusuf Halaçoğlu, who made speeches similar to those of Perinçek.

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19 "Perinçek once more denies Armenian genocide", *swissinfo.ch*, http://www.swissinfo.ch/eng/perin%C3%A7ek-once-more-denies-armenian-genocide/4645442 (latest access, 06.03.2015).

20 "Swiss-Turkish relations hit new low", *swissinfo.ch*, http://www.swissinfo.ch/eng/swiss-turkish-relations-hit-new-low/4640406 (latest access, 06.03.2015).

21 "Ankara postpones Deiss visit to Turkey", *swissinfo.ch*, http://www.swissinfo.ch/eng/ankara-postpones-deiss-visit-to-turkey/4653360 (latest access, 06.03.2015).

The Swiss Minister of Justice Christoph Blocher visited Turkey about a year later in October 2006. In a meeting with his Turkish counterpart, Blocher, referring to Perinçek's investigation, criticized Article 261bis of the Swiss Penal Code. He stated that "no one would have imagined that this law would have resulted in proceedings against a prominent Turkish historian"[22] and expressed his wish for the re-examination of this article. However, Blocher's statements raised criticisms in Switzerland. Swiss President, President of the Federal Commission against Racism, Minister of Interior, Christian Democrats, Radical Party, Social Democrat Party and Switzerland-Armenia Association blasted Blocher particularly for criticizing, instead of defending, a Swiss law that was legislated by the Swiss people in a foreign country.[23] Yet, when Blocher turned back to Switzerland, he endorsed his statements in Turkey by stressing the need for the freedom of expression of the views that may not appeal to everyone.[24] In October 2006, Swiss Head of the Federal Justice Office Michael Leupold told the *Sonntags Zeitung* Daily that there was no question about the abolishment of the Article 261bis of the Swiss Penal Code but certain changes were necessary. He said Swiss judges should "seek assistance from an international institution or that the relevant clause be struck from the law altogether". Leupold's statement raised objections from some Swiss officials.[25]

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22 "Blocher's remarks cause a storm in Switzerland", *swissinfo.ch*, http://www.swissinfo.ch/eng/blocher-s-remarks-cause-a-storm-in-switzerland/5484770 (latest access, 06.03.2015).

23 "Blocher's remarks cause a storm in Switzerland", *swissinfo.ch*, http://www.swissinfo.ch/eng/blocher-s-remarks-cause-a-storm-in-switzerland/5484770 (latest access, 06.03.2015);

"Expert questions Blocher anti-racism remarks", swissinfo.ch, http://www.swissinfo.ch/eng/expert-questions-blocher-anti-racism-remarks/5486298 (latest access, 06.03.2015);

"Cabinet rebukes justice minister", *swissinfo.ch*, http://www.swissinfo.ch/eng/cabinet-rebukes-justice-minister/5509272 (latest access, 06.03.2015).

24 "Blocher's remarks cause a storm in Switzerland", *swissinfo.ch.*

25 "Ministry re-examines genocide definition", *swissinfo.ch*, http://www.swissinfo.ch/eng/ministry-re-examines-genocide-definition/5562142 (latest access, 06.03.2015).

On 19 December 2006, Swiss Institute of Comparative Law presented a comparative study of the laws of 14 European countries (Germany, Austria, Belgium, Denmark, Spain, Finland, France, Ireland, Italy, Luxembourg, Norway, the Netherlands, the United Kingdom and Sweden) and the United States and Canada about the offence of denial of crimes against humanity with a particular on genocide denial (see, European Court of Human Rights, *Matter of Perinçek v. Switzerland*, Application no. 27510/08, 17 December 2013, at para. 30).

In February 2007, Swiss Interior Minister Pascal Couchepin paid a visit to Ankara to discuss the return of the certain cultural goods.[26] On 4 February 2007, Couchepin told to Swiss Radio that Swiss Government's approach to the 'Armenian issue' was to leaving it to historians. He said that an international commission of historians would "examine the issues and look for the causes of the events of that time-including the massacre".[27] Perinçek's investigation in Switzerland continued to inflame debates on the delicate balance between hate speech and freedom of expression. In March 2007, while Lausanne Police Court was still examining the Perinçek case, the Dean of the Faculty of Law at Geneva University Robert Roth stated that "the lawmakers wanted to assimilate the negation of a historical reality to a racist proclamation". He said that this was controversial because these were two different things. Refering to Perinçek's trial, Roth pointed out the question of the agent that is supposed to make judgements on historical events.[28]

Perinçek's Appeal to the European Court of Human Rights and the Judgement of the ECHR on 17 December 2013

After no means were left in the Swiss legal system, Perinçek applied to the European Court of Human Rights against Switzerland on 10 June 2008. Relying on Article 10 of the European Convention on Human Rights on the freedom of expression, he complained that Switzerland unjustly restricted his freedom of expression. On 18 January 2011, Switzerland handed over its plea to the ECHR. Switzerland claimed that ECHR's task was not to replace the decisions of national courts but to examine their decisions with respect to Article 10 of the European Convention of Human Rights. By emphasizing that this article was legislated on September 25th, 1994 by a referendum, Switzerland asked the ECHR to respect the will of the Swiss people. The ECHR decided to hear Perinçek v. Switzerland as a case on freedom of expression in the meaning of Article 10 and Article 17 of the European Convention of Human Rights. Turkey applied the ECHR to intervene as a third party on 15 September 2011.[29]

Perinçek argued that Article 261bis, paragraph 4 of the Swiss Criminal Code lacked clarity and specification as to whether it was about the "Jewish genocide" or the "Armenian genocide". Perinçek also claimed that because

26 Notably, about a month before Couchepin' visit, a prominent Armenian-Turkish journalist Hrant Dink was assassinated by a 17-year old ultra-nationalist Turkish terrorist.

27 "Couchepin builds bridges with Turkey", *swissinfo.ch*, http://www.swissinfo.ch/eng/couchepin-builds-bridges-with-turkey/5708638 (latest access, 06.03.2015).

28 "Genocide denial trial raises many questions", *swissinfo.ch*, http://www.swissinfo.ch/eng/genocide-denial-trial-raises-many-questions/5762840 (latest access, 06.03.2015).

29 See footnote 4 for articles 10 and 17 of the European Convention on Human Rights.

Swiss Criminal Code Article 261bis, paragraph 4 does not refer to the Armenian genocide, his conviction amounted to the disregard of the principle of *nulla poena sine lege* (no penalty without a law). He also underlined that in 2001 Bern-Laupen Court in Switzerland made an opposite judgment on a similar case. Thirdly, Perinçek reminded the ECHR that the former Swiss Minister of Justice during a visit in Turkey in 2006 criticized the Article 261bis, paragraph 4 of the Swiss Criminal Code. Based on these, Perinçek claimed that his conviction was unpredictable.

Swiss Government responded to Perinçek's claim of unpredictability by arguing that the wording of Article 261bis, paragraph 4 of the Swiss Criminal Code had sufficient clarity. Switzerland also claimed that Perinçek should have known Swiss National Council's resolution adopted in 2002.[30] According to Switzerland, the existence of a consensus on the factuality of the Armenian genocide and its recognition by more than twenty national parliaments and the European Parliament were also sufficient to predict the possibility of conviction due to the denial of the 'Armenian genocide'. Switzerland also recalled that Perinçek had declared he would not change his position, even if a neutral commission affirms the factuality of the 'Armenian genocide' as a testimony of his awareness of the Swiss standard of denial. Eventually, the ECHR dismissed Perinçek's claim of unpredictability.

Perinçek accused the Lausanne Police Court of ignoring his theory and views by overlooking the documents he submitted and the scholarly views that reject the characterization of the 1915 events as genocide. As such, Perinçek blamed the Lausanne Police Court of impartiality and hostility against himself. According to Perinçek, the unratified Armenia-Turkey Protocols signed in Zurich on 10 October 2009 refutes Switzerland's claim of Armenian genocide as a "clearly established fact". Perinçek also mentioned Bernard Accoyer's report to the French National Assembly on 18 November 2008 on the inadequacy of court decisions on matters concerning the imputation of certain historic events. Against these accusations, in addition to the above mentioned arguments, Switzerland argued that Armenian genocide is used as a classical example in the study of genocides.

The ECHR stated that it was not possible to speak of a general consensus on the 'Armenian genocide', also by drawing attention to different opinions even within the political bodies in Switzerland.[31] Likewise, the ECHR underlined

30 However, as stated above, Swiss Federal Council refused to accept this resolution or to issue a similar one.

31 The ECHR stated that "while the National Council, i.e. the lower house of the federal parliament, has officially acknowledged the Armenian genocide, the Federal Council has refused to do so on several occasions" (European Court of Human Rights, *Matter of Perinçek v. Switzerland*, Application no. 27510/08, 17 December 2013, at para. 115).

that only about twenty nations out of more than 190 in the world have recognized the 'Armenian genocide' and sometimes these recognitions came not from the governments, but "but only from their parliament or from one of its chambers".

Notably, the ECHR stated that:[32]

> 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.

More substantively as to the 'general consensus', the ECHR underlined that:[33]

> Genocide' is a well-defined legal concept…for the violation to be described as genocide, the members of a targeted group must not only be chosen as a target because of their membership in this group, but it is necessary at the same time that the actions committed be accomplished with the intention of destroying, in whole or in part, the group as such (*dolus specialis*). It is thus a very strict legal concept, which is, moreover, difficult to prove. *The Court is not convinced that the 'general consensus' to which the Swiss courts have referred, to justify the conviction of the applicant, can bear on these very specific points of law* (emphasis added).

In line with this perspective, against the attempt of Switzerland to draw parallel between the Jewish Holocaust and the 1915 events, the ECHR argued that the Armenian case was "clearly distinct from cases bearing on denial of the Holocaust crimes"[34] because Holocaust was an established fact both through historical research and international courts. The ECHR stated that:[35]

32 Ibid, at para. 117.

33 Similarly, in its press release issued on 13.12.2013, the ECHR further stated that:

The existence of a "genocide", which was a precisely defined legal concept, was not easy to prove. The Court doubted that there could be a general consensus as to events such as those at issue, given that historical research was by definition open to discussion and a matter of debate, without necessarily giving rise to final conclusions or to the assertion of objective and absolute truths. (European Court of Human Rights, *Press Release issued by the Registrar of the Court 370 (2013)* (17 December 2013).

34 European Court of Human Rights, *Matter of Perinçek v. Switzerland*, Application no. 27510/08, 17 December 2013, at para. 117.

35 European Court of Human Rights, *Press Release issued by the Registrar of the Court 370 (2013)* (17 December 2013

> In this connection, the Court clearly distinguished the present case from those concerning the negation of the crimes of the Holocaust. In those cases, the applicants had denied the historical facts even though they were sometimes very concrete, such as the existence of the gas chambers. They had denied the crimes perpetrated by the Nazi regime for which there had been a clear legal basis. Lastly, the acts that they had called into question had been found by an international court to be clearly established.

Consequentially, the Court said that whereas Holocaust denial is,[36]

> …today the main driving force of anti-Semitism [and] still a current phenomenon, and against which the international community must be firm and vigilant. One cannot affirm that the dismissal of the description of 'genocide' for the tragic events that occurred in 1915 and the following years might have the same repercussions.

Accordingly, the ECHR made a very important observation on the non-existence of a phenomenon that could be called as 'anti-Armenianism' that refutes the claim that mere 'denial of Armenian genocide' causes threats to the peaceful existence of the Armenians.

The ECHR admitted that Perinçek's statements such as his thesis of "international lie" were provocative. Yet, the ECHR stated that ideas, which are upsetting, shocking or disturbing including those about historical events were also under the protection of the Article 10 of the European Convention of Human Rights. Underlining that whether Perinçek's statements had the "purpose of inciting to hatred or violence" was an important basis for the application of the Article 17 of the European Convention of Human Rights, the ECHR said that "the dismissal of the legal characterisation of the events of 1915 was not likely to in and of itself to incite hatred against the Armenian people".[37] The ECHR judged that Perinçek's speech was "of a nature at once

36 European Court of Human Rights, *Matter of Perinçek v. Switzerland*, Application no. 27510/08, 17 December 2013, at para. 119.

37 As mentioned above, Perinçek's statements about his admiration of Talat Paşa was one of the arguments of the Swiss courts in justifying his criminal conviction. As to this point, the ECHR stated:

> The Court does not rule out that the said identification, to a certain extent, with the perpetrators of the atrocities can be placed on equal footing with an attempt to justify the acts committed by the Ottoman Empire…However, it does not consider itself obligated to respond to this question, given that the applicant has not been prosecuted nor punished for having tried to "justify" a genocide in the meaning of , paragraph 4 of Article 261bis of the Criminal Code (European Court of Human Rights, *Matter of Perinçek v. Switzerland*, Application no. 27510/08, 17 December 2013, at para. 53).

historic, legal and political" and "were not likely to incite hatred or violence".[38] Thus, considering the "public interest that the [Perinçek's] speech takes on", ECHR judged that "the domestic authorities' margin of assessment was reduced". In its press release, the ECHR stated that:[39]

> …The United Nations Human Rights Committee had expressed its conviction that "[l]aws that penalize[d] the expression of opinions about historical facts [were] incompatible with the obligations that the Covenant [on Civil and Political Rights] impose[d] on States parties ..." and that the "Covenant [did] not permit general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events".

Notably, the ECHR affirmed that it was inappropriate "to apply to certain words concerning historic events the same severity as [if they had been spoken] only a few years previously". According to the ECHR, this principle "contributes to the efforts that every country is called on to debate openly and calmly its own history". Elsewhere in its report, the ECHR stated that "the passage of time must necessarily be taken into account to assess the compatibility with freedom of expression of a ban, for example of a book".

Against Lausanne Police Court's emphasis on his refusal to revise his ideas on the 1915 events even if an impartial commission would determine these events were genocide, Perinçek raised the issue that his attitude was based on international law. He said, not the 'impartial commissions' but valid courts could make a judgement on the character of the 1915 events. He repeated that he did not deny the tragic 1915 events, however, he believed, these events could not be characterized as genocide. By denying the legal character of the crime of genocide, Perinçek insisted, Swiss judiciary digressed the framework of the 1948 Genocide Convention. Perinçek sustained that unlike crimes established by a valid court decision such as the Jewish Holocaust, expressing views on historical events that not have been established by a valid court shall not be criminalized. He also accused Lausanne Police Court of not taking important international judicial opinions such as the 'Bosnian genocide' into

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38 The ECHR observed that:

> [Perinçek] had never in fact been prosecuted or convicted for inciting hatred. Nor had he expressed contempt for the victims of the events. The Court therefore found that Mr Perinçek had not abused his right to openly discuss such questions, however sensitive and controversial they might be, and had not used his right to freedom of expression for ends which were contrary to the text and spirit of the Convention (European Court of Human Rights, *Press Release issued by the Registrar of the Court 370 (2013)* (17 December 2013).

39 Ibid.

consideration and therefore missing important legal considerations. Moreover, Perinçek blamed Lausanne Police Court of not taking into account the differences between different types of crimes such as crimes against humanity, war crimes and genocide, hence of causing contradictions in terms. The ECHR acknowledged that Perinçek' rejection of the characterization of the 1915 events as genocide was due to legal reasoning.

Perinçek argued his conviction was neither "necessary in a democratic society" nor did it serve any "urgent social need". He claimed that his expressions were not of the quality that would damage the dignity of the Armenian community. On the contrary, he said, Switzerland's judgement was attacking the honor of the Turkish community. Perinçek argued that Switzerland unjustly assessed his words as nationalist and racist statements. He insisted that his theory had a legal character and was inspired by the international law and in particular by the 1948 Convention.

Switzerland argued that Perinçek's conviction was justified for the "the protection of the reputation and the rights of others, in the particular case the honour of the victims whom the applicant publicly described as instruments of imperialist powers, against the attacks by whom the Turks were only defending their country".[40] It sustained that Perinçek's description of the Armenians as aggressors and his identification of the Armenian genocide as an "international lie" and admiration of Talat Pasha would harm the identity of the Armenians. According to Switzerland, the latter was a particular demonstration of Perinçek's racist and nationalist character and motives. Switzerland insisted that Perinçek's confirmation that he would not change his opinion on the issue demonstrates his ideas stem from his racist view, not from historic inquiry.

The ECHR judged that whereas Switzerland's claim on the protection the honor of the families and friends of Armenian victims of the 1915 events might have justifiable aspects, there should be a balance between the "requirement of protecting the rights of the third parties, namely the honour of the relatives of the Armenian victims" and the freedom of expression, and rejected the argument that Perinçek's words posed a serious threat to the public order. The ECHR stated that "all the other Nations have apparently not felt an 'urgent social need' to provide such a law" as the invalidation of Switzerland's claim of "urgent social need".

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40 European Court of Human Rights, *Matter of Perinçek v. Switzerland*, Application no. 27510/08, 17 December 2013, at para. 73.

The ECHR stated that only two countries, namely, Luxembourg and Spain criminalize "denial of genocide, without limiting themselves to the crimes committed by the Nazi regime". However, it added that the Spanish Constitutional Court later on ruled that "simple denial of a genocide crime was not a direct incitement for violence and the simple dissemination of conclusions regarding the existence or non-existence of specific facts, without making a value judgment on them or on their illegal nature, was protected by scientific freedom".[41] The ECHR, on the other hand, underlined that Luxemburg foresaw the punishment of denşial of genocide only if it is recognized by the Luxemburg court or international court.[42] The ECHR also recalled that the French Constitutional Court also judged that 'genocide denial law' was unconstitutional and this law was contradicting freedom of expression and freedom of research. The ECHR stated that "the decision of the [French] Constitutional Court shows perfectly that there is, a priori, no contradiction between the official acknowledgement of certain events such as genocide, on the one hand, and the unconstitutionality of criminal penalties for individuals calling the official stance into question, on the other".[43] Overall, the ECHR said that:[44]

> Governments that have acknowledged the Armenian genocide – the vast majority of them through their parliaments – have not deemed it necessary to adopt laws laying down criminal punishment, since they are aware that one of the main aims of the freedom of expression is to protect minority points of view likely to encourage debate on questions of general interest that have not been fully established".

The ECHR cited the UN Human Rights Committee, in its General Comment no. 34 that says "covenant does not permit general prohibitions on the expression of a mistaken opinion or an incorrect interpretation of past events".[45] Also, mentioning the Bern-Laupen District Court case in 2001, the ECHR expressed its "doubts that the sentencing of the applicant was required by a 'pressing social need'".[46] Notably, the press release of the ECHR on the hearing of the Perinçek v. Switzerland case issued on 17 December 2013 stated that:[47]

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41 European Court of Human Rights, *Matter of Perinçek v. Switzerland*, Application no. 27510/08, 17 December 2013, at para. 121.

42 Ibid, at para. 39.

43 Ibid, at para. 123.

44 Ibid, at para. 123.

45 Ibid, at para. 124.

46 European Court of Human Rights, *Press Release issued by the Registrar of the Court 370 (2013)* (17 December 2013).

47 Ibid.

The Court underlined that the free exercise of the right to openly discuss questions of a sensitive and controversial nature was one of the fundamental aspects of freedom of expression and distinguished a tolerant and pluralistic democratic society from a totalitarian or dictatorial regime.

In conclusion the ECHR judged as follows:[48]

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

In the 28 January 2015 Grand Chamber hearing, Perinçek and his lawyers, first and foremost, underlined that the essence of the case was the freedom expression of the minority views that might appear controversial within a debate of public interest.

The Hearing at the ECHR Grand Chamber on 28 January 2015

On 17 March 2014, Swiss Government applied to bring the judgement of the ECHR to the Grand Chamber. On 2 June 2014, Switzerland's request was accepted. Turkey applied as a third party on 12 September 2014. Between June and September 2014, fourteen other applications were delivered to the Grand Chamber. Four of them were rejected. The governments of Armenia and France were among the accepted applicants. Only Armenian and Turkish governments were permitted to make an oral presentation in the public hearing. The hearing was held on 28 January 2015, which was broadcasted on internet on the same day.[49]

In the 28 January 2015 Grand Chamber hearing, Perinçek and his lawyers, first and foremost, underlined that the essence of the case was the freedom expression of the minority views that might appear controversial within a

48 European Court of Human Rights, *Matter of Perinçek v. Switzerland*, Application no. 27510/08, 17 December 2013, at para 129.

49 See, http://www.echr.coe.int/Pages/home.aspx?p=hearings&w=2751008_28012015&language=lang&c=&py=2015 (latest access 06.03.2015).

debate of public interest. Perinçek's counsels Mehmet Cengizer and Laurent Pech stressed that defining the truth about a controversial historical event was not within the scope of the current trial. Pech emphasized the gentle balance between the freedom of expression and the legitimate and necessary restrictions on that freedom. He recalled that freedoms must be the rule and restrictions must be exception. Pech, emphasizing the importance of the freedom of expression, stated that:[50]

> Indeed, freedom of expression can not tolerate state-defined historical truths that infringe it on the basis of an undue broadening of the legal concept of genocide as well as the retroactive application of this concept according to a majority at a given time in a respective country. Many historians over the past years have defended the view that in a free state, it is not up to any political authority to define historical truth, or to define by law a historical truth of which the application may have serious consequences and repercussions for intellectual freedom.

In his second-round speech, Pech stated that:[51]

> …I think that the rationale of your court is indeed to protection the main values on which the European Court of Human Rights is founded, which primarily means that *minority and unpopular opinions should be shielded from any tyranny of a majority* (emphasis added).

Underlying that genocide is a legal term defined by the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide*, Perinçek's counsels explicated once again that their client does not deny the forced resettlement and the mass killings perpetrated against the Armenian people in 1915 onwards, but reject the idea that these events could be characterized as genocide.

Disqualifying the charges of racism and ultra-nationalism, Perinçek's counsel Mehmet Cengiz reminded the Grand Chamber of the political career of Perinçek and the awards granted to him by some European organizations combating racism. He also recalled previous judgements of the ECHR on Perinçek v. Turkey cases. Pench mentioned several inaccuracies of the Swiss interpretation of international law, the ambiguity of the Swiss Criminal code while reflecting on the current state of legal regulations with respect to genocide denial.

50 http://www.echr.coe.int/Pages/home.aspx?p=hearings&w=2751008_28012015&language=lang&c=&py=20 (latest access 06.03.2015).

51 Ibid.

Spokespersons of Switzerland besides restating Switzerland's above mentioned views, made several noteworthy points. The agent of the Swiss Government Frank Schürmann stated that the legislation of the Article 261bis of the Swiss Criminal Code caused many debates in Switzerland and finally it was put into force after a referendum in which 54.6% of the voters voted for the legislation. In a way admitting the controversial nature of the Article 261bis, Schürmann also stated that there had been sixteen attempts in the Swiss Parliament to revise this article, the last one of which was still pending. In defense of the Article 261bis, Schürmann stated that Perinçek was the only case of conviction with respect to this article, which, however, is a half-truth; as mentioned above the Bern-Laupen Court in 2001 investigated several members of the Coordination of the Turkish Associations for violating this law for the same reason with Perinçek, yet that time, the suspects were not found guilty. Schürmann in defense of Switzerland's thesis of "general consensus" on the factuality of the 'Armenian genocide' stated that common people would not understand the legally distinct definition of the genocide and the differences between denial and rejection. Daniel Thürer, the other counsel of Switzerland, mentioned the delicate balance between international and national court and argued that international courts must leave a space for the judgements of the former. He also emphasized the Swiss tradition of democracy as another reason of the necessity of non-interference of the international courts to the national court judgements.

At the Grand Chamber hearing, Turkish Government was represented by the counsel Stefan Talmon. Nullifying the Swiss argument of the 'general consensus', Talmon highlighted that neither Switzerland recognizes the 1915 events as genocide nor had Swiss courts made a judgement on that issue. He recalled the ECHR's judgements on Dink v. Turkey[52] and Güçlü v. Turkey[53] that stated debates on the 1915 events were indisputably of public interest and argued that, therefore, the discussion that Perinçek initiated was also a contribution to that debate. He also argued that 'genocide denial' *per se* could neither be regarded as racial discrimination nor could it be perceived as accusing Armenian for lying or falsifying the history. Talmon rejected the alleged identity between the Jewish Holocaust and the 'Armenian genocide' by recalling that the former is an established historical fact that was also determined by a valid international court. Moreover, he underlined that whereas at the present time Holocaust Denial is a vehicle of anti-Semitism, the same could not be said for the 'denial of the Armenian genocide' since there is no

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52 European Court of Human Rights, *Affaire Dink c. Turquie*, Requêtes nos 2668/07, 6102/08, 30079/08, 7072/09 et 7124/09, 14 September 2010.

53 European Court of Human Rights, *Case of Bayram Güçlü v. Turkey*, Application no. 31535/04, 18 February 2014.

phenomenon of "anti-Armenianism". Remarkably, he argued that Armenian might find the rejection of the characterization of the 1915 events as genocide distressful, however such subjective sentiments can not mean the dignity of the Armenians are violated. As to that point, Talmon stressed the need for general standards instead of subjective claims.

The content of the speeches made by the representatives of the Government of Armenia were plainly different from those of the speeches of the other parties. The content displayed that the intent of the Armenian Government was also different from the intentions of the other parties. Armenia's Prosecutor General Gevorg Kostanyan, who was the first speaker in the name of the Armenian Government, delivered a short speech. This short speech displayed that the Armenia Government perceived the case not as a trial on freedom of speech and the legitimate limitation of this freedom, but as a platform to decide about the character of the 1915 events.[54] The speeches of the representatives of the Armenian Government which were basically on the 'factuality of the Armenian genocide' also revealed that the intent of the Armenian Government was to use the Grand Chamber as a platform for spreading propaganda. Armenian Government's employment of high profile lawyers Geoffrey Robertson QC[55] and Amal Clooney can be interpreted as a choice relevant to this intent.

The speeches of the representatives of the Armenian Government which were basically on the 'factuality of the Armenian genocide' also revealed that the intent of the Armenian Government was to use the Grand Chamber as a platform for spreading propaganda. Armenian Government's employment of high profile lawyers Geoffrey Robertson QC and Amal Clooney can be interpreted as a choice relevant to this intent.

The content of the speeches of Robertson QC and Clooney were identical, yet

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54 In his speech, Gevorg Kostanyan stated:

> [Armenian nation] has never asked this court to pronounce on the suffering it has witnessed. But nor, did it expect this court to ever allow the deniers to find a safe haven in its pronouncements, which are already now used for propaganda purposes of falsifying the history. As an intervener, Armenia's role is to point to the correct principals, under which this case should be decided and to indicate errors that have infected the lower court judgment. Whether or not its conclusion was correct does not matter as much as certain misstatement of fact which have comforted genocide deniers throughout the world
>
> (http://www.echr.coe.int/Pages/home.aspx?p=hearings&w=2751008_28012015&language=lang&c=&py=20, latest access 06.03.2015).

55 Robertson QC published a book titled *An Inconvenient Genocide: Who Now Remembers the Armenians?* in 2014. For a critique of this book, see Jeremy Salt's article titled "A Lawyer's Blundering Foray into History" in this volume

the wording of Robertson QC was strikingly aggressive, derogatory and manipulative. For example, Robertson QC alleged that supporters of Perinçek were "waving flags and fists" outside of the court building in a way to imply that Armenians were under a threat conditioned by racial hatred. However, in reality, a relatively large group of Turks made a silent demonstration outside of the court building just like a smaller group of Armenians at the same place. In his speech, Robertson QC's also directed outrageous insults on the person of Perinçek that were hardly suitable to the norms of courtesy in a court-room.[56]

Robertson QC in his speech stated that:[57]

> Armenia's compelling interest today, as you have seen in its submissions, is to refute certain suggestions in the judgement that there was any doubt over whether the 1915 massacres and deportations amounted to genocide. We are all agreed today that's not the issue. The court in the first paragraph of its judgement on the law, said "we're not called upon to decide that." And yet it went on in paragraphs 115 to 117 to actually cast doubt if it was a genocide and then to comfort genocide deniers, a human rights court comforting genocide deniers by errors.

However, both Robertson QC and Clooney dedicated much of their speeches to validate the 'factuality of the Armenian genocide' with the help of delusive expressions such as "the Euphrates River filled with blood". Clooney in the beginning of her speech stated:[58]

> The most important error made by the court below is that it cast out on the reality of the Armenian genocide that people suffered hundreds years ago…The court itself admitted that it was quote not required to determine whether the massacre suffered by the Armenians amounted to genocide. This is also the position conceded by the applicant and by the government of the Turkey and the government of Armenia agrees. In addition to being unnecessary, the lower court's comments on genocide were totally unsupported and made without even inviting Armenia's assistance.[59]

56 Robertson QC, during his speech referred to Perinçek as "this man, Perinçek" with a facial expression that openly displayed a disgust. He called Perinçek a racist and a designated him a "laughable, rather than dangerous" character.

57 http://www.echr.coe.int/Pages/home.aspx?p=hearings&w=2751008_28012015&language=lang&c=&py=20 (latest access 06.03.2015).

58 Ibid.

59 Armenian Government did not apply to intervene as a third party to the previous ECHR trial.

Notwithstanding the subject of the case before the Grand Chamber, Clooney accused Turkey of restricting freedom of expression by the following words. Interestingly, these words have been the most widely circulated quotation from the Grand Chamber hearing in the Armenian media.[60]

> But I would like to finally note that Armenia ,as a third party intervening in this case, has not made submissions on the merits and is not here to argue against freedom of expression any more than Turkey is here to defend it. This court knows very well how disgraceful Turkey's record on free expression is. You found against the Turkish government in 224 separate cases on freedom of expression grounds. So although this case involves a Turkish citizen, Armenia has every interest in ensuring that its own citizens do not get caught in the net that criminalizes speech too broadly and the family of Mr. Hrant Dink know that all too well.

In her closing remarks, Clooney accused Perinçek of spreading anti-Armenian hatred with the following words:[61]

> The comments in the lower court judgement on genocide dishonor the memory of the Armenians who perished in the Ottoman Empire a century ago and assist those who will deny the genocide in order to incite racial hatred and violence.

In the second-round speeches delivered by the parties of Perinçek and Switzerland, Perinçek's counsel Laurent Pech made several important points. Pech explained why he did not reply to the Armenian Government by the following words that captures the irrelevance of the Armenian Governments approach to the case:[62]

> I would like to focus on the main points raised by the representatives of the Swiss government- I will not refer to the observations made on behalf of the Armenian government because I could not identify any relevant legal arguments for settling the pending case.

Pech criticized Switzerland's argument on the common people's incomprehensibility of the legally distinct definition of the genocide and the differences between denial and rejection. He argued that criminal law shall not be dependent on the population's comprehension or incomprehension of certain

60 http://www.echr.coe.int/Pages/home.aspx?p=hearings&w=2751008_28012015&language=lang&c=&py=20 (latest access 06.03.2015).

61 Ibid.

62 Ibid.

legal terms. As such, Pech defended the autonomy of law and legal processes by pointing out the problem of flexing the law according to the commonly held views. He stated that:[63]

> The notion of general consensus was mentioned on several occasions to back up the thesis according to which the aforementioned events have to be classified as genocide, but I agree on the approach that we should rather refer to the definition of the UN Convention of 1948 than relying on the somewhat subjective notion of "general consensus" which only serves a public majority opinion. It was also argued that the public would not understand the legal distinction which is made between the denial, the challenge of a historical fact and the opinion according to which certain historical events do not qualify as genocide under international penal law. I consider that we should not apply criminal law depending on whether or not the population understands certain legal terms.

He also underlined that it was "wrong to say that there were no States which refused to recognize [Armenian genocide]" by referring to the decision of the German Federal Court on 13 January 2015 that refused to explicitly recognize the 1915 events as genocide "within the meaning of international penal law" also by underlining that the German Federal Government was against "a retroactive application of the 1948 UN Convention". Pech also referred to a similar declaration of the Australian government in 2014.

As mentioned above, one of the arguments of Switzerland was genocide was an inherent constituent of the Armenian identity and for that denial of genocide was an insult on the dignity of the Armenians. As to that argument, Pech stated the following that reveals the inconvenience of making claims based on subjective concerns:[64]

> Considering the concept of genocide as the exclusive means and thus indispensable to prosecute such comparable crimes on the grounds that these might be a threat to the identity as a group is in our opinion not in line with the freedom of expression because *the concept of identity is extremely vague, and accepting this would leave the door wide open to abuse*. The Swiss courts have often referred to identity in relation to dignity. This concept of identity should be only used with big caution since *one does not know how a court could objectively decide which historical tragedies have contributed to the creation of a national*

63 Ibid.

64 Ibid.

> *identity or which ones are at the heart of a national identity or community*. And why should it be prohibited to use another characterization than that approved by one house of parliament or a jurisdiction of a third country (emphasis added).

Conclusion

Doğu Perinçek's investigation and conviction in Switzerland for publicly rejecting the characterization of the 1915 events as genocide and the following legal processes expose several philosophical, legal and political complexities. It is also a case that demonstrates the current state of the dispute on the 1915 events. The final verdict of the ECHR Grand Chamber is likely to shape the prospective framework of the dispute.

Perinçek v. Switzerland case unveils the inherent complications of memory laws.[65] First of all, memory laws bring about the difficult question regarding the justifiable limitations on the freedom of expression. The clauses that tie the restriction of freedom of expression to the condition of intention of racial discrimination, spreading hate, disturbing social order etc. hardly deliver a solution to the problem arising from the challenge of determining the very fine line between criticism and what can be generically called hate speech. Consequently, memory laws remain exposed to abusive instrumentalization by those who seek to illegitimate and silence views that displease them by asserting subjective claims about their ethnic, national, religious or other identities.

Certainly, identities have both objective and subjective elements. Yet, recognition of the subjective elements of identities does not eliminate the existence of this inherent fallacy of the memory laws. Perinçek v. Switzerland case illustrates this paradox. It is true that 'genocide' is the main constituent of the contemporary Armenian identity. However, when this is used as a justification to restrict the study of the 1915 events and to inhibit the expression of views that are perceived as offensive, it turns to be an unacceptable impediment on research and freedom of expression, hence an oppressive weapon. As to this point, Laurent Pech's above mentioned statement about the vagueness of the concept of identity that permits abuse is of crucial importance. Law must clearly distinguish objective and explicit offenses from subjective

65 The legislation of the memory laws has been accelerated since 1990s. These laws, not only but particularly, aim at preventing the denial of the Jewish Holocaust, which is perceived as one of the main expressions of anti-Semitism.

claims of insult. Unless such a distinction is made, memory laws are likely to become tools in the hands of those who are predisposed to abuse them.

The Perinçek v. Switzerland case also reveals the problem that stems from the indifference to the precise definition of the crime of genocide and the ways in which that crime shall be established. Switzerland's insistence on the supposed consensus on the 'factuality of the Armenian genocide' is a striking example of this hazy usage of the term. Not only in the popular literature, but also in the academic one, the term genocide is erroneously used in a way to refer to any mass killing or atrocity. However, genocide is a strictly legal term that is defined very narrowly. An act can only be labeled as genocide only if that act targets a national, ethnical, racial or a religious group (not, for example, a political group) only because of the national, ethnic, racial or religious identity of that group (not, for example, because of an economic or a security reason, but because of a hatred directed to national, ethnic, racial or religious identity of that group) with the intention (not as an undesired side effect of, for example, resettlement or war time circumstances) destroying that group in whole or in part. To put it simply, a crime can be called genocide only if the criminal act targets a national, ethnical and is motivated by a kind of racial hatred and executed with the intention to destroy that group. As such, the term genocide signifies a crime that is separate from a war crime or a crime against humanity. Furthermore, because genocide is a legal term that defines a crime, as the Article 6 of the Convention on the Prevention and Punishment of the Crime of Genocide adopted by the General Assembly of the United Nations on 9 December 1948 states an act can be established as the crime of genocide only by the judgement of a competent tribunal. This means the authority to decide whether an act is genocide are neither historians nor parliaments. Likewise, general public opinion cannot be considered to be a judge on this matter, as well. Therefore, Perinçek's counsel in the ECHR Grand Chamber Laurent Pech's criticism of Switzerland's argument on the public consensus is a very important correction. Yet, what Pech has not said is that historians must focus on understanding the 1915 events, instead of focusing on making

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judgements on the character of those events. Today many historians working on the 1915 events have become parties to the ongoing debate on the proper characterization of the 1915 events. The unproductive results of the partisanship of the historians reflect themselves in the rather low quality research on the 1915 events that often include deliberately falsified arguments based on fabricated or distorted data.[66]

As explained above, Turkey's stern reaction to Perinçek's investigation and conviction raised concerns in Switzerland that followed by debates in that country on the Swiss Criminal Code Article 261bis and the necessity of Perinçek's investigation. Battle of words and reciprocal intimidations between Switzerland and Turkey also followed. Swiss-Turkish friction and the debates in Switzerland reveal important things about 'genocide politics' and, by extension, the insincerity of the arguments based on morality. One of the arguments of the Swiss courts was to protect the dignity of the Armenians that 'genocide denial' threatens. As such, Swiss courts implied a kind of moral responsibility, in addition to more practical concerns on public order, which indeed was an offshoot of the former. However after Turkish reaction, debates began in Switzerland. As the review above shows Switzerland's economic and political interests were at the core of those debates. This not only shows that when economic, political or other interests are at stake, 'moral responsibilities' may be overlooked by the states and other actors, but also demonstrates the political nature of the 'genocide debate', which is obvious, but often obfuscated by the utilization of a moral discourse. Without admitting the political nature of the 'genocide politics', Armenian-Turkish dispute and the attitudes of the third parties cannot be fully understood. In brief, as the Swiss attitude reveals, today not the higher moral imperatives but political interests determine the attitudes of state and non-state actors involved in the dispute on the 1915 events.

As explained above, Pernçek's investigation in Switzerland was initiated by the appeal of the Switzerland-Armenia Association. Likewise, the investigation of the Coordination of the Turkish Associations in Switzerland, in 1997 was also initiated by the appeal of the same organization. This is one of the concrete displays of the significance of the lobby of the Armenian diaspora organizations for the implementation of 'genocide politics'. It seems that Turkey and the

66 Regarding distorted scholarship on the 1915 events, Taner Akçam is a paradigmatic example. As a German citizen of Turkish origin, he has been put in the limelight as a scholar who furiously stands up for the 'Armenian view'. In that, his ethnic origin has been the most important factor; Akçam, defending the 'Armenian thesis' as a 'Turk' certainly has a great 'use-value' for the propagandist circles. For a recent critique of Akçam's scholarship see, Maxime Gauin, "Proving" a 'Crime against Humanity'?", *Journal of Muslim Minority Affairs*, vol. 35(1) (2015): pp. 141-157.

Turkish communities in North America and Europe have recently comprehended the significance of the 'diaspora factor' and began organizing their own lobby. The response of the Armenian diaspora to that is yet to be seen. However, what is most likely is that 'diaspora wars' will become one of the decisive factors of the evolution of 'genocide politics'.

The ECHR, in the merits of its judgement, mentioned some very important points. It recalled the following: 1) there is, indeed, no consensus on the factuality of the 'Armenian genocide, 2) arriving at definitive conclusions and absolute truth in historical scholarship is not possible, 3) genocide is a narrowly defined strictly legal concept, 4) the passage of time must be taken into account while deciding whether usage of a specific terminology would be an offense, 5) the disparity between the 1915 events and the Jewish Holocaust for the attested factuality of the later by a valid court judgement, 6) 'denial of Armenian genocide' *per se* is not spreading hate, racial discrimination or an offense, 7) debates on the 1915 events is to the interest of the public. As such, the merits of the judgement of the ECHR demonstrate another important facet of 'genocide politics'. Put differently, the merits of the judgement of the ECHR show that despite the hegemony of the 'Armenian view' in the popular domain, things change considerably when it comes to the legal domain. The final judgment on Perinçek v. Switzerland is yet to be declared. If the ECHR Grand Chamber confirms the judgement of the lower chamber with the same or similar merits, those who advocate the indisputable factuality of the 'Armenian genocide' and those who attempt to prevent the discussions on the 1915 events that exceed the boundaries they impose will loose much of their credit. This will have positive results for the healthy study of the 1915 events.

Lastly, the intervention of the Armenian Government to the ECHR Grand Chamber hearing as a third party evidently demonstrates the strategy of the Armenian side. Quite obviously, Armenian side not only rejects the acknowledgement of the legal quality of the term genocide, but also attempts to prevent discussion of the 1915 events by imposing it as an undeniable historical fact. Doing that, Armenian side frames the 1915 events as the 'Armenian Holocaust'. Even in an international court, instead of rational and legalistic arguments, Armenian side employs a demagogic rhetoric based on victimhood. A final judgement of the ECHR Grand Chamber that is parallel to the judgement of its lower chamber will invalidate that strategy and pave the way for rational argumentation.

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