the truth will out

Pulat Y. TACAR

MAY 2024
ANKARA

TERAZİ
YAYINCILIK

Pulat Y. TACAR

THE TRUTH WILL OUT

May 2024

TERAZİ
YAYINCILIK

TERAZİ PUBLISHING
Terazi Yayıncılık Bas. Dağ. Dan. Eğt. Org. Mat. Kırt. Ltd. Şti.
Abidin Daver Sok. No. 12/B Daire 4 06550 Çankaya/ANKARA
Tel: 0 (312) 438 50 23-24
Fax: 0 (312) 438 50 26
E-mail: teraziyayincilik@gmail.com
www.teraziyayincilik.com

Avrasya İncelemeleri Merkezi (AVİM)

E-ISBN: 978-625-94066-3-3

EDITOR
Hazel Çağan Elbir

DESIGN
Ruhi Alagöz

FIRST EDITION
May 2024

To receive AVİM publications, please visit http://www.avim.org.tr/

CONTENTS

FOREWORD

The tragic events of the First World War, the ebb and flow of the calamities of war in the Eastern Anatolia front, including the relocation and resettlement of some of the Armenian population in specific areas has become a topic construed out of context and abused for political ends to hammer Türkiye and the Turkish people.

Retired Ambassador Pulat Y. Tacar has studied this subject extensively from a legal-judicial point of view and has published numerous articles on the subject.

This book, titled "The Truth Will Out," is a comprehensive compilation of his previously published articles to shed light on one of Türkiye's foreign policy challenges.

The subjects of the articles are briefly as follows:

"Keys For a Legal Assessment of Genocide Recognition Demands and Reparation Claims of Armenians" aims to evaluate the legal aspects of the Armenian allegations, reparation and compensation claims made within the framework of the allegations.

In the article titled **"Perinçek v. Switzerland Judgement of The European Court of Human Rights,"** it is emphasized that the European Court of Human Rights' (ECtHR) judgment in the Perinçek v. Switzerland case is a well-reasoned and balanced decision. This judgment shows that the concept of genocide should be analyzed in a legal dimension. The ECtHR recognizes that it has no jurisdiction to arbitrate on the legal characterizations attributed to historical events, as it does on their disputed dimensions. The Swiss Courts' reasoning which led to the filling of the EHtHR case, was disturbing because it privileged one view over others, penalized those who held different views and prevented any debate on the issue. The article underlines that the ECtHR's judgment underlines those expressing opinions on sensitive and controversial issues is a fundamental attribute of freedom of expression and that this is the difference between a tolerant, pluralistic and democratic society on the one handand totalitarian regimes on the other. The article highlights the ECtHR's conclusion that there was no valid justification for the restriction of Dr. Perinçek's freedom of expression.

The article titled **"The Legal Avenues That Could Be Resorted to Against Armenian Genocide Claims"** discusses the widely accepted view by the Turkish public and government that the tragic 1915 Events did not constitute genocide is widely accepted by the Turkish public and Turkish governments. However, parliaments, senates, regional assemblies, statespeople and politicians of some countries have declared that genocide was committed against Armenians. The article analyzes the argument that Türkiye should resort to legal remedies in the face of these developments has become a widespread conviction among Turkish politicians and public opinion. Examining the various legal remedies available against genocide allegations, this article concludes that, in addition to encouraging historical research to shed light on the historical truth behind these events, the Turkish authorities should officially emphasize and insist that the crime of genocide can only be established by the decision of a competent court, as provided in the 1948 Genocide Convention, and not by political decisions taken by parliaments. It also argues that individuals can appeal to the ECtHR as "victims" or "potential victims" of laws and practices that restrict freedom of expression.

In the article by retired Ambassador Tacar, titled **"The Tale of European Parliament's 1987 Resolution Entitled 'Political Solution on the Armenian Question'"**, it is recalled that although the Vandemeulebroucke report, which formed the basis for the resolution adopted by the European (Union) Parliament (EP) in 1981 on the "genocide committed against Ottoman Armenians in 1915", was voted down by the EP Political Committee, it was improperly placed on the EP Plenary agenda and adopted there by threatening parliamentarians who opposed the report and draft resolution. The article emphasizes that the resolution is a political maneuver of politicians who wanted to defame Türkiye and exclude Türkiye from the European Union (EU) by making the acceptance of the so-called genocide a condition for Türkiye's full membership to the European Union. The article also states that Türkiye argues that the concept of genocide is a legal term and emphasizes that in a state of law, a suspect cannot be declared guilty without being tried by a competent judicial body.

"State Identity, Continuity and Responsibility: The Ottoman Empire, the Republic of Türkiye and the Armenian Genocide: A Reply to Vahagn Avedian" penned by retired Ambassador Pulat Y. Tacar and historian Dr. Maxime Gauin. The article aims to respond to Vahagn Avedian, who blames the Turkish state for the 1915 Events by claiming the continuity between the Ottoman Empire and its successor, the Republic of Türkiye. Avedian has clearly ignored the situation of the Ottoman state in Anatolia during the First World War and the subsequent Turkish War of Liberation. This article by Tacar and Dr. Gauin legally and historically invalidates Avedian's claims.

The book concludes with the article titled **"Dr. Perinçek's Observations on the Merit of the Case in the light of the Government of Switzerland's Request for Referral and having regard to the Chamber's Judgement of 17 December 2013"** authored by Retired Ambassador Pulat Y. Tacar and Professor Hakan Yavuz.

Ambassador Pulat Y. Tacar, a highly seasoned diplomat with a legal background, an emeritus in his career, having countered Armenian allegations and historically distorted narrative against Türkiye and the Turks even at third party inquiries and high-level international platforms, has opted to deal with the allegations from its most vulnerable façade, that of legal, judicial basis.

AVİM has a number of publications on the historical, political, religious aspects of the events of the time. The 44th book published by AVİM and Terazi Publishing, "The Truth Will Out," is a legalistic reference source that is bound to sustain its validity. As AVİM, we are proud to present this valuable work to readers interested in the subject.

Alev KILIÇ
Ambassador (R.)
AVİM Director

KEYS FOR A LEGAL ASSESSMENT OF GENOCIDE RECOGNITION DEMANDS AND REPARATION CLAIMS OF ARMENIANS*

(ERMENİLER TARAFINDAN ORTAYA ATILAN SOYKIRIM İDDİALARININ TANINMASI VE TAZMİNAT TALEPLERİNİN HUKUKİ DEĞERLENDİRMESİNE İLİŞKİN ESASLAR)

Pulat Y. Tacar
Ambassador (R)

Abstract: *This paper intends to assess the legal aspects of the Armenian genocide claims and the compensation and/or reparation demands attached to it. This paper will not cover the historical, moral, or humanitarian aspects of the Armenian claims.*

Keywords: *Türkiye, 1915 Events, 1948 Genocide Convention, recognition, reparations*

Öz: *Bu makale Ermeni soykırım iddialarının hukuki yönlerini ve iddialar çerçevesinde ortaya konan telafi ve tazminat taleplerini değerlendirmeyi amaçlamaktadır. Makale; Ermeni iddialarının tarihi, ahlaki veya insanı boyutlarına değinmeyecektir.*

Anahtar Kelimeler: *Türkiye, 1915 Olayları, 1948 Soykırım Sözleşmesi, tanıma, tazminat*

* This article is the translated, revised, and expanded version of a Turkish text that was originally prepared as a presentation for a conference on the legal ramifications of Turkish-Armenian controversy over the 1915 events and the Armenian genocide claims. The conference was held in Ankara at the Center for Eurasian Studies (AVİM) on 30 March 2017: https://avim.org.tr/en/Etkinlik/KEYS-FOR-A-LEGAL-ASSESSMENT-OF-THE-ARMENIAN-GENOCIDE-RECOGNITION-DEMANDS-AND-INJURY-REPARATION-CLAIMS-AMBASSADOR-R-PULAT-TACAR

1) Accusations of Genocide

The diaspora Armenians and the Republic of Armenia persistently accuse the Republic of Türkiye of pursuing a "policy of denialism" with regard "the act of genocide committed during 1915–1916," and demand that "Türkiye assumes responsibility for the internationally wrongful acts it has committed against Armenians and other Christian minorities."

Those who maintain the genocide thesis argue the following; "State succession prevails and continuing responsibility has been inherited by the Republic of Türkiye from the Ottoman State; consequently Türkiye must assume full responsibility and should compensate the injury caused by the Ottoman Empire during the tragic events of 1915-1916 and following years."[1]

2) Financial Compensation Claims

Armenian financial compensation claims are listed in a document entitled "Resolution with Justice Reparations of the Armenian Genocide - The Report of the Armenian Genocide Reparations Study Group". The amount of claimed financial compensation varies from 70,030,167,080 to 104,544,260,400 (70-105 billion) US dollars.

The legal arguments for such claims have been laid out in several publications;[2] some of them have been presented at a conference organized by the Armenian Catholicosate of Cilicia in Antelias, Lebanon, from 23 to 25 February 2012. The papers submitted there have been subsequently published by the International Criminal Law Review in 2014.

3) The Supposed Legal Basis for the Demands

The arguments put forward by the authors who maintain the genocide thesis are often confusing and muddled. The proponents of Armenian reparation claims use present-day legal concepts and rules, and attempt to qualify events that have occurred more than a century ago as genocide, without inquiring

1 Vahagn Avedian, "State Identity, Continuity, and Responsibility: The Ottoman Empire, the Republic of Türkiye and the Armenian Genocide," *European Journal of International Law* 23, no. 3 (2012) ; Alfred de Zayas, *The Genocide Against the Armenians 1915-1923 and the Relevance of the 1948 Genocide Convention* (Beirut: Haigazian University, February 2011).

2 "Resolution with Justice: Reparations for the Armenian Genocide - The Report of the Armenian Genocide Reparations Study Group," *Armenian Genocide Reparations Study Group*, March 2015, http://www.armeniangenocidereparations.info/wp-content/uploads/2015/03/20150331-ArmenianGencoideReparations-CompleteBooklet-FINAL.pdf ; Armenian Genocide Centenary Commemoration Committee (AGCCC, the UK), *The Armenian Genocide: A Plea for Justice (April 1915)* ; de Zayas, *The Genocide against the Armenians 1915-1923…*

whether these concepts and rules existed at the time; furthermore they fail to identify and ignore the legal obligations which were binding on the Ottoman State in 1915.

The arguments presented by Armenia, the Armenian nationalist and militant groups and their supporters do not rely on the 1948 United Nations (UN) Convention on the Prevention and Punishment of the Crime of Genocide (thereafter: Genocide Convention). They instead try to anchor their demands on non-binding soft-law instruments or draft treaties such as:

- the Draft Treaty of Sèvres, which has never been ratified, nor has it entered into force.

- the "Draft Declaration on Population Transfer and the Implantation of Settlers" drawn up in 1997 by Mr. Al-Khasawneh, Special Rapporteur on Human Rights and Population Transfer - a Sub-Commission of the Commission of Human Rights of the UN. This Draft Declaration has never been adopted and as such not binding for any State.

- the "Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law." This is another non-binding soft-law instrument. The "Guideline" in question does not entail new and sanctionable international or domestic legal obligations.

- "Draft Articles codifying the Responsibility of States for Internationally Wrongful Acts". These have been drafted by the International Law Commission (ILC) in August 2001 and adopted by the UN General Assembly under Resolution 56/83. This Resolution brought the document in question to the attention of Governments without prejudice to their future adoption or other appropriate action. In other words, this resolution is not a binding legal instrument for State parties. Some Armenian jurists continue to refer to this document as the legal basis of their reparation claims.

4) The Absence Of "Special Intent"

The Turkish government and the great majority of Turks do not deny that Ottoman Armenians as well as other Ottoman citizens were subjects of a great tragedy during the years of 1915–1916. The criminality associated with the tragic events (called *Metz Yeghern* by the Armenians) related to the forced relocation of some Ottoman Armenians in 1915–1916 into the southern

provinces of the Ottoman State was addressed by the Ottoman judiciary. Individuals or members of the groups who attacked the displaced Armenians and/or officials who exploited the Armenian plight and neglected their duties or abused their powers were court-martialed and punished. In 1915, more than 20 Ottoman subjects were sentenced to death and executed for having committed such crimes. They were judged according the Ottoman Penal Law in force at that time.[3]

According a report by Talat Pasha, the Minister of Interior, the Ottoman government created three commissions to investigate the complaints of Armenians. As a result, in March–April 1916, a total of 1673 Muslim Ottoman citizens -including captains, first and second lieutenants, commanders of gendarmery squads, police superintendents, and mayors- were arrested and brought before courts martial. Sixty-seven of them were sentenced to death, 524 Ottoman citizens were sentenced to serve jail terms, and 68 received other punishments such as forced-labor, imprisonment in forts and/or exile. It is not unimportant to notice that several criminals were sentenced to death for committing plunder, and that other death sentences were justified not only by murders, but also by robberies.[4] Authors who maintain the Armenian genocide thesis try to avoid all mentions to these trials and condemnations, probably because the genocide thesis fails to make any sense in light of these trials and condemnations.

The Armenians regard themselves as the only victims of the tragedy which occurred more than hundred years ago in Anatolia. They claim that the Ottoman State pursued a policy of genocide against its Armenian population.[5] This argument is rejected by Türkiye, because the Ottoman State had no "special intent" to destroy the Ottoman Armenians "as such"; other non-Armenian Ottoman citizens also suffered as well; both Ottoman Armenians and the Muslims were the victims of the great tragedy. The result of the inter-ethnic killings between the Armenian armed rebels and the Ottoman Turks and the Kurds was an unprecedented horror. History records few examples of mortality as great as that suffered in Van Province.[6]

3 Pulat Y. Tacar, "2015'te Türkiye'nin Başına Ermeni Tsunamisi Çökecekmiş," *Yeni Türkiye*, Ermeni Meselesi Özel Sayısı V, Yıl 20, Sayı 64 (Eylül-Aralık 2014) ; Pulat Y. Tacar, "The Legal Avenues That Could Be Resorted to Against Armenian Genocide Claims," *Review of Armenian Studies*, No. 13-14 (2007).

4 Tacar, "2015'te Türkiye'nin Başına Ermeni Tsunamisi Çökecekmiş" ; Tacar, "The Legal Avenues That Could Be Resorted to…"

5 Pulat Y. Tacar, "An Invitation to Truth, Transparency and Accountability: Towards 'Responsible Dialogue' on the Armenian Issue," *Review of Armenian Studies*, no. 22 (2010): 135.

6 Justin McCarthy, Ömer Turan, Cemalettin Taşkıran ve Esat Arslan, *1915 Van'da Ermeni İsyanı* (Tarih & Kuram Yayınları, 2015).

5) Why Türkiye And The Great Majority Of The Turks Do Not Define The Tragic Events Of 1915–1916 As Genocide?

The Turkish government and overwhelming majority of Turks, as well as some other governments[7] and many scholars or experts, reject the qualification of the tragic events of 1915 as "genocide", because the *sine-qua-non* legal conditions laid down by the 1948 Genocide Convention do not exist.

Some Turkish experts share the opinion that the tragic events of 1915 may be labelled criminal acts as cited in the Ottoman Penal Code; others qualify these events as "mutual inter-ethnic killings".

The term "genocide" is a legal term. "Genocide is a legal characterization of an event. Genocide is not an event itself. It is an epithet."[8]

6) What Are The Characteristics Of Genocide?

6.1) Protected Groups

The protected groups by the Convention are national, ethnical, racial, or religious groups. Other groups, such political groups or cultural groups or sexual groups are not protected by the Genocide Convention. Furthermore, "Victims of a response to a rebellion are not qualified as victims of genocide, no matter what."[9]

---

7 The United Kingdom (UK-British) government on many occasions officially declared its position on the matter. On 14 April 1999, the Foreign Office spokesperson Baroness Ramsay of Cartvale stated that "the British government has not recognized the events of 1915 as indications of genocide" ; on 7 February 2001, acting on behalf of the British government, Baroness Scotland of Asthal declared: "The government, in line with the previous British governments, have judged the evidence not to be sufficiently unequivocal to persuade us that these events should be categorized as genocide as defined by the 1948 United Nations Convention on genocide. ... The interpretation of events in Eastern Anatolia in 1915–1916 is still the subject of genuine debate among historians. The UK government did not accept the 1915 events as qualifying as genocide."

The Israeli government refused to accept the parallelism between the Holocaust and the tragic events of 1915. The Ambassador of Israel, Rivka Kohen, in Yerevan declared on 7 February 2002 during a press conference that; "the 1915 events couldn't be considered genocide because the main killings in these events were not planned and the Ottoman government had no intention to destroy a nation or a group of people as such. As a well-known fact many people from the Armenian and Muslim groups had lost their lives in these events. The Holocaust is unique. At this stage nothing should be compared with the Holocaust." On 10 April 2001, the Nobel Prize-winning Israeli Foreign Minister Shimon Perez said that "the fate of Armenians in Anatolia was a tragedy, not genocide." He added, "Armenian allegations are meaningless. We reject attempts to create a similarity between the Holocaust and the Armenian allegation. If we have to determine a position on the Armenian issue it should be done with great care not to distort the historical realities."

8 "The Address Delivered By Mr. Tal Buenos At The Luncheon Hosted By NSW Parliamentary Friends Of Türkiye - New South Wales Parliament, 24 November 2014," *Center for Eurasian Studies (AVİM)*, Blog No: 2014/32, December 8, 2014, https://avim.org.tr/Blog/THE-ADDRESS-DELIVERED-BY-TAL-BUENOS-NSW-PARLIAMENT

9 ""The Address Delivered By Mr. Tal Buenos Türkiye…"

6.2) What are the guilty acts (*actus reus)* foreseen by the Genocide Convention?

- Killing members of the group;
- Causing serious bodily or mental harm to members of the group;
- Deliberately inflicting on the group conditions of life, calculated to bring about its physical destruction in whole or in part;
- Imposing measures intended to prevent births within the group;
- Forcibly transferring children of the group to another group.

Some authors maintaining the genocide thesis and their supporters disregard the wording of the Genocide Convention and include the seizure of property in the genocidal acts; "Seizure of property" is not included among the guilty genocidal acts listed by the Convention.

6.3) *Dolus specialis* – Special Intent

The most important characteristic of the Genocide Convention is that, for the crime of genocide to exist, acts must have been committed with the intent to destroy the protected groups as such. The sole existence of a guilty act is not sufficient to qualify the crime as "genocide". As such, "special intent" is the main defining criteria established by the Convention. The International Court of Justice - ICJ (in its verdict on Croatia/Serbia case) clearly underlined that the existence of one or more guilty acts enumerated in Article II of the Convention are not sufficient to qualify the events as "genocide".[10] The existence of special intent would have to be proven. This is why the key words "intent to destroy as such" has been added to Article II of the Genocide Convention.

7) The Main Disagreement Between Türkiye And Armenia On The Issue Of Genocide

The legal aspect of the genocide allegation is the main point of disagreement and reason of conflict between Türkiye and Armenia (as well as between overwhelming majority of Turks and the Armenians and their supporters). For the Armenians, "Türkiye's refusal to recognize and accept the reality of Armenian genocide" amounts to "denial of historical truth". For them, the mere

10 Application Of The Convention On The Prevention And Punishment Of The Crime Of Genocide (Croatia V. Serbia) (International Court of Justice (ICJ), Judgement of February 3, 2015).

existence of one or more of the acts listed in Article II of the Convention equals genocide. What the Armenians do not want to acknowledge and accept, is that from a legal point of view, the existence of the *actus reus* is not enough to call an event as genocide. This aspect was clearly and definitely underlined by the ICJ by its Croatia-Serbia verdict.

Furthermore, the Armenians do not want to acknowledge the mutual killings between the Ottoman Armenian and Muslim population**;** as mentioned above**,** the result of the inter-ethnic killings were unprecedented horror. Also, "...the Armenian narrative does not dwell much on the experiences of the Muslims of the Balkans and the Caucasus who likewise underwent the same process as did the Armenians and others in 1915."[11]

For an event to be accepted as "historical truth" in the context of the legal term "genocide", it should be certified by the decision of a competent court. For example, the Holocaust is regarded and accepted by the judiciary as historical truth because of the existence of the 1946 verdicts of the International Military Tribunal at Nuremberg.

8) Political Use And Abuse Of The Term Of Genocide

Some historians, sociologists, politicians, and even political scientists who deal with these issues tend to describe almost any incident which involves a significant number of loss of life as genocide. As such, they purposely mislead those who are not familiar with the law.

The 1948 Genocide Convention does not allow for convictions on the grounds of genocide by legislatures, scholars, pamphleteers, politicians, or others. Qualifying the events of 1915 as genocide equals to detaching genocide from its legal definition and using it for political and/or moral purposes. Whether it is sound to keep hammering on a legal term based on non-legal considerations is doubtful and could lead to a devaluation of the norm itself.

9) Legal Evaluation Of The Armenian Genocide Accusation

9.1) Retroactivity of the Genocide Convention

Some authors argue that the 1948 Genocide Convention can be applied retroactively to the "1915 Armenian Genocide" because most provisions of the Convention are declarative of pre-existing international law.[12]

11 Nareg Seferian, "The Clash Of Turkish And Armenian Narratives. The Imperative For A Comprehensive And Nuanced Public Memory," *Istanbul Policy Center-Sabancı University Publication* (May 2017): 5.

12 de Zayas, "The Genocide Against the Armenians 1915-1923…"

This is not a valid legal argument. Neither those provisions are declarative of pre-existing international law, nor relevant State practice and *opinio juris* support it.

The Convention does not apply retroactively. The Convention entered into force on 12 January 1951 for Türkiye and Türkiye is only bound with regard to events subsequent of 12 January 1951.[13]

9.2) Statute of Limitation

Authors maintaining the genocide thesis argue that the statute of limitation does not apply to genocide and crimes against humanity. They claim that the Republic of Türkiye is responsible and should pay compensations to the Armenians. This argument is based on the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. But the said Convention deals with individual criminal responsibility, not with State responsibility, and as such, is not applicable to reparation claims against any State.

In fact, the principle of extinctive prescription is widely accepted as a general principle of international law in the sense of Article 38.1.c. of the Statute of the ICJ.

9.3) *Nulla poena sine lege*

This is one of the principles governing international criminal law and means no person convicted by a court may be punished without a law foreseeing such punishment.[14] Authors maintaining the genocide thesis tend to ignore this principle.

13 Other governments share the non-retroactivity of the Genocide Convention. For example, in response to the call for the UK to recognize the events of 1915-1916 as genocide, the British government stated in 2006 that "… it was not possible at the time of the events to label the massacres as genocide within the term of the Convention."

14 1998 Rome Statute of the International Criminal Court (ICC) - Article 23: Nulla poena sine lege: "A person convicted by the Court may be punished only in accordance with this Statute."

9.4) *Nullum crimen sine lege*

Similarly, a person shall not be criminally responsible "...unless his or her conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court."[15]

9.5) Duality Of Responsibility In International Law

Some authors maintaining the genocide thesis persistently use arguments and examples of individual criminal responsibility and try to apply them to the question of state responsibility, neglecting the duality of responsibility in international law. The question of individual responsibility is in principle distinct from the question of state responsibility.

The Genocide Convention confirms individual criminal responsibility for an international crime; the Convention does not create international obligations of a state vis-a-vis its own citizens.[16]

On this issue, the ICJ ruled in Bosnia-Herzegovina "genocide case" the following:

> "The feature of the duality of international responsibility is reflected in Article 25 para. 4 of the Rome Statute for International Criminal Court: No provision in this Statute relating to individual responsibility shall affect the responsibility of States under international law."[17]

---

15 1998 Rome Statute of the International Criminal Court (ICC) – Article 22: Nullum crimen sine lege:

"1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.

2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute."

16 Unpublished legal opinion by Professor Dr. Stefan Talmon (Director of the Institute for Public International Law, University of Bonn, Germany; legal adviser of the Turkish Government during the Perinçek vs. Switzerland case in ECtHR).

17 1998 Rome Statute of the International Criminal Court (ICC) – Article 25: Individual criminal responsibility:

"1. The Court shall have jurisdiction over natural persons pursuant to this Statute.

2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

9.6) *Ne bis in idem*

This principle means that no person shall be tried with respect to conduct which formed the basis of crimes for which the person has already been convicted or acquitted by a competent court.[18]

9.7) Crimes Against Humanity[19]

Some scholars recommended that the Armenians drop their accusation of genocide and embrace the qualification of crimes against humanity with regard to the tragic events of 1915-1916, because the proof of a special intent (*dolus specialis*) is not required for the crimes against humanity.

The *sine qua non* exigence of special intent for the crime of genocide and the impossibility to prove it after hundred years (none of the suspects are alive) brought the concept of "crimes against humanity" to the agenda of some

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime;

(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

18 1998 Rome Statute of the International Criminal Court (ICC) – Article 20: Ne bis in idem:

1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.

2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.

3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or

(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice."

19 1998 Rome Statute of the International Criminal Court (ICC) - Article 7: Crimes Against Humanity

scholars and politicians who embrace the "Armenian Genocide" thesis. They argue that the concept of crimes against humanity was tabled already in 1915 in a Joint Statement issued on 24 May 1915 by the Ambassadors of France, the UK, and Russia to the Ottoman Porte. This is often referred to as evidence in support of the claim of a violation of international law giving rise to reparation claims. This statement claims that;

> "… in view of the crimes of Türkiye against humanity and civilization, the Allied governments announce publicly to the Sublime Porte that they will hold personally responsible for these crimes all members of the Ottoman Government and those of their agents who are implicated in such massacres."

This statement has no legal basis; it is politically motivated. The legal concept of crimes against humanity did not exist in 1915 and was only codified by the Rome Statute which entered into force on 1 July 2002 that created the International Criminal Court (ICC).[20]

The International Criminal Court in its ruling for the Former Yugoslavia in the Tadic Case held that "crimes against humanity were a new category of crime created by the Nuremberg Charter."

---

20 The differences between "genocide" and "crimes against humanity":

a) The proof of special intent (dolus specialis) is not required to establish a crime against humanity;

b) The list of protected groups is enlarged to embrace political, cultural groups;

c) *Actus reus* (guilty acts) list of the crimes against humanity is much longer.

For the establishment of a crime against humanity a "widespread or systematic attack directed against any civilian population with knowledge of the attack" is required.

The list of guilty acts with regard to crimes against humanity is as follows:

a) Murder;

b) Extermination;

c) Enslavement;

d) Deportation or forcible transfer of population;

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

f) Torture;

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

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

i) Enforced disappearance of persons;

j) The crime of apartheid;

k) Other inhuman acts of a similar character intentional causing of great suffering or serious injury to the mental or physical health.

The Rome Statute is not retroactive. In 1915, the Ottoman State's treatment of its citizens was considered an internal affair of the state which was beyond the reach of international law.

9.8) The Competent Tribunal

The crime of genocide -as any other crime- can be legally determined only by the judges of a competent tribunal on the basis of prescribed legal criteria and after a fair and impartial trial.

Article VI of the 1948 Genocide Convention with regard the competent tribunal reads as follows:

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

The issue of a competent tribunal had been extensively debated by the International Preparatory Conference of the 1948 Genocide Convention. The question of determining the competent tribunal was resolved after lengthy discussions, and the above-mentioned text was approved. During the discussions, a proposal for "universal repression" was rejected. Universal repression allows the judging of the suspects by any tribunal of any state.

9.9) Customary Prohibition Of Genocide

Authors who maintain the genocide thesis and their supporters argue that "the Genocide Convention merely confirm existing international law" and "there is no valid argument in international law that would allow the exclusion of Armenians from the application of the Convention."[21]

This argument has no legal basis. The 1948 Genocide Convention does not codify pre-existing customary international law obligation of states in 1915, as the crime of genocide did not exist even as a concept. "Genocide" found its juridical consecration only after 1948.

At the time of the First World War, individual criminal responsibility in international law was unknown.

21 de Zayas, "The Genocide Against the Armenians 1915-1923…"

9.10) Right To Property

Some scholars maintaining the genocide thesis claim that Armenians' right to property was violated by the Ottoman State through expropriation measures, and this act *per se* is a genocidal crime.

This view is not shared by the judiciary; it is widely accepted that taking of property by a state from its own nationals does not violate international law.

The European Court of Human Rights (ECtHR) held with regard to acts of expropriation taken place in 1940's that "… expropriations were carried out in respect of state's own nationals and are therefore not governed by international law".[22]

Finally, as we mentioned above, loss of property or expropriation is not cited as *actus reus* by the Article II of the 1948 Genocide Convention and therefore cannot be qualified as "genocide".

Concerning right to property claims presented under International Covenant of Civil and Political Rights (ICCPR); the right to property is not protected by the ICCPR. Allegations concerning a violation of the right of property are not admissible *ratione materiae* under Article 3 of the Optional Protocol of the ICCPR.

The confiscation or expropriation of property is considered an instantaneous act without continuing effects. Court decisions that confirm past confiscations based on laws adopted prior to the entry into force of the Optional Protocol of the ICCPR do not in themselves constitute a continuing violation of the Covenant.

Similarly, a state's failure to compensate the claimant for the confiscation of his/her property after the entry into force of the Optional Protocol of the ICCPR does not qualify as a continuing effect as such.

Articles 2(3) and 9 (5) of the ICCPR are accessory in nature and do not provide for an independent free-standing right to a remedy or compensation.

If the events constituting violations of the Covenant had occurred before the entry into force of it, the request for compensation will be considered inadmissible *ratione temporis.*

The confiscation of Armenian property during the beginning of 20th century is not subject to Human Rights Committee's jurisdiction, neither *ratione materiae* nor *ratione temporis*.

22 Unpublished legal opinion by Professor Dr. Stefan Talmon.

With regard to complaints presented to the ECtHR, with regard right to protection of property; this right is covered by Article 1 of the First Protocol to the European Convention of Human Rights (ECHR). In general terms, ECHR can receive communications and can order restitution. It can also order compensation and other forms of just satisfaction instead of restitution.

However, this right cannot be interpreted as imposing any general obligation on the Contracting States to return or restore property which was transferred to them before they ratified the Convention.

Türkiye has no obligation under Article 1 of Protocol No.1 to enact laws providing for rehabilitation, restitution of confiscated property or compensation for property lost by Ottoman citizens.

Considering that Ottoman Armenians and their legal successors have been unable to exercise any owner's right in respect of the properties in question, not just for decades but for over a century and that the transfer of Ottoman Armenian property is considered legally valid in Türkiye, any application claiming a violation of the right to the protection of property in Article 1 No. to the ECHR will have to be dismissed as being incompatible *ratione materiae.*

9.11) Claims And Allegations Of Human Rights Violations As The Basis For Reparation, Restitution Of Property, Compensation Claims And/Or Demands For Formal Apology

Complaints and communications of human rights violations may comprise the right to existence; the right to protection of life, health, liberty and property; the right of practicing any religion; the right of immigration and the like.

The Committees established under various United Nations human rights treaties lack jurisdiction *ratione personae* to consider any inter-state communication brought by Armenia against Türkiye. In 1915, as far as international law is concerned, apart from morality, there was no restriction whatsoever, upon a state to abstain from "abusing the rights" of its own citizens. Because the individual was not recognized as a subject of international law, it did not hold rights under international law that could be violated. The international law of human rights developed only after the Second World War.[23]

Both the substantive provisions of UN human rights treaties and the provisions providing for the competence of the committee cannot be applied retroactively.

23 Unpublished legal opinion by Professor Dr. Stefan Talmon.

9.12) Allegations Of Destruction Of Armenian Cultural Property By The Republic of Türkiye

Some Armenians and their supporters argue that Türkiye has engaged in continuation of the crime of genocide against the Armenians through "deliberate destruction of Armenian properties in its territories, the destruction of Armenian memory, negation of historical truth and rehabilitation of murderers".[24] None of these acts meet the definition of "genocide". The list of genocidal acts defined in Article II of the 1948 Genocide Convention is an exhaustive one. Proposals to introduce the concept of "cultural genocide" during the Preparatory Conferences of the Convention in 1948 were voted down. In the Bosnian Genocide trial, the ICJ concluded that the destruction of historical, religious, and cultural heritage cannot be considered to be a genocidal act.[25]

9.13) Forced Migrations

Regarding claims concerning forced migrations (often referred to as "deportations"[26]), the UN Human Rights Committee recently considered claims on the subject and other acts of political repression in the 1940's to be

24 According to Vakhan Avedian, who has written an essay published by the *European Journal of International Law*: "The Republic of Türkiye continued practicing the same internationally wrongful acts, even expanding the massacres beyond its own borders into the Caucasus and the territories of the independent Republic of Armenia..." One can assume that Avedian intended to refer to the 1920 Turco-Armenian war. Much has been written about that tragic period. One of the accurate evaluations of that period was made by the then Prime Minister of Armenia, Hovannes Kachaznuni, who wrote: "Despite these hypotheses there remains an irrefutable fact. That we had not done all that was necessary for us to have done to evade war. We ought to have used peaceful language with the Turks whether we succeeded or not, and we did not do it. … With the carelessness of inexperienced and ignorant men we did not know what forces Türkiye had mustered on our frontiers. When the skirmishes had started the Turks proposed that we meet and confer. We did not do so and defied them." Those who are interested in the realities of that time should read this essential testimony. This may help refresh memories. Furthermore, we should add that the Russian, US, British, and Turkish archives are full of documents which prove the atrocities committed by Armenian forces in Eastern Anatolia during that period, a fact which some Armenian leaders and politicians proudly speak about and do not deny (although they portray these acts in the context of struggle for Armenian liberation and independence). After the end of the Turco-Armenian War, the Treaty of Kars was signed on 13 October 1921 by the delegates of Armenia, Azerbaijan, Georgia, Russia, and Türkiye. The intervention of the then Minister of Foreign Affairs of Armenia, Mr. Muravian, who attended the Kars Peace Treaty Conference on 22 September 1921, is also worth mentioning to reflect on Armenia's official position. He said; "We have not come here with antagonistic feelings and we have no intentions of presenting here the controversial issues we have inherited from the former nationalist governments. We are only admirers of the brave struggle which the preserving people of Türkiye engaged in. We carry a sincere wish, and we are absolutely convinced that a nation which defends its country will be victorious and the enemy will be defeated."

25 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (International Court of Justice (ICJ), Judgment of February 26, 2007).

26 Mehmet Oğuzhan Tulun, "The Events of 1915 and the Word 'Deportation'," *Center for Eurasian Studies* (AVİM), ANALYSIS No: 2015/2, February 8, 2019, https://avim.org.tr/en/Analiz/THE-EVENTS-OF-1915-AND-THE-WORD-DEPORTATION

inadmissible *ratione temporis*. The death and disappearance of a person during the events of 1915 is outside the jurisdiction *ratione temporis* of Human Rights Committee.

9.14) Responsibility Of Türkiye For Wrongful Acts Perpetrated In The Past

Armenians and some of their followers request that draft Articles codifying the Responsibility of States for Internationally Wrongful Acts should be applied with regard to the genocide claims and Türkiye should pay compensation to them.

The Draft Articles in question were drafted by the International Law Commission (ILC) in August 2001 and adopted by the UN General Assembly under Resolution 56/83. This Resolution brought the draft articles to the attention of governments without prejudice to their future adoption or other appropriate action. In other words, this resolution is not a binding legal instrument for state parties.

Some Armenian jurists continue to refer to this document as the legal basis of their reparation claims. Mr. Vaghan Avedian, in an article published by the *European Journal of International Law*, asserts that there is a succession and continuation of responsibility from the Ottoman State to the Republic of Türkiye and that Türkiye must assume full responsibility for and should repair the injury caused by the Ottoman State.

The legal situation is as follows:

After the First World War and the War of Liberation, Türkiye concluded international agreements to put an end to the wars and insurgencies which had disrupted peace in the country as well as in the region since 1914.

Some of these agreements contained amnesty clauses. The amnesties aimed at covering the humanitarian dimensions of the tragic past.

On that matter, *pacta sunt servanda* and *lex specialis* principles are governing the liabilities and legal responsibilities of the Republic of Türkiye.

10) Bilateral and Multilateral Treaties and Agreements to which Türkiye is a Party

Let us here briefly examine the Lausanne, Kars, and Ankara Treaties, as well

as the Agreement between the US and Türkiye on compensation demands with regard the legal responsibilities of Türkiye. These international agreements are qualified *lex specialis* (special rules) as foreseen in Article 55 of the ILC Draft treaty, which clearly recognizes that the responsibility of a state with regard the existence on an internationally recognized wrongful act (if any) is governed by special rules of international law if such special rules are provided for by bilateral or multilateral treaties or other arrangements.

10.1) The Treaty of Lausanne

The Treaty of Lausanne, signed on 24 July 1923, includes a "declaration of amnesty" covering all Turkish nationals, and reciprocally the nationals of other signatory powers of the Treaty of Lausanne, who were arrested, prosecuted, or sentenced prior to 20 November 1922.

In addition, the Treaty of Lausanne, ending the state of war between Türkiye and other powers, decreed that former Ottoman citizens (including Armenians) who resided in countries that were separated from Türkiye by Article 31 of the Treaty and who had gained citizenship of those countries by means of Article 30, would have the right within two years to choose Turkish citizenship. All the Armenians who were outside the borders of Türkiye as of 24 July 1923 and who chose to retain Turkish citizenship obtained the right to return to Türkiye if they so wished. Article 6 of the Amnesty Declaration attached to the Treaty states the following:

> "The Turkish Government which shares the desire for general peace with all the Powers, announces that it will not object to the measures implemented between 20 October 1918 and 20 November 1922, under the protection of the Allies, with the intention of bringing together again the families which were separated because of the war, and of returning possessions to their rightful owners."

It is apparent that this Article concerned the individuals who were forced to immigrate and who returned to their homes during the period of armistice and occupation. At that time, Türkiye announced that the implementation of the measures proclaimed under the occupation powers would be maintained without modification. According to US archives, 644,900 Armenians returned and settled in Anatolia after the war, even before the Treaty of Sèvres was signed. The Treaty of Sèvres was not ratified and did not enter into force. By returning to Ottoman territories in 1918–1919, many Armenians reacquired some of the property that they had left behind during 1915 transfer of population. For instance, the number of properties returned by 30 April 1919 was recorded as 241,000. This number included approximately 98 per cent of

the immovable property. Records also state that some problems and injustices occurred during the application of the regulations.[27] Challenging such acts is judicially possible. Two recent decisions of the Turkish local courts in Adana and in Istanbul (Sarıyer district) which returned properties to one Lebanese and one Turkish citizen of Armenian origin prove that those who possess appropriate documents may present their cases to a competent Turkish court, and if unsatisfied (with the outcome), they may as well take the file to the European Court of Human Rights.

10.1.1) Liquidation Of Ottoman Debts And Other Economic Clauses Of The Treaty Of Lausanne

Articles 46–63 of the Treaty of Lausanne regulate the liquidation of the debts of the Ottoman State. The Republic of Türkiye paid all the debts of the Ottoman State.

According to Article 58 of the Treaty, the parties to the treaty reciprocally renounced all claims for the loss and damage suffered between 1 August 1914 and 6 June 1924 as a result of acts of war or measures of requisition, sequestration, disposal, or confiscation.

Articles 65–72 of the Treaty incorporate economic clauses which protect the rights and legal interests of those Ottoman citizens who were subjected to relocation. Article 74 of the Treaty contains special provisions regarding insurance policies. The following take into account those provisions.

10.2) Treaties of Moscow and Kars

The Moscow Treaty of 16 March 1921 was signed between Türkiye and Russia. Thereafter, the Treaty of Kars was concluded between Türkiye, Armenia, Azerbaijan, and Georgia on 13 October 1921. The Treaty of Kars, which was signed before the Treaty of Lausanne, settled the conflict between Türkiye and Armenia, as well as other Caucasian republics. That Treaty stated in Article 15 that “each of the Contracting Parties agrees to promulgate complete amnesty to citizens of the other Party for crimes and offenses committed during the course of the war on the Caucasian front”.

The “murders and atrocities” that occurred were by no means limited to actions

27 Tacar, “*Türkiye’nin Başına Ermeni Tsunamisi Çökecekmiş*” ; Pulat Y. Tacar, “Soykırımı Siyasal veya Tarihsel Değil, Hukuksal Bir Kavramdır” (Sevk ve İskanın Yüzüncü Yılında Ermeni Meselesi ve 1915 Olayları Uluslararası Sempozyumu, İstanbul, 2015), 35–69.

of the Turks and other Muslims against Armenians. The investigation by Captain Emory H. Niles and Arthur E. Sutherland in eastern Anatolia in 1919 led them to conclude that; "Armenians massacred Moslems with many refinements of cruelty, and that Armenians are responsible for most of the destruction done to towns and villages".

10.3) The Treaty of Ankara Concluded with France

Some of the tragic events took place in Ottoman territories occupied by France, where Armenian groups cooperating with France massacred the Muslim population. The Ottoman Muslims retaliated. The Ankara Treaty signed on 20 October 1921 between France and Türkiye had foreseen the parties promulgating total amnesty for the crimes committed in those occupied territories. Article 5 of the Treaty reads as follows: "both sides will announce a general amnesty in the evacuated area, following the occupation of this area".

Once again, the amnesty was far from covering only Turks. French courts martial sentenced many Armenians for banditry, robbery, rape, and assassinations against Turkish civilians, and more generally the large scale of atrocities and destruction -by arson in particular- have been confirmed by numerous French, British, and American sources, in addition to Turkish records.

Finally, with regard to the international responsibilities of Türkiye, the above-mentioned treaties of Kars, Ankara, and Lausanne constitute *lex specialis* in legal terms.

10.4) Settlement of Claims Agreement with the United States of America

Türkiye settled also the issue of the Ottoman debts to citizens of the US and paid 899,840 US dollars to the Government of the United States for distribution to its citizens on the basis of the Agreement of 24 December 1923 and Supplemental Agreements concluded and implemented between the US and Türkiye. The Supplemental Agreement of 25 October 1934 concluded between the two governments provided for the settlement of the outstanding claims of the nationals of each country against the other.

Article II of the agreement is as follows:

> "The two Governments agree that the Republic of Türkiye will be released from liability with respect that, by the payment of the aforesaid

sum [$1,300,000], the Government to all of the above-mentioned claims formulated against it and further agree that every claim embraced by the Agreement of December 24, 1923, shall be considered and treated as finally settled."[28]

11) Can The Armenian Side Bring The Genocide Accusation To The International Court Of Justice?

Some politicians and experts hired by the Government of Armenia, Armenian diaspora or the Armenian Apostolic Church have suggested to bring the "Armenian Genocide" accusation before the International Court of Justice with the hope that the Court may prosecute the application and award reparation and compensation for material and non-material injury.

On this issue it should be underlined,

a) Only states may be parties in cases presented to the International Court for Justice. As such, the Armenian Apostolic Church cannot seek reparation through proceedings before the ICJ.

b) The right to jurisdiction by the Court depends upon the mutual consent of the parties.

It is unlikely that Türkiye and Armenia will be able to conclude an agreement to bring Armenian reparation claims before the ICJ.

12) Can Armenia Use The Possibility Offered By The Article IX Of The 1948 Genocide Convention?

The Article IX of the 1948 Genocide Convention reads as follows:

"Disputes between Contracting Parties relating to the interpretation and

28 The dossiers of the claims had to contain the documents establishing the nature, origin, and justification of each claim. The claims had to be submitted by 15 February 1934. The US government had the right to submit other documents in support of claims up to 15 August 1934. According to a report of Mr. Nielsen, Representative of the US Government; "the provisions of the Agreement between Türkiye and the US on the matter are in harmony with international practice. In relation to US and Türkiye, they are engaged to consider the result of the proceedings of the (claims settlement) commission as a full, perfect and final settlement of every claim upon either Government arising out of any transaction of a date prior to the exchange of the ratifications of the present convention; and further engage that every such claim, whether or not the same may have been presented to the notice of, made, preferred or laid before the said commission." The last US report in 1937 finally estimated that the principal and interest amounted to 899,840.56 US dollars. It is remarkable that not a single claimant with an Armenian name was considered by the American civil servants to have made a credible case of seizure and/or destruction of property.

> application of fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or any other acts enumerated in Article III shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."

For decades, the Republic of Armenia has had the opportunity to bring such a claim before the ICJ; but it did not. Why? Because Armenian authorities knew well that, if put forward, such a claim will be rejected by the Court. The Armenian Government is well aware that the non-retroactivity clause codified in Article 28 of the Vienna Convention of the Law of Treaties applies to the Genocide Convention of 1948.

Any claim concerning events in the territory of the former Ottoman State in 1915 and the following years will automatically raise the temporal scope of the ICJ jurisdiction under the compromising provision of Article IX of the Genocide Convention. This is called *ratione temporis*.

The Convention does not give rise to individual criminal or state responsibility for events which occurred during the early 20th century, or at any time prior the date of entry into force of the Convention.[29]

Furthermore, on its judgement of 3 February 2015 in the Croatian Genocide case, the ICJ addressed at great length the question of its jurisdiction *ratione temporis* under Article IX of the Convention. The Court stated that Article IX was not a general provision for the settlement of disputes; accordingly, the temporal scope of Article IX is necessarily linked to the temporal scope of the substantive provisions of the Convention. The Court held that not only the obligations to prevent and punish genocide, but also the responsibility of a state under the Convention for the commission of acts of genocide is not retroactive. The ICJ stated: "to hold otherwise would be to disregard the rule expressed in Article 28 of the Vienna Convention or in its negotiating

29 When US President Harry S. Truman submitted the Genocide Convention to the US Senate for advice and consent on 16 June 1949, he pointed out that Article IX of the Convention, which speaks of the responsibility of a state for Genocide, shall not be understood as meaning that the state can be held liable for damages for injuries inflicted by it on its own nationals. See: Nehemiah Robinson, *The Genocide Convention. A Commentary* (New York: Institute of Jewish Affairs, World Jewish Congress, 1960), 102-103.

30 1969 Vienna Convention of the Law of Treaties – Article 28: Non-Retroactivity of Treaties: "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."

history."[30]

13) Can The Armenian Reparation Claim Before The International Criminal Court Be Pursued Through The "Advisory Opinion" Proceedings?

A request for such an advisory opinion could be made by the UN Security Council or the General Assembly.

Under present circumstances, it seems highly unlikely that a majority of 9 members of the Security Council will take the risk of opening "the Pandora's Box", because such step would possibly trigger an unprecedented avalanche of other political moves (for example: the Soviet possibly genocidal acts in Eastern Europe; German actions in Luxemburg, Alsace-Lorraine, or Slovenia etc.)[31]

The act of bringing the 1915 events before the International Court of Justice a century after the tragic events, by way of an advisory opinion, would set a precedent for other historical events. That is why it seems highly unlikely that Armenia could master the necessary majority in the General Assembly for submitting such request to the ICJ. That is the reason why until now, the Government of Armenia has not taken the risk of bringing the matter to the UN.

14) What Are The Chances Of Success Of Any Armenian Reparation Claims Before The International Court Of Justice, The United Nations Treaty Bodies Or The European Court Of Human Rights?

The chances of success of any Armenian reparation claims before the International Court Of Justice, the UN Treaty bodies, or the European Court of Human Rights are almost non-existent under existing international law.[32]

There are insurmountable procedural obstacles for such claims. Even if those obstacles could be surmounted, Türkiye could not be held responsible for any material or moral injury resulting from the 1915 events and the following years,

31 Anton Weiss-Wendt, "Hostage of Politics: Raphael Lemkin on 'Soviet Genocide'," *Journal on Genocide Research* 7, no. 4 (December 2005): 551-559. See also: Tal Buenos, "The Many Genocides Of Raphael Lemkin," *Daily Sabah*, September 11, 2014, https://www.dailysabah.com/opinion/2014/09/11/the-many-genocides-of-raphael-lemkin ; Tal Buenos, "The Lemkin Hole in the Swiss Case," *Daily Sabah*, August 1, 2014, https://www.dailysabah.com/opinion/2014/08/01/the-lemkin-hole-in-the-swiss-case

32 Pulat Y. Tacar, "Ermenistan Birleşmiş Milletler Genel Kuruluna Başvursun ve Uluslararası Adalet Divanı'nda Türkiye Aleyhine Dava Açsın," *Ermeni Araştırmaları*, No. 36 (2010).

33 Unpublished legal opinion by Professor Dr. Stefan Talmon.

as the conduct of the Ottoman State did not violate any obligations under the rules of customary international law applicable at the time[33]

With regards to cases that may be brought before the US (or other country) courts, even if some lower level tribunals in the US assume jurisdiction under the Foreign Sovereign Immunities Act over Armenian property claims, such jurisdiction would not be in conformity with current customary international law on Immunity of the State and would expected to be invalidated by the higher US courts (for the details, see my previous articles on the subject [34] and the recent article written by Aslan Yavuz Şir[35]).

Any substantial ruling on such claims would be flawed because substantive claims on the legality of an expropriation under international law would have to be addressed not according to present day international law, but according to international law in force at the time the expropriation had occurred. International law did not in 1915 and does not even today regulate the confiscation of property by states of their own citizens.

15) Attempts To Condemn Persons Rejecting The Armenian Genocide Accusation

Recently, we witnessed legal and juridical attempts to condemn persons who publicly reject the Armenian genocide allegations. The most known is the Dr. Doğu Perinçek vs. Switzerland case. The Swiss courts condemned Perinçek because he openly rejected the allegation of "Armenian Genocide" and called it "an international lie". The European Court of Human Rights Grand Chamber annulled the decision of the Swiss courts and condemned the Swiss government.

On this occasion, the European Union's Framework Decision of 28 November 2008 on Combatting Certain Forms and Expressions of Racism and Xenophobia by means of Criminal Laws should also be mentioned. This Framework Decision foresees to "condemn denying or grossly trivialising crimes of genocide, crimes against humanity of war crimes". The conditions attached to such condemnation are that the denial must be publicly carried out in a manner likely to incite violence or hatred against the groups or a member of the group defined by reference to race, colour, religion, descent or national or ethnic origin. Other forms of denial or rejection are not condemned and are protected as a freedom of opinion; for example, "to call the Armenian genocide

34 Pulat Y. Tacar, "Türkiye'ye Karşı Hukuk Savaşı: Ermeni Asıllı ABD Vatandaşlarının ABD Mahkemelerinde Türkiye Cumhuriyeti'ne, Türkiye Cumhuriyeti Merkez Bankası'na ve Ziraat Bankası'na Açtığı Davalar," *Ermeni Araştırmaları*, 10. Yıl Özel Sayısı, no. 37-38 (2010-2011).

35 Aslan Yavuz Şir, "Armenian Legal Attempts Are Futile," *Center for Eurasian Studies (AVİM)*, Commentary No: 2017/18, https://avim.org.tr/en/Yorum/ARMENIAN-LEGAL-ATTEMPTS-ARE-FUTILE-1

allegation an international lie" is covered and protected by the European Human Rights Convention.

Equally, it must be added that to qualify the tragic events of 1915 "a genocidal act" is also covered and protected under the same umbrella of freedom of expression.

France has tried to amend its legislation enabling French courts to condemn those who reject the accusations of "Armenian Genocide". The French Constitutional Council has annulled twice the laws in question enacted by the French Parliament.[36]

16) Conclusions

The "Armenian Genocide" allegations will never be recognized by Türkiye and by the great majority of the Turks. Historical and socio-political considerations must be added to legal justifications attached to this rejection.

On the other hand, the Turkish Government and the NGOs as well as the academia should try to better explain the reasons for their rejection to their partners.

I do not expect Armenians and or third parties who support Armenians' genocide thesis to withdraw or retreat from the accusations of genocide; such accusations have become a dogma for them and retracting the accusations has become a taboo subject.[37]

Some other governments, senates, parliaments or local assemblies that embrace the "Armenian Genocide" accusations (and here I am referring to the decision of the German Parliament or the position of the French Governments, as well as the action of the Swiss Government on the Perinçek-Switzerland case), although they must be well aware of the legal arguments surrounding the legal aspects of the crime of genocide. They qualify their recognition as a political act. They may have different political motives, influenced by either historical reasons or current interests - other than being somehow attached to the Armenian-Turkish controversy on this topic.

36 Maxime Gauin, "Stopping the Censors: The Final Defeat of Armenian Nationalism at the French Constitutional Council in January 2017," *Review of Armenian Studies,* no. 36 (2017).

37 For example, the Armenian Minister of Foreign Affairs Edward Nalbandian stated on 5 February 2018 that "the Armenian genocide is irreversible… It is obvious that the century-long denialist policy has failed… However, Türkiye continues to stick to the stereotypes. Ankara does not shy away to distort not just the historic facts but the current realities, including by misrepresenting the rulings of the European Court of Human Rights."

38 Pulat Y. Tacar and Maxime Gauin, "State Identity, Continuity, and Responsibility: The Ottoman Empire, the Republic of Türkiye and the Armenian Genocide: A Reply to Vahagn Avedian," *European Journal of International Law* 23, no. 3 (2012): 821-835 ; For further writing on this point, also see; Tacar,"An Invitation to Truth, Transparency and Accountability…," 135.

To their address, I want to quote the last sentence of an article we have written together with Maxime Gauin and published by the *European Journal of International Law*:[38]

> " .... We are of the opinion that those who complain of an internationally wrongful act for which the Turkish Republic is responsible may be well advised to take their complaints to the relevant international institutions, like the UN, the ICJ, the Council of Europe or any other similar establishment, instead of making very questionable accusations."

The above-mentioned final decisions of the European Court of Human Rights on the Perinçek vs. Switzerland case and the verdict of the International Court

39 On intractable conflicts see: Ebru Çoban Öztürk, "1915 Events, New Issues and Reconciliation Within the Framework of Persistence of Conflict and the Concept of Intractable Conflict," *Review of Armenian Studies*, no. 36 (2017) ; Daniel Bar-Tal, "Sociopsychological Foundations of Intractable Conflicts," *American Behavioral Scientists* 50, no. 11 (July 2007).

of Justice on Serbia/Croatia trial must be regarded as serious setbacks for the supporters of "Armenians Genocide" allegations. With regard to the political aspects of the issue, we are facing an "intractable conflict"[39] and this seems doomed to be a never-ending one.

BIBLIOGRAPHY

"Resolution with Justice: Reparations for the Armenian Genocide - The Report of the Armenian Genocide Reparations Study Group." *Armenian Genocide Reparations Study Group*, March 2015. http://www.armeniangenocidereparations.info/wp-content/uploads/2015/03/20150331-ArmenianGencoideReparations-CompleteBooklet-FINAL.pdf

"The Address Delivered By Mr Tal Buenos At The Luncheon Hosted By NSW Parliamentary Friends Of Türkiye - New South Wales Parliament, 24 November 2014." *Center for Eurasian Studies (AVİM)*, Blog No: 2014/32, December 8, 2014. https://avim.org.tr/Blog/THE-ADDRESS-DELIVERED-BY-TAL-BUENOS-NSW-PARLIAMENT

1969 Vienna Convention of the Law of Treaties

1998 Rome Statute of the International Criminal Court (ICC)

Application Of The Convention On The Prevention And Punishment Of The Crime Of Genocide (Croatia V. Serbia) (International Court of Justice (ICJ), Judgement of February 3, 2015).

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (International Court of Justice (ICJ), Judgment of February 26, 2007).

Armenian Genocide Centenary Commemoration Committee (AGCCC, the UK). *The Armenian Genocide: A Plea for Justice (April 1915)*

Avedian, Vahagn. "State Identity, Continuity, and Responsibility: The Ottoman Empire, the Republic of Türkiye and the Armenian Genocide*." European Journal of International Law* 23, no. 3 (2012)

Bar-Tal, Daniel. "Sociopsychological Foundations of Intractable Conflicts." *American Behavioral Scientists* 50, no. 11 (July 2007).

Buenos, Tal. "The Lemkin Hole in the Swiss Case." *Daily Sabah*, August 1, 2014. https://www.dailysabah.com/opinion/2014/08/01/the-lemkin-hole-in-

the-swiss-case

Buenos, Tal. "The Many Genocides Of Raphael Lemkin." *Daily Sabah*, September 11, 2014. https://www.dailysabah.com/opinion/2014/09/11/the-many-genocides-of-raphael-lemkin

Çoban Öztürk, Ebru. "1915 Events, New Issues and Reconciliation Within the Framework of Persistence of Conflict and the Concept of Intractable Conflict." *Review of Armenian Studies*, no. 36 (2017).

de Zayas, Alfred. *The Genocide Against the Armenians 1915-1923 and the Relevance of the 1948 Genocide Convention.* Beirut: Haigazian University, February 2011.

Gauin, Maxime. "Stopping the Censors: The Final Defeat of Armenian Nationalism at the French Constitutional Council in January 2017." *Review of Armenian Studies,* no. 36 (2017).

McCarthy, Justin, Ömer Turan, Cemalettin Taşkıran ve Esat Arslan, *1915 Van'da Ermeni İsyanı*. Tarih & Kuram Yayınları, 2015.

Robinson, Nehemiah. *The Genocide Convention. A Commentary*. New York: Institute of Jewish Affairs, World Jewish Congress, 1960.

Seferian, Nareg. "The Clash Of Turkish And Armenian Narratives. The Imperative For A Comprehensive And Nuanced Public Memory." Istanbul Policy Center-Sabancı University Publication (May 2017).

Şir, Aslan Yavuz. "Armenian Legal Attempts Are Futile." *Center for Eurasian Studies (AVİM)*, Commentary No: 2017/18. https://avim.org.tr/en/Yorum/ARMENIAN-LEGAL-ATTEMPTS-ARE-FUTILE-1

Tacar, Pulat and Maxime Gauin. "State Identity, Continuity, and Responsibility: The Ottoman Empire, the Republic of Türkiye and the Armenian Genocide: A Reply to Vahagn Avedian." *European Journal of International Law* 23, no. 3 (2012): 821-835.

Tacar, Pulat. "2015'te Türkiye'nin Başına Ermeni Tsunamisi Çökecekmiş." *Yeni Türkiye*, Ermeni Meselesi Özel Sayısı V, Yıl 20, Sayı 64 (Eylül-Aralık 2014).

Tacar, Pulat. "An Invitation to Truth, Transparency and Accountability: Towards 'Responsible Dialogue' on the Armenian Issue." *Review of*

Armenian Studies, no. 22 (2010).

Tacar, Pulat. "Ermenistan Birleşmiş Milletler Genel Kuruluna Başvursun ve Uluslararası Adalet Divanı'nda Türkiye Aleyhine Dava Açsın." *Ermeni Araştırmaları*, No. 36 (2010).

Tacar, Pulat. "Soykırımı Siyasal veya Tarihsel Değil, Hukuksal Bir Kavramdır", 35–69. Sevk ve İskanın Yüzüncü Yılında Ermeni Meselesi ve 1915 Olayları Uluslararası Sempozyumu. İstanbul, 2015.

Tacar, Pulat. "The Legal Avenues That Could Be Resorted to Against Armenian Genocide Claims." *Review of Armenian Studies*, No. 13-14 (2007).

Tulun, Mehmet Oğuzhan. "The Events of 1915 and the Word 'Deportation'." *Center for Eurasian Studies (AVİM)*, ANALYSIS No: 2015/2, February 8, 2019. https://avim.org.tr/en/Analiz/THE-EVENTS-OF-1915-AND-THE-WORD-DEPORTATION

Unpublished legal opinion by Professor Dr. Stefan Talmon (Director of the Institute for Public International Law, University of Bonn, Germany; legal adviser of the Turkish Government during the Perinçek vs. Switzerland case in ECtHR).

Weiss-Wendt, Anton. "Hostage of Politics: Raphael Lemkin on 'Soviet Genocide'," *Journal on Genocide Research* 7, no. 4 (December 2005).

RELATED WORKS[40]

Akçam, Taner. *İnsan Hakları ve Ermeni Sorunu*. İmge Yayınevi, 1999.

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

Aktan, Gündüz. *Açık Kriptolar, Ermeni Soykırımı İddiaları, Avrupa'da Irkçılık ve Türkiye'nin AB Üyeliği.* Aşina Kitapları, 2006.

Akyılmaz, Gül. "Osmanlı Devleti'ndeki Hukuki Düzenlemeler Çerçevesinde Ermeniler ve Geride Bıraktıkları Mallar (Emvâl-i Metruke)". Ankara: Avrasya İncelemeleri Merkezi (AVİM), Rapor No: 16, Temmuz 2017. https://avim.org.tr/images/uploads/Rapor/kapak16.pdf

40 These sources have been utilized for acquiring background information and ideas about this article's research topic, but they have not been specifically cited in the main text of the article. They have been included in this section for readers who are interested in additional information concerning this topic.

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

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

Aya, S.S. *The Genocide of the Truth Continues*. Istanbul: Derin Publications, 2010.

Aya, S.S. *The Genocide of the Truth*. Istanbul: Commerce University Publications, 2008.

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

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

Buenos, Tal. "Genovive: Hobbes and a Nation's Natural Right to Survive." *Middle East Critique* 20, no. 3 (2011).

Cannie, H., & D. Voorhoof. "The Abuse Clause and Freedom of Expression in the European Human Rights Convention. An Added Value for Democracy and Human Rights Protection." *Netherlands Quarterly of Human Rights* 29, no. 1 (2011).

Case Of Perinçek v. Switzerland, Application no. 27510/08 (European Court of Human Rights, Second Chamber, Judgement of December 17, 2013).

Çağan, Hazel. "Twisted Law And Documented History - Geoffrey Roberson's Opinion On Genocide Against Proven Facts." *Review of Armenian Studies,* no. 28 (2013).

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

Danto, Arthur C. *Analytical Philosophy of History*. London: Cambridge University Press, 1965.

Dink, Hrant. *İki Yakın Halk, İki Uzak Komşu*. İstanbul: Uluslararası Hrant Dink Vakfı Yayınları, Haziran 2008.

Ehrhold, Kaethe. *Flucht in die Heimat. Aus Dem Kriegserleben Deutscher Missionsschwester in die Asiatischen Türkei.* Dresden, 1937.

Geçmişin Yükünden Toplumsal Barış ve Demokrasiye - Geçmişle Hesaplaşma. Neden? Ne zaman? Nasıl? Istanbul: Heinrich Böll Stiftung Derneği, Eylül 2007.

Gürün, Kamuran. *The Armenian File-The Myth of Innocence Exposed*. London: K. Rustem & Bro, 1985.

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

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

Hür. Ayşe. Öteki Tarih I – Abdülmecid'den İttihat Terakki'ye. İstanbul: Profil Yayıncılık, 2014.

International Criminal Law Review (Armenian Genocide Reparations - Special Issue) 14, no. 2 (2014): 220-469.

İlter, Erdal. *Türk-Ermeni İlişkileri Bibliyografyası*. Ankara: Ankara Üniversitesi, 1997.

Joinet, Louis. *Lutter contre L'Impunité*. Paris: La Découverte, 2002.

Lewy, G. "Can There be Genocide Without the Intent to Commit Genocide?" *Journal of Genocide Research* 10, no. 1 (2008).

Lobba, Paolo. "Le destin de la pénalisation du négationnisme." *Liberté Pour L'Histoire*, 5 février 2014. http://www.lph-asso.fr/indexa68f.html?option=com_content&view=article&id=194%3Ale-destin-de-la-penalisation-du-negationnisme-par-paolo-lobba&catid=53%3Aactualites&Itemid=170&lang=fr#1

Lütem, Ömer Engin (der). *Ermeni Sorunu - Temel Bilgi ve Belgeler*. Ankara: Terazi Yayıncılık, Temmuz 2009.

Mann, Michael. *Dark Side of Democracy: Explaining Ethnic Cleansing*. New York: Cambridge University Press, 2004.

McCarthy, J, E. Arslan, C. Taşkıran and Ö. Turan. *The Armenian Rebellion in Van*. Salt Lake City: The University of Utah Press, *2006.*

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

Nora, Pierre & Françoise Chandernagor. *Liberté pour l'histoire.* CNRS Editions, 2008.

Öke, Mim Kemal. *The Armenian Question 1914-1923*. K. Rüstem & Brother, 1988.

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

Pazarcı, Hüseyin. *Türk Dış Politikasının Başlıca Sorunları*. Ankara: Turham Kitabevi, 2015.

Perinçek, Doğu. *Ermeni Sorununda Strateji ve Siyaset.* Kaynak Yayınları, 2006.

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

Perinçek, Mehmet. *Армянский Вопрос в 120 Документах из Российских Государственных Архивов*. Москва: Labıratoriya Kniigi, 2011.

Remond, René. "L'histoire et la Loi." *Liberté pour l'histoire*, Texte paru dans Études, n° 4046, juin 2006. http://www.lph-asso.fr/indexe19b.html?option=com_content&view=article&id=154&Itemid=184&lang=fr

Reynolds, Michael. *Shattering Empires: The Clash and Collapse of the Ottoman and Russian Empires -1908-1918*. Cambridge: Cambridge University Press, 2010.

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

Sassounian, Harut. "Text of Swiss Appeal to European Court on Armenian Genocide Disclosed." *RFE/RL – Azatutyun*, April 1, 2014. https://www.azatutyun.am/a/25316449.html

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

Sonyel, Salahi R. "Yeni Belgelerin Işığı Altında Ermeni Tehcirleri (16 belge ile birlikte)." *Belleten* 36*,* no. 141 (1972).

Sonyel, Salahi R. *The Ottoman Armenians*. Oxford University Printing House, 1987.

Şimşir, B. *Armenians in the Ottoman Empire and Modern Türkiye (1912-1926)*. Istanbul: Boğaziçi University Publications, 1984.

Tacar, Pulat. "Soykırım Savlarına Karşı Başvurulabilecek Hukuk Yolları." *Teori Aylık Dergi: Soykırımı Yalanına Karşı Hukuk Cephesi*, Nisan 2007.

Timur, Taner. *1915 Sonrası Türkler ve Ermeniler*. Ankara: İmge Kitabevi Yayınları, 2000.

Timur, Taner. *Küreselleşme ve Demokrasi Krizi*. Ankara: İmge Kitabevi Yayınları, 1996.

Tuğal, Cihan. "1915 Hatıraları ve Ermeni Kimliğinin İnşası." *Türkiye'nin Toplumsal Hafızası* içinde, Esra Özyürek (der.), 127-153. Ankara: İletişim Yayınları, 2001.

Türk-Ermeni İlişkilerinin Gelişimi ve 1915 Olayları Uluslararası Sempozyumu Bildirileri. Ankara: Gazi Üniversitesi, 2006.

Voorhoof, Dirk and Hannes Cannie. "The Abuse Clause and Freedom of Expression in the European Human Rights Convention, An Added Value to Democracy and Human Rights Protection." *Netherlands Quarterly of Human Rights* 29, no. 1 (March 2011).

Voorhoof, Dirk. "Perinçek Judgment on Genocide Denial." *ECHR Blog*, January 7, 2014. https://echrblog.blogspot.com/2014/01/perincek-judgment-on-genocide-denial.html

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

Yerasimos, Stéphane. *Questions d'Orient-Frontieres et minorités de Balkans au Caucase.* Paris: La Decouverte & Livres Héredote, 1993.

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

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

Pulat Y. Tacar
Retired Ambassador

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

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

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

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

1. The circumstances of *Perinçek v Switzerland* Case

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

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

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

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

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

Article 43 of the Convention, foresees that requests for referral to the Grand Chamber are examined by a panel of five judges of the Grand Chamber. Article

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

"Whoever publicly by word, writing, image, gesture, acts of violence or any other manner, demands or discriminates against an individual or a group of individuals because of their race, their ethnicity or their religion in a way which undermines human dignity, or for the same reason, denies, grossly minimizes or seeks to justify a genocide or other crimes against humanity... will be punished by a maximum of three years imprisonment or a fine."

43/2 of the Convention provides that a request for referral may be accepted "*if the case raises a serious question affecting the interpretation or application of the Convention or the Protocols thereto or a serious issue of general importance."*[2]

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

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

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

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

2. What is the Meaning of "Genocide"?

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

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

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

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

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

> *"In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group* ***as such:*** *a)Killing members of the group; b)Causing bodily or mental harm to members of the group; c)Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; d)Imposing measures intended to prevent births within the group; e) Forcibly transferring children of the group to another group".*

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

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

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

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

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

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

---

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

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

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

Para.188. The specificity of the intent and its particular requirements are highlighted when genocide is placed in the context of other related criminal acts, notably crimes against humanity and persecution.

"[The] basic moral principle required for persecution is higher than for ordinary crimes against humanity, although lower than for genocide… Both persecution and genocide are crimes perpetrated against persons that **belong to a particular group and who are targeted because of such belonging.** In both categories what matters is the intent to discriminate: to attack persons on account of their ethnic, racial, or religious characteristics...., it can be said that, from the viewpoint of *mens rea*, genocide is an extreme and most inhuman form of persecution. To put it differently, when persecution escalates to the extreme form of wilful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide. (IT-95-16-T, Judgment of 14 January 2000, (para. 636.)

8 Para. 23 of the judgment

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

On this occasion it should be remembered that the **ECtHR judgement makes it clear that Dr. Perinçek did not deny the existence of deportations, relocations of population, and massacres committed against the Ottoman Armenians; he refused to qualify these events as genocide**.

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

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

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

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

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

Furthermore, with regard to the suspects of crimes against humanity and/or genocide, several States recently introduced in their penal legislation, stipulations allowing suspects to be tried outside the national territory where

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

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

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

the crime has been committed[12]. Finally, the **Framework Decision (2008/913/JHA) on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law**[13] adopted by the European Union *"criminalizes the denial or gross trivialisation of genocide, in a manner likely to incite violence or hatred against a group, if these crimes have been established by a final decision of a national court of this Member State, and/or an international court..."*

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

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

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

---

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

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

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

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

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

These tragic events are to be labelled as crimes enumerated by the Ottoman Penal Code. In 1915 more than 20 Muslims were sentenced to death and executed for such crimes[16]. Following a report by Talat Pasha,[17] the Ottoman Government created three commissions[18] to investigate the complaints of Armenians and the denunciations of civil servants. As a result, on March-April 1916, 1673 persons, including captains, first and second lieutenants, commanders of gendarme squads, police superintendents and mayors were remanded to courts martial. 67 of them were sentenced to death, 524 were sentenced to jail, and 68 received other punishments such as forced labour, imprisonment in forts, and exile. Several of them were sentenced to death for plunder, and other death sentences were justified not only by murders, but also by robberies[19].

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

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

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

16 Günther Lewy, supra.

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

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

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

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

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

government declined to use any "fake" evidence developed by the said Ottoman tribunals.[22]

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

The ECtHR is not the competent tribunal to evaluate and decide on the materiality of the tragic events that seriously harmed the Ottoman Armenian people during the population transfer which occurred in 1915 and 1916. Consequently, the ECtHR made no pronouncement concerning the appropriateness of legally describing these facts as genocide.

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

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

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

The ECHR's judgement has been welcomed by Dr. Doğu Perinçek, by the Turkish authorities and also by many scholars[24].No surprise that it has been

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

23 Para. 111.of the judgment

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

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

criticized by Armenian diaspora organizations, lawyers, and their supporters, because it condemned Switzerland for limiting the freedom of expression of Dr. Perinçek.

The above mentioned Armenian sources revealed that the petition of Switzerland to the ECtHR concerning the referral of the judgement to the Grand Chamber contains critical remarks on it.

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

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

For the Swiss courts

*"**the main ground for the condemnation of Dr. Perinçek, was the denial of the general consensus which seems to exist in the community, in particular in the scientific community, on the genocide description of the events in question**."*[26] On that point, the ECHR *"was not convinced that the general*

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

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

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

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

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

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

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

26 Para. 114 of the judgment.

consensus concept - which the Swiss courts have referred, to justify the conviction of Dr. Perinçek- can bear on these very specific points of law."[27]

ECtHR justifications on that matter are as follows:

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

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

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

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

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

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

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

27 Para. 116 of the judgment

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

29 Para. 115 of the judgment

30 Para. 115 of the judgment

31 Para. 117 of the judgment

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

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

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

If the act in question is posterior to the Genocide Convention, the tribunal will follow the verb of the Convention which -after its ratification by the Swiss Parliament-became an integral part of the Swiss legislation. The denial of a genocide designed as such **by the competent tribunal** should be reprimanded in accordance with article 261, *bis* of the Swiss Penal Code. For example: the denial of Srebrenitsa genocide is included in that category; also the denial of genocide in Rwanda is to be punished.

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

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

32 Para. 103 of the judgment

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

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

On this topic, we should not fail to add that the "historical genocides list" issue is a critical political matter of actuality, and those who follow the subject are aware of the diplomatic horse-trading behind closed doors[35]. Several methods may be experimented to finalize a sort of "historical genocides list": voting is one of the alternatives; as it was experimented by the International Association of Genocide Scholars ***(funded by the Armenian Zoryan Institute!);*** creating People's Tribunals (like the one in Sorbonne, Paris in 1984) may be another practical solution!

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

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

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

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

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

> *"**The first group of scholars** agree that the consequences of the events constitute genocide, the Turks are perpetrators and the Armenians are blameless victims. However within the same epistemic community they provide diverse, even contradictory causal explanations. Their causes vary from Islam[37] to the structure of the Ottoman State and to Turkish nationalism[38]; to the leadership of the vengeance oriented CUP leaders, the authoritarian and theocratic Ottoman State structure...; they hardly question the activities of the Armenian revolutionary organizations and their close alliance with the occupying forces...; they agree that Türkiye should recognize the events as genocide and respond to its legal implications. They do not take the role of Western imperialism or the insurgency tactics of Armenian revolutionary committees into account and ignores the demographic pressure of the deportations of Muslims from the Balkans and the Caucasus… This courtroom-centred type of academic activity solely seeks to display the guilt of perpetrators.*
>
> *Other (functionalist) scholars treat also the destruction of the Armenian communities as genocide by outcome; they tend to disagree with the essentialist thesis; they reject the premeditation[39] argument: a) it was an incremental genocide without a single order or plan ;b) the logic of total war, converted the war's foreseeable excesses into unintended genocide; c)the defeats in the*

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

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

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

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

Balkans and the anxiety around the collapse of the Ottoman State accelerated Turkish-Armenian conflict beyond control. Ideological, economic, military and political conditions all together may create a toxic mix to explain mass killings[40]. David Bloxham argues "that the war was the most important factor in the annihilation of the Armenians; ...there was no well-articulated plan of genocide, but rather a gradual radicalization of the Ottoman policies. Furthermore, the core argument of the premeditation has been challenged by a series of prominent scholars. Ronald Sunny, an Armenian political scientist argues that the most plausible argument to explain the genocide is the role of state elites and emerging modernity.. The deportation was a deliberate elite decision to protect the State and also to prevent the Armenian actors from collaborating with Russia. Fuat Dündar claims that the CUP's main goal was to create a Muslim-Turkish homeland though assimilation and deportation.

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

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

The Turkish Republic has refused to accept charges of historical guilt and accused in turn its challengers of ignoring the mass killing of Ottoman Muslims during the same period... ***The nationalist Turkish perspective*** *views the actions in 1915 as necessary for stopping Armenian treachery and protecting the homeland; some tend to view the Armenians as treacherous people who were waiting to seize an opportunity to rebel and stab the beleaguered Ottoman State in the back, with the help of imperialist powers, especially Russia; The Ottoman Army and the Muslim communities used the right to self-defence to protect their life and properties[42]. Many Ottoman historians treat the decision to relocate the Armenian population as a security measure to stop them from collaborating with the Russian enemy and also as a means for protecting the civilian*

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

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

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

population[43]. A group of Turkish historians who embraced the large scale massacres thesis stress the role of the CUP leadership and their dictatorial ideology. Murat Belge argues that the diaspora should give up the term genocide; Fikret Adanır argues that the Turkish State should never recognize events of 1915 as genocide, since they were not genocide in legal terms; he does not think one can prove he intent since there is no such document which calls or killing the Armenians; he argues that CUP and the Armenian nationalists were similar, since both group believed in social Darwinism. The interpretation of the Islamist historiography defend the thesis "not genocide but Kıtal (large scale communal violence)";the Islamist understanding of the Armenian issue, including among the leadership of the Justice and Development Party is filtered through Abdülhamit II's perspective of the Armenian challenges; the removal of the Armenian communities is the result of two conflicting secular nationalistic ideologies, with the Armenians supported by the European Christians..."

7. The Quest for an equitable memory

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

The Minister of Foreign Affairs of Türkiye, Professor Ahmet Davutoğlu, recently said that he was sensitive to the sufferings of the Ottoman Armenians,[44] but he also expected from the Armenians and their supporters the same understanding regarding the plight of the Muslim Ottomans, who equally suffered during the tragic events in Eastern Anatolia. Prof. Ahmet Davutoğlu called for spending every possible effort to attain a just and equitable memory on this issue.

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

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

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

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

It is indisputable that the last years of the Ottoman Empire were a difficult period, full of suffering for Turkish, Kurdish, Arab, Armenian and millions of other Ottoman citizens, regardless of their religion or ethnic origin.

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

Any conscientious, fair and humanistic approach to these issues requires an understanding of all the sufferings endured in this period, without discriminating as to religion or ethnicity.
Certainly, neither constructing hierarchies of pain nor comparing and contrasting suffering carries any meaning for those who experienced this pain themselves. As a Turkish proverb goes, "fire burns the place where it falls".
It is a duty of humanity to acknowledge that Armenians remember the suffering experienced in that period, just like every other citizen of the Ottoman Empire.
In Türkiye, expressing different opinions and thoughts freely on the events of 1915 is the requirement of a pluralistic perspective as well as of a culture of democracy and modernity.
Some may perceive this climate of freedom in Türkiye as an opportunity to express accusatory, offensive and even provocative assertions and allegations.
Even so, if this will enable us to better understand historical issues with their legal aspects and to transform resentment to friendship again, it is natural to approach different discourses with empathy and tolerance and expect a similar attitude from all sides.
The Republic of Türkiye will continue to approach every idea with dignity in line with the universal values of law.
Nevertheless, using the events of 1915 as an excuse for hostility against Türkiye and turning this issue into a matter of political conflict is inadmissible.
The incidents of the First World War are our shared pain. To evaluate this painful period of history through a perspective of just memory is a humane and scholarly responsibility.
Millions of people of all religions and ethnicities lost their lives in the First World War. Having experienced events which had inhumane consequences - such as relocation - during the First World War, should not prevent Turks and Armenians from establishing compassion and mutually humane attitudes among towards one another.
In today's world, deriving enmity from history and creating new antagonisms are neither acceptable nor useful for building a common future.
The spirit of the age necessitates dialogue despite differences, understanding by heeding others, evaluating means for compromise, denouncing hatred, and praising respect and tolerance.
With this understanding, we, as the Turkish Republic, have called for the establishment of a joint historical commission in order to study the events of 1915 in a scholarly manner. This call remains valid. Scholarly research to be carried out by Turkish, Armenian and international historians would play a significant role in shedding light on the events of 1915 and an accurate understanding of history.
It is with this understanding that we have opened our archives to all researchers. Today, hundreds of thousands of documents in our archives are at the service of historians.
Looking to the future with confidence, Türkiye has always supported scholarly and comprehensive studies for an accurate understanding of history. The people of Anatolia, who lived together for centuries regardless of their different ethnic and religious origins, have established common values in every field from art to diplomacy, from state administration to commerce.
Today they continue to have the same ability to create a new future.
It is our hope and belief that the peoples of an ancient and unique geography, who share similar customs and manners will be able to talk to each other about the past with maturity and to remember together their losses in a decent manner. And it is with this hope and belief that we wish that the Armenians who lost their lives in the context of the early twentieth century rest in peace, and we convey our condolences to their grandchildren.
Regardless of their ethnic or religious origins, we pay tribute, with compassion and respect, to all Ottoman citizens who lost their lives in the same period and under similar conditions." 23.04.2014, Ankara

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

History does not emanate from some single omnipotent base.[47] The whole truth about a certain period in the past can never be told.[48] The historians do not agree with one another; they are selective in what they choose to report and there are

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

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

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

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

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

Gündüz Aktan *The Armenian problem and International Law* op. cit. p.281: "The Balkan-type use of violence constituted a model in that the terrorist groups would attack the civilian Moslem population to provoke them to retaliate. If the Muslims retaliated or if the administration took military action, there would be loud cries of massacres to the Ottoman Christians."

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

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

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

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

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

no principles of selection clearly dictated by the nature of history itself.The choice of a method of presentation is influenced as much by the nature of a particular period or by a historian's personal preferences.Besides, statements about the past are claimed necessarily to diminish in credibility as time goes on[49]. There exists the possibility of an indefinite number of causes for a particular event such as the outbreak of upheavals, social revolutions, or wars. This opens up the possibility of disputes over which causes are more important or significant; disputes which may be sharpened by claims that one thing is the true real cause of the "tragic events". There are no absolute "facts" in history, as these are unavoidably subject to selection by the historian[50]. It is inevitable that the historian's own judgments and his moral, political, religious, aesthetic values determine his writings. The historian will make moral judgments of the conduct of men and women of past times who lived by different standards[51].For example; the use of the terms- "executed", "murdered", "killed" which are all value laden items will make difference in history writing. Historical agents have had a variety of reasons for what they did, and accordingly historians will disagree over what their real or main reasons were. Finally the historians are not entitled to judge on the qualification to be accorded to a crime and **there cannot be a general consensus on historical matters.**

8. Historical memory laws

Perinçek vs Switzerland case and the judgment of ECtHR brought to surface evident dangers of memory laws and their arbitrary enforcement by the judges under the spectre of denials. The memory laws, the denial, and the limits of the freedom of speech have been the subject of intensive debates, and research since the past 30 to 40 years[52]. This triggered coming to the stage of the legislators as well as the judges as the new protectors of the official history and of "historical memory laws". The last is defined as "a *law imposing the official point of view of a State over historical events*"[53]. One of the effects of memory laws is to create a kind of competition among victims of past tragedies at the risk of replacing a collective understanding of the past with the disgruntlement of special interest groups that design themselves through their unique historical experiences.

49 Atkinson, R.F. op.cit

50 Atkinson, R.F. op.cit.

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

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

53 Ibid. p.76, footnote 3.

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

The historical memory laws show the considerations that underlie their adoption; essentially electoral ones, which have more to do with feeling than reasoning. They arise out of the same desire, as felt by specific religious and ethnic communities to persuade the others, to take seriously their past experience by taking history as a whole as hostage[55].Memory laws were misused by the Governments for political purposes[56]. When dealing with law on memory and their application by the judges, how far one should go back in time? To the Crusaders? Or to the Albigensian massacres? Or to Slave Trade? Can Protestants not demand reparations for the persecution they suffered after the revocation of the Edict of Nantes? Should also the deniers of those crimes be sentenced? More and more the historical memories of these special interest groups are threatening to provoke members of the social groups up against the other?[57] Almost every day we read hate speech filled messages in the social media emanating from militant Armenians against the Turkish nation as a whole.[58]

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

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

> *"The judgment of the European Court of Human Rights in the Perinçek v. Switzerland case* ***has reduced the concept of genocide to that of law***[59]*."According to the CJICL, "The term genocide has been used, misused*

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

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

56 Timothy Garton Ash, ibid

57 René Rémond, ibid.

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

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

> *and abused ad nauseum by a variety of actors seeking to advance their particular agenda. Yet this word should not be ascribed more significance of meaning than it actually has. Genocide remains above all a legal construct - nothing more, and nothing less-. It should be kept in mind that the crime of genocide as defined under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide requires the specific "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."*[60]

10. The Margin of Appreciation of the Swiss courts

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

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

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

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

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

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

60 ibid.

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

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

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

The Court also considered it important to mention that Dr. Perinçek had never disputed the massacres or deportations during the years in question. Dr. Perinçek refused to accept the legal description of genocide attributed to those events[62]. Second Chamber of the ECtHR underlines that *"ideas* which are upsetting, shocking or disturbing" **are also protected** by the Article 10 of the Convention.[63]

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

61 "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein... or at their limitation to a greater extent than is provided for in the Convention"

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

63 Para. 51,52 and 54 of the judgement

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

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

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

14. Was the condemnation predictable?

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

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

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

Swiss Minister of Justice Mr. Blocher, during an official visit to Türkiye stated to the media that the Swiss Government had the intention of revising Article 261. bis of the Swiss Penal Code because that legislation was incompatible with freedom of expression[67] and was hindering historical research. Mr. Blocher added that he was embarrassed because of alegal pursuit conducted in Switzerland against Professor Yusuf Halaçoğlu who rejected the allegations of Armenian genocide *(Professor Halaçoğlu was at that time the chairperson of the Turkish Historical Society)*.

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

65 Para.72 of the judgment

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

67 *Swissinfo.ch*. March 5, 2007

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

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

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

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

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

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

It is extremely difficult to understand the insistence of the Swiss Government to put aside the legal context of the crime of genocide - as provided by the

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

Genocide Convention-and try to replace it by a- political parlance. It is believed that the main misunderstanding and difference of opinion between the Swiss Government and Dr. Perinçek as well as the Second Chamber of ECHR lies there.

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

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

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

Words of denial may be criminal if they incite hatred and violence and if they represent a real danger in light of the history and social conditions prevalent in a given society.

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

The Second Chamber's conclusion on the matter is that the **Swiss Court has not proved that it was necessary, in a democratic society, to protect the honour and feelings of the descendants of victims of atrocities dating back to 1915 and thereafter and that "the domestic court therefore exceeded the limited margin of assessment that it enjoyed in the case in hand, which was part of a debate ofspecific interest to the public.**

69 Para 73 to75 of the verdict

70 Para.75 of the verdict

71 Article 10.1; "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of radio broadcasting, television or cinema enterprises."

Article 10.2.; "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others."

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

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

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

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

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

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

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

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

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

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

73 Para. 126 of the judgment

74 Para. 119 of the judgment

75 Para. 51 of the judgment

76 Para. 51 of the judgment

77 Article 261 bis .para 4: "Whoever publicly by word, writing, image, gesture, acts of violence or any other manner, demeans or discriminates against an individual or a group of individuals because of their race, their ethnicity or their religion in a way which undermines human dignity or for the same reason denies, grossly minimizes o seeks to justify a genocide or other crimes against humanity..."

In a judgment dated 7 November 2007 (no.235/2007) **Spanish Constitutional Court** ruled that the simple denial of any genocide was not a direct incitement to violence, and that simple dissemination of conclusions regarding the existence or non-existence of specific facts, without making a value judgment on them or on their illegal nature was protected as scientific freedom.[78]

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

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

Furthermore, ECHR points out that in countries that have acknowledged the Armenian genocide - almost all of them through their parliaments- "*have not deemed it necessary to adopt laws laying down criminal punishment since they are aware that one of the main aims of the freedom of expression is to protect minority points of view likely to encourage debate on questions of general interest that have not been fully established."*[80]

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

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

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

Twelve Turkish citizens "*have been acquitted on 14 September 2001 by*

78 Para. 121 of the verdict

79 Para. 122 of the verdict

80 Para. 123 of the verdict

81 Para. 124 of the verdict

Bern—Laupen district court, on the charges of genocide denial in accordance with the provision 261 bis of the Swiss Criminal Code."[82]

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

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

The judgement of ECHR underlines that

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

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

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

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

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

In this context, it should be added that German Jews neither engaged in a struggle for independence, nor did they ever chase after and stab the German armies in the back by blocking the strategic roads and logistic lines. The Jews in Germany and in other countries of Europe constituted a totally innocent community with respect to politics. A peaceful, civilized and successful community was destroyed with a virulent racist hatred called anti-Semitism in

82 Para. 125 of the verdict

83 Para. 119 of the verdict

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

an exceptionally systematic manner, planned in advance and implemented with a massive organizational drive, for no other reason than being Jewish.

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

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

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

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

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

Dr. Perinçek's using the words of "international lie" is not directed to Armenians but to imperialist powers; this statement reflects his political position in his capacity of Chairperson of the Turkish Workers Party. The crimes committed during the tragic events of 1915-1916 have been judged by

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

86 Gündüz Aktan, op.cit

the Ottoman Tribunals, and those found guilty were condemned in accordance with the Ottoman penal law.[87]

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

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

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

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

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

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

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

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

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

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

89 Para. 98 of the verdict.

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

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

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

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

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

  In **Gündüz vs Türkiye** (No. 35071/97 ECHR 2003-XI) case Mr. Gündüz was condemned for statements that were described by the domestic jurisdiction as "hate speech". The Court observed that the words spoken by the applicant denoted a resolutely critical stand and discontent with contemporary Turkish institutions, such as the principle of secularism and democracy. Examined in their context they could not, however be taken as a call for violence or as a hate speech based on religious intolerance. The simple fact of defending Sharia law, without calling for violence to establish it, could not be considered "hate speech".

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

  In **Erbakan vs Türkiye** case (No. 59405/00 6 July 2006) Mr. Erbakan was judged guilty of having made a public speech inciting hatred and religious intolerance. ECtHR ruled that the words- assuming they were in fact spoken- of a famous politician pronounced at a public gathering,

90 Para.106 of the ECHR verdict

91 Para.107 of the ECHR verdict

92 Para. 108 of the ECHR judgment

presented, moreover, a vision of society structured exclusively around religious values, and thus seemed difficult to reconcile with the pluralism that characterizes contemporary societies in which the most varied groups encounter one another. However the grounds put forth to justify the necessity of the steps taken against Mr. Erbakan were not considered sufficient to convince the Court that this interference in the right to freedom of expression was **necessary in a democratic society.**

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

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

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

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

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

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

93 Para. 109 of the ECHR judgment

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

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

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

> *"the Parties to the said Convention have undertaken to declare illegal, organisations ... which incite to racial discrimination and punish by law the participation to these activities.*" "*The Swiss Government is in the opinion that even only this (element) justifies as such, the referral of the Perinçek's verdict to the Grand Chamber, in order to clarify the scope of the principle of subsidiarity underlying the machinery of control of the Convention.*".*On the other hand the Swiss Government questions also the reason, why the Second Chamber did not produce in extenso the para 4b of the said Convention.*[94]

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

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

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

Is the term "pig foreigner" racial discrimination?

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

22. Conclusions

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

- The verdict of the ECtHR in *Perinçek vs Switzerland* affair is consistent with the established case-law of the Court. This well-reasoned and balanced verdict is related to the violation of the freedom of expression;
- The ECtHR judgement underlines that expressing opinions on sensitive and debated issues is a fundamental aspect of freedom of expression and the difference between tolerant, pluralist and democratic society and totalitarian regimes lies in this;
- ECtHR observes that it was not competent to arbitrate upon the controversial historical aspects and also on the legal qualification to be attributed to the matter;
- And it was certainly not to an European Court to give a legal opinion on these issues;
- The rejection of legal characterisation as "genocide" of the tragic events of 1915-1916, was not directed to incite hatred against the Armenians;
- The prosecution and conviction of Dr. Perinçek was not necessary in a democratic society;

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

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

- The margin of appreciation of the Swiss authorities on deciding whether interference with Dr. Perinçek's freedom of expression was limited;
- And it was very difficult to identify the existence of a general consensus about the qualification of the "Armenian genocide";
- Finally, there was no pressing social need or condemning Dr. Doğu Perinçek.

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

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

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

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

BIBLIOGRAPHY

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

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

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

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

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

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

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

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

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

British Blue Book, No. 6 (1894)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Tacar, P. & Gauin M. (2012). "State Identity, Continuity, and responsibility: The Ottoman Empire the Republic of Türkiye and the Armenian Genocide. A reply to Avedian, Vahagn" (2012, August), *European Journal of International Law* (Volume: 23, No: 3, August 2012 pp: 828-829)

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

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

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

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

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

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

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

THE LEGAL AVENUES THAT COULD BE RESORTED TO AGAINST ARMENIAN GENOCIDE CLAIMS

Pulat Y. TACAR
Ambassador (Ret.), Author

Abstract: *The view that the tragic events of 1915 do not constitute genocide is widely accepted by the Turkish general public and Turkish governments. However, the parliaments, senates, regional assemblies, statesmen and politicians of some countries have declared that a genocide was perpetrated against the Armenians. In the face of these developments, the view that Türkiye should resort to legal avenues has begun to take root amongst the ranks of the Turkish politicians and the general public. This article which analyzes the various legal means which may be resorted to against these genocide allegations, concludes that alongside promoting the conduct of historical research in order to shed light upon the historical truth that lies behind these events, the Turkish authorities should officially underline and insist that the crime of genocide can not be established by political decisions taken by parliaments, but only by the verdict of the competent court as foreseen in the 1948 Genocide Convention. Furthermore, this article maintains that against laws and practices restricting the freedom of expression, individuals can resort to the European Court of Human Rights as "victims" or "potential victims"*

Key Words: *Turk, Armenian, Genocide, Ottoman*

Öz: *1915'te yaşanan trajik olayların soykırım teşkil etmediği görüşü Türk kamuoyu ve Türk hükümetleri tarafından geniş ölçüde kabul görmektedir. Ancak bazı ülkelerin parlamentoları, senatoları, bölge meclisleri, devlet adamları ve siyasetçileri Ermenilere karşı soykırım yapıldığını ilan etmişlerdir. Bu gelişmeler karşısında Türkiye'nin hukuki yollara başvurması gerektiği görüşü Türk siyasetçileri ve kamuoyu arasında kök salmaya başlamıştır. Soykırım iddialarına karşı başvurulabilecek çeşitli hukuki yolları inceleyen bu makale, Türk makamlarının, bu olayların ardında yatan tarihi gerçeğin aydınlatılması için tarihi araştırmaların yapılmasını teşvik etmenin yanı sıra, soykırım suçunun parlamentolar tarafından alınan siyasi kararlarla değil, ancak 1948 Soykırım Sözleşmesi'nde öngörüldüğü üzere yetkili mahkemenin*

kararıyla tespit edilebileceğini resmi olarak vurgulaması ve bunda ısrar etmesi gerektiği sonucuna varmaktadır. Ayrıca bu makale, ifade özgürlüğünü kısıtlayan yasa ve uygulamalara karşı bireylerin "mağdur" veya "potansiyel mağdur" olarak Avrupa İnsan Hakları Mahkemesi'ne başvurabileceğini savunmaktadır.

Anahtar Kelimeler: *Türk, Ermeni, Soykırım, Osmanlı*

INTRODUCTION

Genocide is a crime under international law[1]. The main feature which differentiates this crime from other crimes, including crimes against humanity, war crimes or common crimes is the special "intent to destroy, in whole or in part a national, ethnical, racial or religious group, *as such*."

The Armenian Diaspora as well as the government of the Armenian Republic demands the Turkish Government and the Turkish general public to acknowledge that genocide was perpetrated against the Ottoman Armenians between the years 1915-1923. In reality their goal is not to attain moral satisfaction but: "to plan what comes after Türkiye has been forced to recognize the Armenian Genocide and provide restitution and reparations…[2]". To achieve this goal, the Diaspora continues to stir into action its supporters in the parliaments of same countries as well as in the European parliament with a view to exert pressure on Türkiye. The political, legal and ethical consequences sought by this political action can be summarized as follows:

The acknowledgement by the Turkish Government that the Ottoman Government ordered the annihilation of Ottoman Armenians solely on the basis of their group identity;

The acknowledgement of the guilt of 130 persons who were transferred to Malta to stand trial for committing crimes against humanity and civilization and subsequently released after two years of detention without even being brought before a court due to lack of evidence;

The payment of compensation by the Turkish Republic, as the successor State of the Ottoman Empire, for the damages caused on the part of Ottoman

1 United Nations General Assembly Decision 96 (I) 11 December 1946. and the Preamble of the Convention on the Prevention and Punishment of the Crime of Genocide

2 Press Release of the Armenian Revolutionary Federation Association dated November 19, 2006 announcing a Panel Discussion to be held in Hollywood, California on December 3, 2006.

officials alleged to have committed genocide and, in this manner, to pave the way of returning certain immovable properties;

The creation of the political groundwork for demands of an Armenian homeland in Türkiye (*Armenia continues to refer to the Eastern Provinces of Türkiye as "Western Armenia"*);

The acceptance by Türkiye that the 1915 genocide allegations can be dealt within a political framework and outside of the legal sphere created by the Genocide Convention of 1948;

The acceptance by the Turkish public of a selective treatment of the victims of tragic events during the period covering the years 1915-1923 by recognizing that their ancestors committed the crime of genocide against the Ottoman Armenians and overlooking the massacres and lass of life of the Muslim Ottoman citizens during the same period.

The great majority of the Turkish nation and Turkish governments are of the belief that the tragic events which occurred in Eastern Anatolia during the period under discussion can not be called genocide. Various other governments-such as the British Government, the Israeli Government-[3] as well as many foreign scholars, historians, intellectuals or members of the media are also of the belief that the necessary conditions have not been ful611ed for the events in question to be dassi6ed as genocide.

Nonetheless, various parliaments, senates, regional assemblies, statesmen and politicians have acknowledged that an act of genocide has been committed against the Armenians as of 1915.

In the face of these developments, the view that Türkiye should resort to legal avenues to counter these claims has begun to take root amongst the ranks of the Turkish politicians and the general public.

3 -On 14 April 1999 the Foreign Office spokesperson Baroness Ramsay of Cartvale said that "the British Governments have not recognized the events of1915 as indications of Genocide";-on 7 February 2001, acting on behalf of the British Government, Baroness Scotland of Asthal declared: "The Government, in line with the previous British Governments, have judged the evidence not to be sufficiently unequivocal to persuade us that these event s should be categorized as genocide as defined by the 1948 United Nations on Genocide, a Convention which was drafted in response to the Holocaust and is not retrospective in application. The interpretation of events in Eastern Anatolia in 1915-1916 is still the subject of genuine debate among historians" (U.N. Document A/55/1008-S/2001/655 which include in its annex the letter of the Permanent Representative of Türkiye to the United Nations Secretary-General dated 29 June 2001. - On 10 April 2001 the Nobel Prize awarded Israeli, Foreign Minister Shimon Perez said that "the fate of Armenians in Anatolia was a tragedy, not a genocide." He added: "Armenian allegations are meaningless. we reject attempts to create a similarity between the Holocaust and the Armenian allegation... If we have to determine a position on the Armenian issue it should be done with great care not to distort the historical realities" (Middle East Intelligence Bulletin. Vol.3. No. 5 May 2001)

On the other hand, a legal adviser of the European Armenian Federation for justice and Democracy Mr. Alfred de Zayas, who has written a Memorandum for this Federation suggests that the Government of Armenia should address the International Court of Justice (ICJ) by invoking Article IX of the Convention and submit a dispute to the ICJ, requesting a determination that the massacres against the Armenians constitute genocide within the meaning of the Convention. The legal consequences of a decision by the ICJ concerning such a demand should be -he asserts- the "*return to the Armenian people and to the Armenian Church of monasteries, churches and other properties of historic and cultural significance, as well as the granting compensation to the descendants of the victims of the genocide...*[4]"

Regarding the Armenian demands of restitution and compensation I would like to underline that all the issues concerning the period covering World War I have been settled by the Lausanne Peace Treaty and today no one has the right to make demands from Türkiye about the historical events which occurred before the signing of this agreement[5]. One should also bear in mind that if the issue of compensation and restitution has been settled by way of an international treaty in the aftermath of a given event, then the provisions of that agreement shall be applied thereof. In this context the treaty of Peace with Türkiye signed at Lausanne should be considered the main legal reference.

The Lausanne Peace Treaty and the Armenian demands

According to the Lausanne Peace Treaty ending the war between Türkiye and other powers, it was decreed that previous Ottoman citizens who resided in countries that were separated from Türkiye by the Article 31 of the Lausanne Treaty, and who had automatically gained citizenship of that country by Article 30, would have the right within two years to choose Turkish citizenship. Through these decrees, all the Armenians who were at the time outside Türkiye, and who had retained Turkish citizenship, and those Armenians who were in those countries separated from Türkiye, obtained the right to return to Türkiye if they wished.

Furthermore, a General Amnesty Declaration has been signed in Lausanne. Article 6 of the Declaration states: "*The Turkish Government which shares the desire for general peace with all the Powers, announces that it will not object to the measures implemented between 20 October 1918 and 20 November 1922, under the protection of the Allies, with the intention of bringing together*

4 Alfred de ZAYAS, Memorandum written to the European Armenian Federation for Justice and Democracy: "The Genocide Against the Armenians 1915-1923 and the Application of the 1948 Genocide Convention" Executive Summary p. 19.

5 Kamuran GÜRÜN, *The Armenian File*, İstanbul, Rüstem, 2001, pp. 299-300.

again the families which were separated because of the war, and of returning possessions to their rightful owners." It is apparent that this Article concerned the individuals were forced to emigrate, and who returned to their homes during the period of armistice and occupation. At that time, Türkiye announced that these procedures, which were made under the control of the occupation powers, would be maintained without modification.

According to the Amnesty Declaration, and Protocol, Turkish nationals, and reciprocally nationals of the other Powers signatory of the Treaty of Peace arrested, prosecuted or sentenced prior to 20 November 1922, have taken benefit from an amnesty.

Article 65 of the Treaty of Lausanne stipulates that property of individuals who had foreign citizenship when the war started, and whose possessions in Türkiye had been confiscated, would be returned to them. The Article 95 gave a deadline for inquiries on this matter. Finally, Articles 46-63 of the Lausanne Treaty are about the liquidation of the debts of the Ottoman State. As a result of this process Türkiye has paid all the debts.

1- The Legal Avenues Which Can Be Resorted to by the State

1. Applying to the International Court of Justice

a. The Legal Basis for Applying to the International Court of Justice: Article IX of the Genocide Convention

According to Article IX of the Genocide Convention "the disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the Parties to the dispute."

The acts enumerated in Article III are: genocide; conspiracy to commit genocide; direct and public incitement to commit genocide; attempt to commit genocide; complicity in genocide.

To address a point widely misunderstood, it should be emphasized that to resort to the ICJ, the applicant and respondent do not need to arrive at a prior agreement among them. At most, the respondent state can advance a counter-claim that the ICJ does not have jurisdiction to hear the case, which the Court shall have to ascertain prior to hearing the merits of the case.

b. The Precondition: Officially Establishing the Existence of a Dispute

For a Party to apply to the ICJ on the basis of Article IX of the Genocide Convention, the State in question must, in the first instance, officially establish the existence of a dispute to be brought before the Court. "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons...[6]"

Because of the reasons stated below, I am of the opinion that the French Law of 2001 recognizing the existence of the 1915 Armenian genocide created a dispute between France and Türkiye relating to the application and interpretation of the 1948 Genocide Convention.

Whether or not the ICJ will find itself competent to consider an application on this subject is another issue which I will not address in detail in the context of this article.

c. The Perpetrator(s) of Genocide; the Competent Court and the ICJ Decision on Bosnia

According to the Genocide Convention the crime of genocide is perpetrated by individuals (Article IV)[7] The court which has jurisdiction to try persons charged with genocide is the competent Tribunal of the State in the territory of which the act was committed, or an International Penal Tribunal the jurisdiction of which has been accepted by the Contracting Parties (Article VI). As such, the determination that an act constitutes genocide can be established only by way of a valid judgment at law rendered by a competent court convicting the accused in question. Such a legal decision of criminal law falls within the framework of individual criminal responsibility.

During the drafting of the Genocide Convention the question of jurisdiction has been discussed at length. A proposal concerning the principle of universal repression by a national court in respect to individuals who had committed genocide abroad has been rejected by four votes against two and one abstention on 13 April 1948. During the discussion of Article VII, a proposal to reverse the foregoing decision was also rejected on 26 April 1948[8].

6 Permanent Court of International Justice: Mavrommatis Palestine Concession Case, PCIJ, Series A, No.2, 1924, pp.6*93.

7 Article IV of the Genocide Convention reads as follows: Persons committing genocide or any of the other acts enumerated in Article 3 shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

8 Travaux Preparatoires of the Genocide Convention. U.N. ECOSOC Document E /794, 24 May 1948

With regard to the question of determining the responsibility of a State: this in principle is the subject of a civil court case carried out in accordance with civil law of the country.

Furthermore, according the Article IX of the Genocide Convention the International Court of Justice is also competent to rule on the matter. But one should underline that in its Bosnia judgment, the ICJ observed "*that if a State is to be responsible because it has breached its obligation not to commit genocide, it must be shown that genocide as defined in the Convention has been committed*[9]"and "*claims against a State involving charges of exceptional gravity must be proved by evidence' that is fully conclusive*[10]"

This raises the question of whether or not the recent Bosnia and Herzegovina *v.* Serbia and Montenegro judgment of the le], infringed Article IV of the Convention. it was the International Criminal Tribunal for the Former Yugoslavia (ICTY) who was (and still is) the "competent court" on that matter, and ICTY -in the Kristic and Blagoyevic cases-arrived at the determination that during 12-13 July 1995 the massacres which took place in Srebrenica amounted to genocide. As such, several of the allegations brought before the IC] have already been the subject of decisions of the ICTY. The ICTY has not yet arrived at the conclusion that genocide was committed elsewhere other than in Srebrenica; the trials still continue and same suspects are actually at large. But the evidence and judgments rendered by the ICTY has established that several crimes may have been committed throughout the Bosnian Wat.

In dealing with this situation the ICJ states that although these do not amount to genocide, they might constitute crimes against humanity or Wat crimes, which -as stipulated in the judgment-the ICJ does not have jurisdiction over. As such, after the decision of the ICJ, it appears unlikely that the crimes which are the subject of the remaining cases before the ICTY shall be determined to be of a genocidal nature.

The ICJ decision underlined the difference between genocide and "ethnic cleansing"; while "ethnic cleansing" can be carried out by the displacement of a group of persons from a specific area, genocide is defined by "*specific intent*".

The ICJ placed dispositive emphasis on the question of intent. It held that genocide as defined in the Convention requires both acts and intent[11]. The court added "It is not enough to establish that deliberate killings of members of the

9 Judgment of the ICJ on Bosnia and Herzegovina *v.* Serbia and Montenegro. Para. 180.

10 Judgment of the ICJ on Bosnia and Herzegovina v. Serbia and Montenegro. Para. 209.

11 International Court of Justice, "Case Concerning the Application of the Convention of the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Serbia and Montenegro" para. 187.

group have occurred. The additional intent must also be established and this intent -*dolus specialis* is defined precisely. It is not enough that the members of the group are targeted because they belong to that group, that is because the perpetrator has a discriminatory intent. The acts listed in Article II must be done with the intent to destroy the group as such". The words "as such" emphasize that intent to destroy the protected group[12] and "great care must be taken in finding in the facts a sufficiently clear manifestation of that intent[13]."

In the judgment under section IV "The Applicable Law: The Convention on the Prevention and Punishment of the Crime of Genocide," the ICJ concludes that "State responsibility can arise under the Convention for genocide and complicity, without an individual being convicted of the crime or an associated one[14]". This controversial decision does not fall in line with the wording of the Genocide Convention, for according to Article IV of the Convention -as I underlined above- "genocide is perpetrated by individuals"

267 pages of dissenting and separate opinions were written by the judges, appended to the judgment of the Court, attest that there is a serious lack of consent amongst the judges regarding various issues of central concern[15].

On this point, I would like to add that during an International Conference hosted by the Ankara Bar Association in January 2005, I asked the following question regarding the competent court to Mrs. Anika Usacka, judge at the International Criminal Court:

"According to the 1948 Genocide Convention, whether or not a given event constitutes genocide can be ascertained by a competent court, i.e., the competent tribunal on the territory of which the crime has been committed, or the International Criminal Court, that is, the Court you are currently working at. Is it possible to designate an event as genocide without a competent court decision?" The reply of Judge Usacka was as follows: "We are presently at a Law Conference; hence my reply must be compatible with the dictates of law. Without a decision of a competent court an event can not be designated as genocide".

12 International Court of Justice, "Case Concerning the Application of the Convention of the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Serbia and Montenegro" para. 187.

13 International Court of Justice, "Case Concerning the Application of the Convention of the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Serbia and Montenegro" para. 189.

14 International Court of Justice, "Case Concerning the Application of the Convention of the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Serbia and Montenegro" para. 182.

15 Vice-President A1-Khasawneh appended a dissenting opinion; Judges Ranjeva, Shi and Koroma appended a joint dissenting opinion; Judge Ranjeva appended a separate opinion; Judges Shi and Koroma appended a joint declaration; Judges Owada and Tomka appended separate opinions; Judges Keith, Bennouna and Skotnikov appended declarations; Judge ad hoc Mahiou appended a dissenting opinion; and Judge ad hoc Kreca appended a separate opinion to the Judgment of the Court.

d. State Responsibility Relating to the Crime of Genocide

Article IX of the Genocide Convention addresses the issue of State responsibility with regard to the crime of genocide. it should be reiterated that State responsibility concerns the interpretation, application and fulfillment of the Convention. For example, if a Contracting Party does not transfer for trial an individual accused of or indicted for genocide, state responsibility is incurred[16]. Responsibility on the part of a state is further incurred, for example, if a Government representing a State violates its obligation to prevent genocide. In the Bosnia Herzegovina v. Serbia and Montenegro case heard at the ICJ, the responsibility of the state of Serbia was incurred for these reasons.

The other responsibilities of State prescribed by the Convention are as follows:

In accordance with Article V, the Contracting Parties have the responsibility "to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions" of the Convention and, "to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in Article III"

In accordance with Article VI, the Contracting Parties have the responsibility to transfer those accused of committing genocide to the competent tribunal which may have jurisdiction, and in accordance with Article VII, they have the responsibility to extradite criminals.

If any Contracting Party violates these obligations, its responsibility is incurred and if a disagreement is to arise thereupon, a State may resort to the International Court of Justice on the basis of Article IX of the Convention.

16 The tragic events of1915 do not fall under the 1948 Convention which can not be applied retrospectively. *But taking into account that such crimes also were unlawful at that period under customary international law and to underline that the Ottoman Government prosecuted and condemned at that time the perpetrators of the crimes one should not foil to mention that in 1916the Ottoman Government charged 1673 individuals for violations against -among others-the Ottoman citizens of Armenian origin; 659 suspects were convicted and 67 of them executed in accordance with the Ottoman Penal Code-. Those were crimes like murder, massacre, rape, usurpation and maltreatment etc. These trials continued after the end of the war under the occupation of the Allied powers. The legality and the fairness of these trials are seriously contested by some historians. The courts records and judgments have been published in Takvim-i Vekayi, the Otoman governments' official gazette. Ref: Associate Prof Yusuf Sarınay*, "*Ermeni Tehciri ve Yargılamalar 1915-1916. Türk-Ermeni İlişkilerinin Gelişimi ve 1915 Olayları Uluslararası Sempozyum Bildirileri," Ankara, Gazi Üniversitesi Atatürk ilkeleri ve İnkılap Tarihi Araştırma ve Uygulama Merkezi Yayını,* 2006, pp.257-265. Prof. Yusuf Sarınay: in its article with the tide "The Armenian Relocation and Trials" reports that this information is deduced from the lists annexed to confidential letters dated. *February 19,1916; March LG. 1916; and May 22, 1916.* sent from the Ottoman Ministry of Interior to the Ottoman Foreign Ministry.

e. Damages Caused by the Officials

According the general principles of law the State is under the obligation to provide compensation for the damages caused on the part of its officials. Those leaders or members of the governments who incited the crime of genocide will also be punished and may have to provide for compensation for damages caused. However, under the Genocide Convention for such consequences to arise, the competent court must, in the first instance, arrive at the determination that the accused committed the crime of genocide.

f. The Legal Continuity of the Successor Government

According to general principles of international law, and specincal1y the doctrine of legal continuity and State responsibility, a successor government can be made liable in respect claims arising from a former Government's violation of law[17]. As such, the German Government incurred the responsibility stemming from the actions of the Third Reich, The French Government redressed the damage inflicted by the Vichy regime under German occupation. Article 36 of the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives, and Debts states that "a succession of states does not as such affect the rights and obligations of creditors". The Turkish Republic having paid all the debts of the Ottoman State has legally accepted to be the successor of the Ottoman State.

g. Retroactive Application of the Genocide Convention

Positivist lawyers argue that the Genocide Convention can not be applied retroactively. This is a general rule under international law. Article 28 of the 1969 Vienna Convention on the Law of Treaties which entered into force on January 27, 1980, states that the provisions of treaties "do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."

The legal analysis prepared at the initiative of the Turkish-Armenian Reconciliation Commission, for the International Center for Transnational Justice (ICTJ) by a group of anonymous legal advisors entitled "The Applicability of the United Nations Convention on the Prevention and Punishment of the Crimes of Genocide to Events Which Occurred During the Early Twentieth Century" explicitly states that "the Genocide Convention

17 Commission on Human Rights: Document E/CN.4/1999/65.

contains no provisions mandating its retroactive application[18]" In fact, this analysis maintains that "neither the text nor the 'travaux préparatoires' of the Convention manifest an intention to apply its provisions retroactively[19]." The said document includes the following statement: "Although the Genocide Convention does not give rise to State or individual liability for events which occurred prior to January 12, 1951, the term "genocide" as defined in the Convention, may be used to describe such events." The analysis pretends that the term "genocide" may be applied "as a general matter" or as a "historical fact" to describe the events of 1915. This deduction should be viewed as a political endeavor (as opposed to a legal conclusion) undertaken to appease those supporting the Armenian stance on this matter. Actually those who now consent that the tragic events of 1915 can not be legally qualified as genocide, started to use the terminology "genocide in the political meaning" or "genocide according to the definition accepted by social sciences" . There is of course no consensus on the definition of this terminology.

Disturbed by the above-mentioned legal analysis the Armenian diaspora appointed Alfred de Zayas, a retired U.N. official, to draft a counter-memorandum[20].

In its memorandum entitled "The Genocide Against the Armenians 1915-1923 and the Relevance of the 1948 Genocide Convention", Alfred de Zayas states that the language of the Genocide Convention is inconclusive on the issue of its retroactive application, and that the *travaux préparatoires* of a Treaty merely provides for a "supplementary means of interpretation." Moreover, de Zayas refers to the Article 1 of the 1968 U.N. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity and maintains that statutory limitations do not apply to the Genocide Convention.

According to the general principles of criminal law there can be no crime without law, as laid out in paragraph 1 of Article 15 of the International Covenant on Civil and Political Rights. But there are certain exceptions to this general principle: the paragraph 2 of article 15 of the Covenant reads as follows: "nothing in this article should prejudice the trial and punishment of *any person* for any act or omission which, at the time when it was committed,

18 "The Applicability of the United Nations Convention on the Prevention and Punishment of the Crimes of Genocide to events which occurred during the early twentieth century," prepared for the International Center for Transnational Justice" (by unknown and unnamed experts): p.4.

19 "The Applicability of the United Nations Convention..," p.7.

20 Alfred de Zayas, Memorandum written for the European Armenian Federation for Justice &Democracy with the tide of "Memorandum on the Genocide Against the Armenians 1915-1923 and the Application of the 1948 Genocide Convention"

was criminal according to the general principles of law recognized by the community of nations".

The Armenian's advisor stresses that "the criminal law aspects of the Convention are of lesser relevance in the Armenian context, since none of the perpetrators ... are stil1 alive"[21] but that laws of restitution and compensation can be resorted to and brought into action. As such it would not be wrong to state that efforts towards the recognition of the Armenian Genocide for purposes of moral satisfaction, is merely a facade for attaining restitution and compensation and for advancing territorial claims.

However, without establishing that the crime of genocide was perpetrated and without determining who actually carried out the crime, how can such compensation claims be advanced and what will they be based upon? The Armenian side aspires to attain these goals by way of the decisions of various parliaments recognizing the so-called genocide and the French Parliament (among others) is being manipulated for this very purpose.

These arguments and counter-arguments may lead one to feel that this debate shall not be resolved soon. Nonetheless one should bear in mind that the non-retroactivity of the Genocide Convention is espoused by the great majority of legal scholars.

h. A Case in Point: The French Law of 2001

With the legislation passed in 2001, France has publicly recognized the 1915 events as genocide perpetrated by the Armenians. This may be seen as a misinterpretation of Article VI of the 1948 Genocide Convention relating to the competent court. Furthermore, in October 2006, a bill was passed in the French National Assembly foreseeing the punishment of those denying "the 1915 Armenian genocide". This draft bill will become law if endorsed by the Senate and if it is subsequently published in the Official Gazette upon ratification on the part of the French President. The threat of this bill becoming law shall continue to disrupt trade, cultural, and other relations between France and Türkiye. Furthermore, this situation will no doubt have an adverse effect upon the friendly ties between the peoples of these two countries, and shall present itself as an obstacle on the road leading to the European Union; an aim likely to be pursued by those who militate against Turkish membership.

In view of legally establishing the existence of the conflict, Türkiye could address a diplomatic note to France with regard to the 2001 Law and state the following:

21 "Memorandum on the Genocide...", p. 19.

"On January 29,2001 the French Senate and National Assembly adopted a Law by which " France publicly recognizes the Armenian Genocide of 1915. Although merely of a declaratory nature, the adoption of this Law has created a dispute between France and Türkiye relating to the interpretation of the 1948 Convention, manifested by its effects and damaging consequences. The records of the debates at the French Parliament and at the Turkish Grand National Assembly reflect the magnitude of this dispute. By affirming that the crime of genocide was perpetrated in 1915, the French National Assembly has substituted itself to the position of a competent court and has arrived at this conclusion without a trial or hearing the other side of the truth. However, the Genocide Convention foresees that whether or not an accused committed the crime of genocide is to be ascertained by a competent court, and if so determined foresees the punishment of the responsible perpetrator(s). However, with the bill adopted by France in 2006, the legislation of 2001 has been equated to a court verdict and France has chosen to penalize those who "deny" the existence of the crime of genocide.

According Article VI of the Genocide Convention, the competent body to ascertain the perpetrators of the crime of genocide is not a parliament, but the court in the territory of which the crime was perpetrated or an International Penal Tribunal. lt is against the basic principles of law for a competent court to find a party guilty of any crime, before hearing the defense of the accused, let alone for that of genocide. Actually, the Paris Civil Court of First Instance had stipulated during the trial held against the eminent historian Bernard Lewis that it was not within its jurisdiction to adjudge whether or not the events of 1915 amounted to genocide. According the Turkish Government as well as many scholars, a court or a Parliament is not entitled to name the tragic events of 1915 in Eastern Anatolia a genocide, because the discussions among the historians on this issue did not yet come to a result and also the core element of the crime of genocide which differs that crime from other crimes ,namely the intention to destroy in whole or in part a national, ethnical, racial or religious group *as such*, the *dolus specialis* has not been assessed or proved. 1here are numerous documents attesting that such an intent did not exist.

By disregarding the Genocide Convention of 1948 and the basic principles of law, the French Government acting upon the law adopted by the French Parliament has contravened Article VI of the Genocide Convention. Consequently, a dispute relating to the interpretation and application of the Genocide Convention as foreseen in Article IX has emerged between Türkiye and France. Türkiye expects that France shall repeal the legislation in question. In response, the French Government may declare that: "The 2001 legislation is merely of a declaratory nature, and that the 2006 bill has not yet become law. The legislation adopted by the French National Assembly does not fall within the scope of the 1948 Genocide Convention. The Genocide Convention

can not be applied retroactively. However, as stated in the Preamble of the Convention, France recognizes that at all periods of history genocide has inflicted great losses on humanity and acting upon the conviction of the majority of the French citizens on the matter, declared that the events of 1915 amounted to genocide."

If the ICJ is resorted to on the basis of the 2001 legislation, the Court will first decide if there exists a "dispute" between France and Türkiye. The Turkish demand will most probably not focus on the question "Was or was not the Armenian community of the Ottoman Empire the victim of a genocidal act in 1915?" But will concentrate on the following question. "Having regard to the legislation enacted by the French Republic on 29 January 2001 and 12 October 2006 whose justification is disputed by the Government of Türkiye, and having regard to the dispute that has arisen between their Governments as a consequence of these legislation, is the cited legislation a) in conformity with the definition of the crime under the international law of genocide as that crime is defined by Article II of the Genocide Convention; b) are the factual predicates of the French legislation sustainable under the standards of proof established by the Court in respect of a claim of genocide; c) Can the French Parliament enact as the competent court on this judicial matter?"

Taking the current composition of the ICJ into account and the very controversial decision taken by it on the Bosnian case the Court may take a cautious position on this rather political issue and may decide not to hear the case on the premise that this legislation do es not fall within the scope of the application of the Genocide Convention, because clearly the Convention is only applicable to acts of genocide perpetrated after its entry into force.

On the other hand, Türkiye is faced by demands coming from several French politicians to acknowledge the Armenian Genocide. Lately the French President Chirac reiterated such a demand during his official visit to Armenia in 2006[22]. The request for "acknowledgment" is a form of "reparation" for an international wrongful act as established under Article 37 of the Articles of State Responsibility[23]. Türkiye could argue that in view of the inaccuracy of

22 http://ec.europa.eu/enlargment/Türkiye/key-documents.htm.

23 U.N. General Assembly Resolution 56/83 of December 12i 2001:

"Satisfaction:

1- The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.

2- Satisfaction may consist of an acknowledgment of the breach, an expression of regret, a formal apology or another appropriate modality

3- Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State"

the characterization as genocide of the tragic events of 1915 no such request for reparation can be made without "humiliating" the Republic of Türkiye.

2. Inter State Application to the European Court of Human Rights

If the 2006 Law is adopted, then Türkiye may complain about the violation by France of Article 10 (on the freedom of expression) of the European Convention of Human Rights. Türkiye may lodge an application with the European Court of Human Rights, pursuant to Article 33 of the European Convention. However, proceedings before the Court are lengthy, costly and the outcome is never sure. Instead of this, the author of this article recommends encouraging the victims or potential victims of the violations of Article 10 of the European Human Rights Convention to lodge an application with the European Court of Human Rights.

3. The International Court of Arbitration

As a further alternative, the view that Türkiye could resort to the International Court of Arbitration to counter Armenian genocide claims, was advanced by Ret. Ambassador Gündüz Aktan. During debates carried out at the Turkish Grand National Assembly (TGNA) , Istanbul deputy and Ret. Ambassador Şükrü Elekdağ also made a suggestion in this direction.

In a statement made to *Milliyet* newspaper on November, 16, 2006, Ret. Ambassador Gündüz Aktan made the following remarks: "Instead of France, let's bring Armenia to court... In the event that a resolution in this regard is passed in Congress, we should equally take the U.S. to court... The most appropriate avenue to see this case is the Permanent Court of Arbitration situated in the Hague. Arbitration may last between 5-10 years… If they do not respond to our call to resort to arbitration, they shall be exposed to public contempt, if they respond positively all lies shall be revealed..." According to Aktan, the option of resorting to arbitration would entail "the examination of archives, statistics, military history, records relating to deaths during the relocation, medical statistics and if necessary, forensic research."

However, it is highly unlikely that the Armenians shall accept resorting to arbitration on this matter as it carries with it a high probability of undermining their dogmatic theses. Actually, under the present conditions, it does not appear possible for the two sides to arrive at an arbitration agreement, a prerequisite for resorting to this legal alternative. Likewise, France would not accept taking this matter to arbitration, a matter which is not of direct concern to them. As such, the said proposal would be tantamount to a political challenge.

The Armenian Republic which would not view this proposal favorably if advanced, will in all likelihood continue to propagate genocide allegations with the desire of exerting pressure on Türkiye. They are of the belief (or have been made to believe) that they can obtain all that is desired from Türkiye by way of international pressure. Speaking to Ece Temelkuran of *Milliyet* newspaper, the French politician Patrik Devecian has explicitly stated that "the acquiescence of Türkiye can be obtained only through pressure" Armenian Foreign Minister Oskanian has made similar remarks.

French politicians are engaging in pressure tactics via genocide recognition to a) gain votes from the Armenian constituent body and b) to keep Türkiye from attaining full membership in the European Union.

And now there are those who believe pressure can be exerted upon Türkiye by way of passing resolutions in both houses of the U.S. Congress. it is certain that such initiatives shall be counter-productive in the long run and even in the short-term.

a. The Drawbacks of Resorting to Arbitration

- Arbitration is a legal avenue resorted to for the resolution of civil law disputes. However, genocide is a crime relating to national and international criminal law. The Genocide Convention foresees the punishment of those who have committed the crime of genocide. Criminal law is applied by way of legal trials and not by way of arbitration.

- According to the Genocide Convention "Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention...shall be submitted to the International Court of Justice at the request of any parties to the dispute." Overlooking this stipulation, or going against it would not be wise as this would imply Türkiye's acquiescence to accepting a solution that supersedes the framework of the Genocide Convention. The aim of the Armenian side and their sympathizers is to discard certain provisions of the Genocide Convention (including the clause concerning the competent court) to set this issue within a political framework.

- If the alternative of arbitration is resorted to, the consequential outcome will be the acceptance of the capacity of another body or authority other than that foreseen by the Genocide Convention to determine whether or not the crime committed by the accused (which according to the Genocide Convention may only be an individual) amounts to genocide. The Permanent Court of Arbitration is to consist of an equal number of

judges or specialists designated by both parties and an individual (whose vote shall constitute a determining factor) appointed by the President of the International Court of Justice or the Secretary General of the U.N. As such, in a manner unprecedented by law, the authority to determine whether the acts of individuals no longer alive constitute genocide shall be delegated to the Court of Arbitration. Consequently, basic principles of law, including the right of defense as well as the corner stones of the Genocide Convention shall be disregarded.

- Moreover, resorting to arbitration, shall equate into the acceptance, on the part of Türkiye, that the definition incorporated into the Genocide Convention can be applied retroactively, an outcome which would be wise to preclude. The judgments of the Ottoman courts-martial rendered 80 years ago and in accordance with the Ottoman Penal Code, took into consideration the conditions under which the crimes (ascertained by legal decisions) were perpetrated, i.e. whether or not the crimes occurred as a result of deliberate killings, with the aim of revenge, or as result of mutual mass killings. it is not possible according to general principles of law, to take sides and alter these decisions 80-90 years on to suit political purposes. No state governed by the rule of law can accept the alteration of court decisions by a unauthorized bodies.

b. Political and Moral Responsibilities

If we are to discuss the political and moral responsibilities relating to the events of 1915, the situation is different. This issue should be analyzed taking into account the conditions of that time. For example, the Van massacre committed prior to the relocation decision by three Armenian detachments lead by Armenian members of the Ottoman Parliament as well as from the other rebellions which transpired at the time should also be taken into account when evaluating the tragic events of 1915. To counter the rebellions and to defend the country, the Ottoman Government resorted to necessary military and penal measures, which were no different than those resorted to by various other governments during the time. On this matter, historians, and archive experts and in fact politicians must step in because the analyses and reports they could draft may serve to engender objective opinions. If the sentiments of the majority of those who are to read these analyses are to converge on a certain view, "personal opinions" could then engender a "comman public sentiment and understanding." The Armenians resort to the term "Metz Yergern" meaning "The Odious Scourge" when referring to the events of 1915. While the Armenians shall continue to view and refer to the tragic events as such, others shall continue to refer to them as "genocide" or "mutual mass killings". It should not be expected these views shall change any time soon. However, these

evaluations do not constitute legal assessments but pertain to one's conscience or are of a political nature.

Certain individuals within the Turkish society state that the massacre carried out was intentionally committed by members of or those affiliated with the Committee of Union and Progress party, such as the *Teşkilat-ı Mahsusa* units (namely, the Ottoman Special Forces). it seems unlikely that people of this contention will alter their views. However, the great majority of the Turks shall continue to speak of mutual mass killings and the great lass of lives during the mass relocation and continue to reject the existence of an intent annihilating the Ottoman Armenians as a group as such. This discrepancy in opinions is only normal as it is not possible to make all minds think alike. The freedom of expression permits, within the confines laid down in European Convention of Human Rights, the expression of all these views.

4. The European Court of Human Rights

Article 33 of the European Convention for the Protection of Human Rights and Fundamental Freedoms states that "any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the protocols thereto by another High Contracting Party."

The content of such an application is laid out in Article 46 of the Courts Statute. Before lodging a state application with the European Court of Human Rights (ECHR), the bill passed in the French National Assembly in 2006 becoming law will be a pre-condition sought after by the Court. In accordance with Article 46 (e) of the ECHR Statute, Türkiye must prove that as a country it-or that one of its citizens-became a victim as a result of the enforcement of the French law.

Specialists have expressed that the outcome of such an application would be determined on the basis not of objective, but political and subjective criteria. This alternative which would last many years is not the main preference of the author.

II. OPTIONS FOR LODGING INDIVIDUAL APPLICATIONS WITH THE ECHR

1. Resorting to the ECHR As a Victim

If a bill foreseeing the conviction of an individual for denying the Armenian "genocide" is to become law in France (or another country), and if an

individual is convicted along these lines by, for example, a French (or Swiss) court, the individual in question, after exhausting all domestic remedies, can lodge an application with the ECHR. In such an event, it may be stated that in contrast with the genocide perpetrated against the Jews, in the case of the Armenian "genocide," there is no competent court decision substantiating such claims, that the French law which penalizes those denying the Armenian genocide violates the "competent court" stipulation of the Genocide Convention, that the French parliament is substituting itself as the competent court and that for this reason being convicted for having stated that "the tragic events which befell the Armenians as of 1915 can not be deemed as genocide" contravenes Articles X of the European Convention on Human Rights relating to the freedom of expression. To apply to ECHR the victim in question must be convicted and all domestic legal remedies must be exhausted.

On the basis of the jurisprudence of the ECHR thus far, one may conclude that the chances of an individual winning such a case are high. Nonetheless this is a laborious path to walk down. The individual in question may have to paya penalty or go to prison. To this end civil society organizations or official authorities may provide the necessary legal or logistic (i.e., financial) support to the person who has lodged such an application with the ECHR.

2. Resorting to the ECHR As a Potential Victim

According to a detailed analysis conducted by the President of Istanbul Bahçeşehir University, Professor Dr. Süheyl Batum, and other members of staff; individuals who reside particularly in France or in Switzerland, academics, businessmen, sportsmen and others who have to go to these countries for various reasons and do not qualify the tragic events of 1915 as genocide, may feel as potential victim as "potential victims" or muzzled and silenced persons because of the risk of penalization on the ground they express their conviction and views contrary to those included in the legislation in question.

In the example of France, if the 2001 legislation, altered in 2006, is enforced, even some individuals which have not yet expressed their views and have not been convicted for the "crime of denying the Armenian genocide", may evaluated themselves directly placed under risk. The concept of "potentially victim", is a concept that has been adopted and applied by the ECHR in previous judgments, in the event that it is proved that a reasonable convincing risk is directly affecting the applicant. That the 2006 French legislation foreseeing the penalization of those denying the Armenian "genocide" has not, as of yet, been applied, does not guarantee that it shall not be applied in the future.

Furthermore, in the event that a genocide denial law incorporating the term "Armenian genocide" is passed by the Swiss Confederation or if a sentence of a Swiss national court condemning an individual because of contesting the existence of the so called 1915 Armenian genocide (e.g., Mr. Doğu Perinçek which was condemned by the Geneva Police Court) is confirmed by the highest court in Switzerland, then other individual may feel as "potential victims" because they freedom of expression will be denied.

The grounds for advancing that Article X of the Convention was violated can be summed up as follows:

The prohibition of expressing one's opinion on a certain topic and attaching to these penal sanctions: a) suppresses pluralism; b) suppresses the external dimensions of the right to freedom of thought and conscience, and renders meaningless the right of inquiry born out of these freedoms; c) prohibits the thought embodied in opinions the expression of which have been prohibited, state indoctrination is pursued, and the manner in which individuals are to think is systematically inculcated.

The French bill directly infringes upon the freedom of expression recognized by the ECHR. For such an intervention to be made, it must be compatible with the conditions, and restrictions laid down in Article 10/2 of the Convention. Accordingly, the exercise of this freedom may subject to limitations "prescribed by law" and that "are necessary in a democratic society"; such as protecting against the incitement of hostility, animosity, and hatred amongst citizens due to religious or ethnic origins, or the incitement of violence against a Government official or a section of the public, or an armed struggle, or dash of arms, or protecting against racist expressions or those based on racist hatred. It is manifest that the French bills' infringement of the freedom of expression is not necessary in a democratic society, is not in the interest of the public good, and is not necessary for maintaining the authority and impartiality of the judiciary. The restriction does not set a balance, and as such, is not proportionate. The bill aims not at the prohibition of commending the crime of genocide or the expression of thoughts vindicating or excusing the crime, but aims at prohibiting the research of historical facts, and all opinions arrived at bye way of deliberation. However, there does not exist an accord of viewpoints among historians and scholars on this matter. A historical event can not be assessed by way of judicial decisions which carry definitive judgments, can not be established as an irrefutable legal fact and the freedom of expression can not be restricted in such a broad manner. The study conducted by Bahçeşehir University assessed the ECHR case law and has based its legal views on the grounds and clauses incorporated thereof. If France ratifies the said bill, inevitably several Turkish citizens shall resort to the ECHR against France, and such cases, as the author maintains, will come to a favorable conclusion.

CONCLUSION

The Republic of Türkiye is a party to the Convention on the Prevention and Punishment of Genocide. According to Article IX of the said Convention, if one of the Contracting Parties is of the view that another Party violated its obligations of interpretation, application or fulfillment of the Convention, it may resort to the International Court of Justice. However, if France counters with the argument that it did not pass the 2001 bill and the 2006 draft bill within the framework of the Genocide Convention, the ICJ would in all likelihood accept the argument that the Convention can not be applied retroactively; and may favor the view that the French legislation has not been enacted within the frame of the Genocide Convention. That may lead the Court to reject the claim as inadmissible. Doing so, the Court would not enter into the controversial field of judging history.

Due to the reasons cited in this Article, the author believes that resorting to the International Court of Arbitration against the Republic of Armenia against Armenian genocide allegations is not advisable. If the 2006 legislation is enforced in France and a sentence condemning an individual on the ground that he or she does not interpret the tragic events of 1915 as genocide is given by a national court in France or in Switzerland, then an individual "victim" or "potential victim" may lodge a case with the ECHR. Alongside conducting vigorous studies to unravel the historical truth that lies behind the events of 1915, Türkiye must focus on and adopt the official line that a) the crime of genocide can only be ascertained by a competent court; b) that the ICJ requires a very high level of proof and a certainty with regard to the allegations of the existence of special intent (*dolus specialis*) and; c) that everyone has the right to hold opinions and to express them.

THE TALE OF EUROPEAN PARLIAMENT'S 1987 RESOLUTION ENTITLED "POLITICAL SOLUTION TO THE ARMENIAN QUESTION"

Pulat Y. TACAR
Ambassador (Rtd),
Vice-President of UNESCO-Türkiye National Commission

Abstract: *Recently the basis of1981 Resolution of the Parliament that accepted the genocide allegations committed towards the Ottoman Armenians in 1915, Vandemeulebroucke Report, illegally came to the agenda of the General Council although rejected with the votes of Political Committee. This report was later approved there through intimidation of those parliamentarians opposing the report and the draft of resolution. The resolution is a political maneuver of those politicians who want to slander and exclude Türkiye from Europe, by making it a condition for the full membership of Türkiye to the European Union. Türkiye should maintain that genocide is a legal concept and should stress the impossibility of declaring somebody of being a criminal before the decision of the competent court. In doing that, Türkiye should bring the issue to the agenda of Türkiye-European Parliament Joint Parliamentary Commission and defend her views there in order to state that there is no legal way for some suspects to be accused of committing the crime of genocide.*

Keywords: *European Parliament, Armenian Diaspora, Ottoman Armenians, France, Armenian Terror*

Öz: *1915 yılında Osmanlı Ermenilerine karşı soykırım uygulandığına dair, 1981 yılında Avrupa Parlamentosu (AP) tarafından alınan karara dayanak oluşturan Vandemeulebroucke raporu AP Siyasi Komitesi tarafından oylanarak reddedilmesine rağmen, usulsüz olarak AP Genel Kurul gündemine alınmış ve orada rapora ve karar taslağına karşı olan parlamenterler tehdit edilerek kabul ettirilmiştir. Alınan karar Türkiye'yi karalamak ve soykırımının kabulünü ülkemizin Avrupa Birliğine tam üyeliğinin koşulu haline getirerek Türkiye'yi Avrupa'dan dışlamak isteyen siyasetçilerin bir siyasal manevrasıdır. Türkiye soykırımının hukuksal bir terim olduğunu belirterek, bir hukuk devletinde, herhangi bir zanlının yetkili yargı organı tarafından yargılamadan suçlu ilan*

edilemeyeceğini vurgulayarak, kimi zanlıların soykırımı suçu işlediğini tanımasına hukuken olanak bulunmadığını belirtmek amacıyla konuyu Türkiye Avrupa Parlamentosu Karma Parlamento Komisyonunun gündemine getirmeli ve orada görüşlerini savunmalıdır.

Anahtar Kelimeler: *Avrupa Parlamentosu, Soykırımı Sözleşmesi, Ermeni Diasporası, Osmanlı Ermenileri, Fransa, Ermeni Terörü*

I was appointed as the Permanent Representative of Türkiye to the European Union in November 1984. During my three-year service, each month, I spent one week in Strasbourg, except for the months of August when the European Parliament (EP) did not convene. I participated in the EP meetings and discussed several issues with the members of the EP. In that period, Türkiye was brought to the agenda of nearly all of the EP meetings; many reports were written and many resolutions were adopted regarding Türkiye and in almost all of them Türkiye was criticized and condemned.

After my appointment, the first problem about the relations with the EP was the initiative of the French members of the Parliament in order to make the EP adopted a resolution recognizing the claim of the "Armenian genocide committed by the Ottoman Empire in 1915."

I went to the EP and met with its President, Pflimlin, in December 1984. At the beginning of our conversation, he asked me why Türkiye had not accepted the so-called 'genocide'. His discourse resembled a discourse used in a conversation between an employer and employee or between the strong and the weak. During my three and a half year embassy in Indonesia, I was treated quite well by the Indonesian political elite because of their admiration towards Türkiye and its founder, Atatürk. Before, I had experienced multilateral diplomacy in the International Atomic Energy Agency for nine years. Such a style, which I had never witnessed, disturbed me seriously. Later, I would perceive that the diplomacy of European integration developed a sui generis style regarding the communication of the European Communities' institutions with the member and candidate states. it was necessary to use this style as soon as possible. But, let me turn to my first meeting with President Pflimlin.

I thought that I had to stay calm against the disturbing style of the President towards a partner state's ambassador, which was not in accordance with the diplomatic customs, while I should not give up my firm stance. He was a lawyer; thus, I should bring the issue to that field. I told him that the concept of 'genocide' emerged with the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide, and it should not be

used so carelessly. I added that without any decision by a competent court or any other judicial authority, one could not be accused of any crime; and this was a rule not only in Türkiye but also in France. I also said that the European Communities had established a judicial framework and it was expected from the President of EP not to act contrary to international law. I added that Türkiye had accepted the 1948 Convention and transformed it as a part of internal law, thus it was impossible to breach our internal laws. What is more, I said that many Turkish diplomats had been victims of Armenian terror and this conversation -according to me -was carried out under the shadow of these awful murders. My remarks disturbed him and said that he also condemned terrorism, he loved the Turks and he had many Turkish friends. 1hen he tried to bring the conversation to the political field, and said that accepting the so-called genocide would only glorify Türkiye while Türkiye could not be held responsible for the events occurred prior to its foundation. I told him I believed that it was unfair to voice the atrocities suffered solely by the non-Muslims residing within the multicultural Ottoman society while overlooking the Muslim Ottomans that were killed. He stated that the French society was very sensitive with respect to this issue. I replied by stating that I knew this subject quite well, and added that in the 1920's, Armenians were sent to war at Çukurova having been dressed up in French uniform, and that previously Ottoman Armenians were dressed up in Tsarist Russian uniform. I told him that the Armenian representative participating in the Sevres negotiations, Bogos Nubar, stated that they were the belligerent party and that when France was retreating from Çukurova he brought a part of the 'Anatolian Armenian soldiers' to France. I told him that there existed at cemeteries in France memorial graves for 'the Armenians that perished for the French', and that for this reason I was not surprised that he felt close to Armenians. I added that I was against a one-sided review of history, that my aim was not to remind him of certain passages of history he may not want to read or the existence of which he may not know of. I said that I just wanted to make a courtesy visit to the President of the European Parliament and added that if he wanted more detailed information on this topic, I was ready to provide for it in the future.

During this visit, the French openly put forth how they were resolute about bringing the Armenian question before the European Parliament. Their first initiative was made in 1981, with French Parliamentarian Jacquet's draft entitled "The Condition of the Armenian People[1]". Thereafter, a draft carrying the signature of French Parliamentarian Miss Duport and Belgium Parliamentarian Glinne was presented on behalf of the Socialist Group[2]. On behalf of the new EP's Socialist Group elected as of June 1984, French Parliamentarian Saby and his friends renewed the Armenian draft.

1 Doc. No. 1-782/81

2 Doc. No. 1-735/83

At the beginning of 1984, Israel, the French Parliamentarian who was appointed to write a report on the Armenian issue, resigned from this assignment. believe that the Jewish lobby, which did not want to share the characteristic of being victims of genocide with the Armenians, influenced him. Upon Monsieur Israel's refusal, this time an agreement was made with Belgian Parliamentarian Mr. Vandemeulebroucke who, at that time, was a member of the Vlamski Block party known for being extreme-rightist, nationalist and racist. I invited Vandemeulebroucke for lunch in the days following his appointment as a reporter in January 1985. I stressed that we were prepared to submit all the information and documents he wanted on the topic he was to write a report, and stated that he could meet with all pertinent individuals and officials including the Armenian community by coming to Türkiye and that he could conduct research in our archives. I told him that we expected him to be objective and include allegations as well as counter-arguments in his report. I added that we expected his prospective report would help heal the deep wound inflicted on the Turkish and world public's conscience as a result of the bloody activities carried out by terrorist groups voicing that they acted on behalf of the Armenians. I told him that this report carried the prospect of aiding in the creation of an atmosphere of mutual dialogue and understanding between the Armenians and Turks. I stated -upon his question-that we do not expect anybody to suppress his memory or disregard tragic events of the past. I added that the report also needed to include passages of history that certain historians and politicians denied, and that I desired all pages of history and the causes of events to be evaluated together. Otherwise, people would be constrained to read history for personal satisfaction or to reinforce their prejudices. Furthermore, I explained the basic elements of the Genocide Convention, and pointed out to my counterpart that he was not a competent judge, prosecutor, nor lawyer. I added that the European Parliament was not a court and stated that genocide was a legal term. I also said that this crime could be carried out by individuals; therefore, it was not in line with justice for a politician to write a report on a legal matter as if it were handing down a sentence without listening to the pleas of the defendants none of whom are alive today. Upon my counterpart stating how he heard that the massacres inflicted upon the Armenians went unpunished and that he wanted to analyze this matter, I explained how approximately 1300 Ottoman leaders were tried for wrongdoings during the relocation, a big portion of which was tried by the Courts set up during the Committee for Unity and Progress period, some of which was executed, and some of which were deported to Malta but set free due to the lack of evidence. During this first meeting, my counterpart accepted our invitation stated that he would come to Türkiye, and wanted us to be sure that he would be objective.

However, The Belgian Parliamentarian never came to our country, nor explained why he did so. As time passed, it became more apparent that the

reporter was acting on behalf of the diaspora. He did not accept to meet me in his room and during our discussions carried out in the Parliament's canteen there was always a "party commissar" accompanying him, who listened to our conversations without uttering a word. I told the reporter that he took upon himself an important duty, since his prospective report could serve to bring the Turks and Armenians together. I insistently requested for the report to contribute to a culture of peace, not to a cu1ture rancor and revenge, and gave him books and documents to be put to use in his report. As time passed, information started to reach us through indirect ways regarding the points that he elaborated in his report. Among this information there existed documents, the fraudulence of which were ascertained, and factitious assertions such as the genocide claim that was accepted by The United Nations Economic and Social Council, Human Rights Sub-Committee. We analyzed all of this material and prepared counter documents approximately 200 pages in length. We distributed these documents to the Be1gian reporter and also to the other parliamentarians. We observed a group of parliamentarians throw away the documents they retrieved from their post boxes without having read them in a big trash box next to the document distribution section, as the parliamentarians did not have the time to read those documents that did not fall within their own areas of priority. Every day they received a heavy load of letters and documents. Also, during that period, a group of European parliamentarians came to Strasbourg on Mondays, signed the attendance registry, and then returned. They came again on Fridays to sign the registry again, and they took their daily payments as if they were present the whole week. This resulted in the overflow of their post-boxes.

Those elected to the European Parliament that term, with the exception of 50-60 of them, were second class politicians who could not be elected to their national parliaments. Due to these observations, we made, we figured out that it would be of greater use to send the information and documents we wanted to deliver not to the parliamentarians themselves, but to their political assistants and in fact to the advisors of the political groups they were affiliated with, both of which we got in touch with as well. During that period, I discussed this issue with approximately 100 European parliamentarians face to face. During these discussions, excluding the French parliamentarians, they stated that they understood our views but that the subject matter was a problem having top priority amongst the French members of the European Parliament. They stated that the Greeks supported the French and that the reciprocal concessions granted and balances formed in Parliament left no possibility of going against this demand of the French. As a matter of fact, this subject carried no priority for the other European parliamentarians. Furthermore, they pointed out how there existed a wide spread conviction among Europe that in 1915 the Armenians were subjected to a grave massacre and that we should not pay much attention to political resolutions taken by the European Parliament that

was not binding such as the one in question. The main justification of those who were opposing the matter being taken up by the Ep, stemmed from how the parliament was not a place to try history, and from how they were against distorting the past for political motives. Those in opposition displayed resistance towards the matter not as a result of its essence but out of procedure. They either were unaware or did not attribute much importance to the sufferings of the Ottoman Muslims who encountered the same hardships during that period, such as the Van massacre in April 1915 inflicted by Armenian armed units. French parliamentarians adopted a highly unreliable attitude, and were voicing how this issue was a domestic political problem, and that it did not target Türkiye. Their prejudices on this matter were deeply entrenched; they did not even want to hear any counter arguments.

I should point out that during that period, I meticulously analyzed social ¬psychology books on opinion formation and alteration techniques, and benefited greatly from this inquiry. Due to our profession also entailing the persuasion of one's counterpart, I believe it would be highly useful to teach social psychology to all young diplomats.

Let us return to our topic. To my mind, the Vandemeulebroucke report has been drafted by the Armenian diaspora. The report was full of biased and erroneous information. The report was presented to the Political Committee of the European Parliament. At the Committee's meeting held in The Hague, the main justification that the EU was not a historical institution and was not competent to try history took over and the report was rejected by a single vote. In fact, as I personally listened to the meeting's recordings, I have no doubt that the Political Committee's Chairman (Italian) Formigoni, held the voting twice -to avoid any mistakes- and that the outcome of both was rejection. The recordings of the meeting were presented to us on the same day by an official present at the room where the meeting was held. According to the procedural by-law, the rejection of a report in a Committee through voting necessitated that it be dropped from the agenda and that the matter would not be dealt with again. Actually, the Chairman of the Committee had drawn attention to this fact before the matter was subjected to a vote. However, when so desired, issues were not taken up in a fashion falling in line with law at the European Parliament, alleged to be a legal institution. it was apolitical arena and all kinds of maneuvers were deemed legitimate. Due to the Turkish parliamentarians not being members of the European Parliament our adversaries had an advantage. Pressure was exerted upon the Committee's Chairman for the report to be reassessed. However, the Chairman Formigoni resisted such pressures towards this end and stated that the report was put to a vote and that this case is dosed. This time, they waited for Formigoni's tenure to come to an end. He was replaced by another Italian, Ercini. I knew Ercini as well, he was unreliable, would smile in your face but carry out deeds of a contrary nature

behind your back. We overheard that the report was brought to the agenda of the Political Committee once again -as if it were a fresh Issue-by the new Chairman. Fellow parliamentarians wanted to bring the Issue to the By-law Committee. The By-law Committee rejected this appeal.

On the other hand, the Political Committee's new Chairman Ercini once again brought the Vandemeulebroucke report to the fore. As a result of the efforts of German Klaus Haensch -a member of the Political Committee and who thereafter was the President of the European Parliament-references made to the genocide were removed from the draft resolution pertaining to the report. The French initially opposed this. Subsequently, when the General Assembly convened, they conceded to the changes made at the Committee, presuming that they could insert whatever wordings they desired through various motions for amendment. A group of members of the Political Committee who had voted against the report at the first meeting came to me and stated that they were being threatened, and added that they would not take part in the meeting where the votes would be east and what was being carried out went against all the rules. The report and draft resolution were passed from the Political Committee and were brought to the General Assembly. On 18 July 1987 the European parliament was encircled by Armenians, coming from various locations. One evening the groups of Armenians who went down town placed up notices at the corner of every street. The French police took no measures. Very few parliamentarians had participated in the session. During the Parliament's session, the French parliamentarians who ascended a platform that was placed outside, explained what was going on inside to those demonstrators waiting under the rain. They applauded those who supported the Armenian thesis and heckled those who did not. The terrorists that seeped into Parliament threatened certain parliamentarians, for example when German Wedekind had the floor he disclosed that he had been threatened with a gun, that this was a scandal and stated that under these conditions this matter could not be dealt with. French parliamentarian and member of the Socialist Group Miss Pery, who was deliberately chosen to hold the presidential chair of that session, turned a deaf ear on these developments. The very same person, during a lunch break, -acting in contravention of the rules of the procedural by-law, and despite all objections, passed a resolution in the General Assembly at where approximately 40 people were present, denouncing the military operation carried out by Türkiye towards the PKK terrorists. To sum up, everything unraveled according to the scenario construed by the French parliamentarians who were taking directives from the Armenian diaspora. Almost all of the strict amendments proposed during the session of General Assembly regarding Vandemeulebroucke report entitled "A Political Solution to the Armenian Question" and the pertinent draft resolution were adopted and in this fashion the resolution was accepted by the European Parliament. For me and for those who are aware of the realities

I explained above, this resolution is a shame for the European Parliament and is of less worth than a piece of a dirty tissue paper.

Now let me try to summarize and curtly evaluate the points incorporated in the resolution endorsed by the European Parliament. This exercise shall help us understand the expectations and stance against Türkiye of those who prepared the draft resolution and of those who made alterations to it of a stricter nature. As additions were made to the draft resolution during the General Assembly the final text is of a highly complex nature. The ensuing analysis deals with the same topic, yet I brought together various articles which do not succeed one another in the text and added sub-headings.

Genocide and Consequences of Its Recognition

The Armenian side regards these events as planned genocide within the meaning of the 1948 UN Convention on the Prevention and Punishment of the Crime of Genocide

The Turkish State rejects the charge of genocide as unfounded.

(In the first text, perceptions of two sides were given separately in these two paragraphs, thus a balance was provided with the inclusion of the following paragraph to the resolution of the European Parliament, it was shown that the events had been believed to be genocide.)

[European Parliament] believes that the tragic events in 1915-1917 involving the Armenians living in the territory of the Ottoman Empire constitute genocide within the meaning of the convention on the prevention and the punishment of the crime of genocide adopted by the UN General Assembly on 9 December 1948; Recognizes, however, that the present Türkiye cannot be held responsible for the tragedy experienced by the Armenians of the Ottoman Empire and stresses that neither political nor legal or material claims against present-day Türkiye can be derived from the recognition of this historical event as an act of genocide.

(The expression of "... neither political nor legal or material claims against present day Türkiye can be derived from the recognition of this historical event as an act of genocide" implies that the consequences of recognition is not material. However, the representatives of the Armenian organizations state that the recognition of genocide would have consequences regarding compensation and the Turkish governments must be held responsible for the payment of it. In the meetings that I attended after the adoption of the resolution, there were parliaments, which tried to attract my attention that only the verb 'believe:

instead of 'recognize' was used in the resolution; they claimed that they could succeed to prevent recognition by this usage.

In my opinion, European Parliament interpreted the 1948 Convention wrong and acted contrary to it. Because, only a competent court, not a political body such as the European Parliament could decide whether there is the crime of genocide. If this wrong interpretation was to be done by one of the governments, which was a party to the Convention, other parties to the Convention would have the right to apply to the International Court of Justice with the legal ground that there was a mistake of procedure if not substance.)

The historically proven Armenian genocide has so fat neither been the object of political condemnation nor received due compensation.

(With this paragraph, the concept of genocide, which is a legal concept, is excluded from the legal framework and put into a historical and political structure. By stating that the genocide is historically proven, the arguments of some historians recognizing the 1915-16 events as genocide was accepted as evidence, while opposite views were simply disregarded. Today the same approach continues. For example, those scholars who argue that these events cannot be accepted as genocide (such as Justin McCarthy, Bernard Lewis, and Stanford Shaw) are accused of being Turkish agents; their works are denied; they are not invited to the scientific (!) conferences that the other side organize; even expression of their views are feared. Moreover, the expression of due compensation' simply contradicts with the former paragraph articulating that "... neither political nor legal or material claims against present-day Türkiye can be derived from the recognition of this historical event as an act of genocide." Those who demanded compensation are tried to be satisfied with the 'due compensation')

The Turkish Government, by refusing to recognize the genocide of 1915, continues to deprive the Armenian people of the right to their own history.

(With this paragraph Türkiye was demanded to take some steps to cure the 'psychological crises' of the Armenians. In the former paragraphs the years '1915-1917' are stated, whereas here only '1915' is written. The claim of the Armenian Diaspora that Türkiye is responsible for all the problems of Armenians is reflected here as well. Otherwise, it is impossible for a state to deprive another state to read, understand and evaluate its own history.)

The recognition of the Armenian genocide by Türkiye must therefore be viewed as a profoundly humane act of moral rehabilitation towards the Armenians, which can only bring honor to the Turkish Government.

[European Parliament] calls on the Council to obtain from the present Turkish Government as acknowledgment of the genocide perpetrated against the Armenians in 1915-1917 and promote the establishment of apolitical dialogue between Türkiye and the representatives of the Armenians.

(Here again the period of genocide is expressed as the years 1915-1917, thus the massacres committed by the Armenians much later, particularly during the War of Liberation, is excluded. However, the Van Massacre of April 1915 is forgotten as well since the blame is tried to be put on the Russian army, commanded by Armenians who were former deputies of the Ottoman Parliament.

The Council on the other hand, did not act in accordance with the EP's demand and there was no initiative on this issue towards Türkiye. The expression of 'representatives of Armenians' implies not the Republic of Armenia, which had not been an independent state at that time, but the Armenian Diaspora. Some of them openly supported the Armenian terror both financially and morally.)

Armenian Terrorist Activities: Establishment of Jewish-Armenian Connection

[European Parliament] profoundly regrets and condemns the mindless terrorism by groups of Armenians who were responsible between 1973 and 1986 of several attacks causing death or injury to innocent victims and deplored by an overwhelming majority of the Armenian people.

[European Parliament] condemns strongly any violence and any form of terrorism carried out by isolated groupings unrepresentative of the Armenian people, and calls for reconciliation between Armenians and Turks.

The obdurate stance of every Turkish Government towards the Armenian question has in no way helped to reduce the tension.

[European Parliament] calls on the Community Member States to dedicate a day to the memory of the genocide and crimes against humanity perpetrated in the 20th century, specifically against the Armenians and Jews.

(These four paragraphs reflect the balance within the European Parliament. In the first of them, Armenian terrorism is condemned, while this condemnation is somehow moderated with the expression that these event s are individual acts. In the third paragraph, it is implied that these acts of terror have a reason. The attitude of European televisions, radios and press right after the Armenian

terror was not much different. They perceived these events as an opportunity to reflect Armenian allegations. Those European parliamentarians, whom I met, argued that this was a text of compromise and it was aimed to satisfy the French and the Greek; and they 'laughed'!)

Package Paragraphs Condemning Türkiye

The refusal by the present Turkish Government to acknowledge the genocide against the Armenian people committed by the Young Turk government, its reluctance to apply the principles of international law to its differences of opinion with Greece, the maintenance of Turkish occupation forces in Cyprus and the denial of existence of the Kurdish question, together with the lack of true parliamentary democracy and the failure to respect individual and collective freedoms, in particular freedom of religion, in that country are insurmountable obstacles to consideration of the possibility of Türkiye's accession to the Community.

(This paragraph is a package paragraph. The European Parliament filled whatever it founded about Türkiye into this package. Moreover, it reflects the negative attitude towards Turkish application for membership to the European Communities in April 1987. The interesting thing is that the European Parliament mentions 'insurmountable obstacles.')

Conscious of those past misfortunes, [European Parliament] supports its desire for the development of a specific identity, the securing of its minority rights and the unrestricted exercise of its people's human and civil rights as defined in the European Convention of Human Rights and its five protocols.

(This is also a package paragraph in which 'civilizing' mission of Europe is reflected.)

The Rights of the Non-Muslim Minorities in Türkiye and Their Cultural Heritage

[European Parliament] calls on Türkiye in this connection to abide faithfully by the provisions for the protection of the non-Muslim minorities as stipulated in Articles 37 to 45 of the 1923 Treaty of Lausanne which, moreover, was signed by most Member States of the Community.

(Whenever a report, a draft or a question regarding Türkiye came to the agenda of the European Parliament, anti-Turkish Greek parliamentarians perceived this as an opportunity to denigrate Türkiye. This paragraph was put into the text as a result of the Greek demands.)

[European Parliament] calls for fair treatment of the Armenian minority in Türkiye as regards their identity, language, religion, culture and school system, and makes an emphatic plea for improvements in the care of monuments and for the maintenance and conservation of the Armenian religious architectural heritage in Türkiye and invites the Community to examine how it could make an appropriate contribution.

[European Parliament] considers that the protection of monuments and the maintenance and conservation of the Armenian religious architectural heritage in Türkiye must be regarded as part of a wider policy designed to preserve the cultural heritage of all civilizations which have developed over the centuries on present-day Turkish territory and, in particular, that of the Christian minorities that formed part of the Ottoman Empire.

[European Parliament] calls therefore on the Community to extend the Association Agreement with Türkiye to the cultural field so that the remains of Christian or other civilizations such as the ancient classical, Hittite, Ottoman, etc., in that country are preserved and made generally accessible.

(These three paragraphs are taken from different parts of the resolution. In preparing the first paragraph, the views of the Armenian community in Türkiye was not addressed This paragraph only reflects the demands of the Armenian Diaspora. In this respect, the advices of the representatives of Armenian community in Türkiye were disregarded both by the reporter and the European Parliament. Greek parliamentarians who were discontent of the reference to the Armenian cultural heritage in Türkiye, and other parliamentarians who supported them, tried to transform the question into a question of Christian heritage by adding a reference to the whole Christian heritage.)

Armenian in Iran and Soviet Union

[European Parliament] condemns the violations of individual freedoms com mitted in the Soviet Union against the Armenian population.

[European Parliament] expresses its concern at the difficulties currently being experienced by the Armenian community in Iran with respect to the Armenian language and their own education in accordance with the rules of their own religion.

(These paragraphs were included by the demand of the Armenian Diaspora)

Final Provisions

[European Parliament] instructs its President to forward this resolution to the Commission, the European Council, the Foreign Ministers meeting in political cooperation, the EEC/Türkiye Association Council and the Turkish, Iranian and Soviet Governments and the UN Secretary General.

(European Communities did not take any action in line with this paragraph. The issue was brought to the agenda of the European Parliament several times. Political authorities of the Republic of Armenia think that Türkiye could not be a full member of the European Union without recognizing the Armenian genocide. It is argued that some French Parliamentarians and Patrick Deveciyan, a French Minister, assured them about that. Within this context French and German newspapers wrote that during the meeting of French Interior Minister, Nicholas Sarkosy, and the leader of German CDU party, Angela Merkel on the prevention of Turkish full membership, Armenian question came to the agenda and German recognition of the Armenian genocide was in line with this policy.)

Conclusion

In the resolution adopted on September 2005, European Parliament stated that recognition of 1915 events as genocide is a precondition for Turkish full membership to the European Union. Although it is argued that the resolutions of the European Parliament are not binding, in the final stage, European Parliament will approve Turkish membership and before that it will bring these resolutions to the agenda. In order to reduce tension, Türkiye should seek an immediate dialogue with the European Parliament. In addition to our discourse which stipulates that the archives should be opened, the Armenian question should be left to the historians and a joint commission should be established; Türkiye should explain why 1915 events can not legally be accepted as genocide.

The attitude of the Turkish governments and the majority of the Turkish people are still perceived by the Europeans as a ‘denial’. However, the legal, psychological and historical reasons of this attitude cannot be explained well. On the other hand, Turkish media argued that the resolution adopted by the German Parliament recognized Armenian genocide; while German Parliament especially avoided using the term ‘recognition of genocide.’ Although not approving this resolution, I think that this was a significant detail, because if the claim of genocide could be drawn out of the equation, it would be possible that these events would be examined more objectively by those who had

developed an opinion on this matter. At least, they could accept that other interpretations are possible.

The institution that Türkiye could initiate a dialogue with the European Parliament and other parliaments is the Turkish Grand National Assembly and its EP-Türkiye Joint Parliamentary Commission. Within this framework following themes should be stressed:

- The concept of genocide is a legal concept,
- It is impossible to try the suspects of these events, all of whom are not alive, without their presence and to declare that they committed the crime of genocide,
- The elements of the crime of genocide and the authority to decide on this matter is defined in the 1948 Convention
- This Convention should be examined carefully
- Those parliaments, which had acted contrary to the Convention, might be complained to the International Court of Justice. 1915 events were a tragedy both for Armenians and the Muslim population, and this reality is undeniable.
- Necessary precautions should be taken to prevent similar events in the future and education should be given primacy.
- However, regarding a subject of international and internal criminal issue, a government can not be forced to adopt apolitical decision. This is contrary to the basic premises of the international law such as equity.
- Even if such a decision is adopted, it can not be accepted by the Turkish nation
- Regarding ethical and moral responsibility, every individual or group can form an opinion based on historical data, and they should be free to express this opinion.
- One can not expect to erase the memory of a group of people
- However, historical data should not be gathered selectively.
- It is impossible to force others to accept the established dogmas and insistence on that matter will create new conflicts.

STATE IDENTITY, CONTINUITY, AND RESPONSIBILITY: THE OTTOMAN EMPIRE, THE REPUBLIC OF TÜRKİYE AND THE ARMENIAN GENOCIDE: A REPLY TO VAHAGN AVEDIAN

Pulat Y. TACAR* and Maxime GAUIN**

Introduction

We have been asked by the European Journal of International Law to write a reply to an article entitled 'State Identity, Continuity and Responsibility: The Ottoman Empire, the Republic of Türkiye and the Armenian Genocide'. The article accuses Türkiye of 'practicing a denialist policy' with regard to 'the act of genocide committed during 1915–1916', demanding that it 'make itself responsible for its own internationally wrongful acts committed against Armenians and other Christian minorities', and also accuses it of 'expanding the massacres beyond its borders into the Caucasus and the territories of the independent Republic of Armenia'. According to the same article, there is a state succession and continuation of responsibility from the Ottoman Empire to the Turkish Republic, and the Republic must assume full responsibility for and should also repair the injury caused by the Ottoman Empire.

The Armenian question is especially sensitive, among other reasons because of the long accumulation of prejudices against Turks[1], Armenian terrorism in 1973–1991[2], the Armenian invasion and occupation of western Azerbaijan

* Pulat Y. Tacar has been Co-Chairperson of the Turkish National Commission for UNESCO (1995–2006); he was Ambassador of Türkiye to UNESCO (1989–1995), Ambassador of Türkiye to the European Communities (1984–1987) and to Jakarta (1981–1984). He is the author of many books and articles. Email: tacarps@gmail.com.

** Maxime Gauin is a doctor of history.
Email: gauin.maxime@wanadoo.fr.

1 J. McCarthy, The Turk in America. The Creation of an Enduring Prejudice (2010).

2 'ASALA: We All Believed In One Idea: Party', available at: https://armenians-1915.blogspot.com/2012/04/3348-asala-we-all-believed-in-one-idea.html.; Gauin, 'Remembering the Orly Attack', VII-27 Rev Int'l L & Politics (2011) 113; M.M. Gunter, Pursuing the Just Cause of their People. A Study of Contemporary Armenian Terrorism (1986); M.M. Gunter, Armenian History and the Question of Genocide (2011); F.P. Hyland, Armenian Terrorism: The Past, the Present, the Prospects (1991); T. Somer et al. (eds), International Terrorism and the Drug Connection (1984); A. Mango, Türkiye and the War on Terror. For Forty Years We Fought Alone (2005), at 11–13; B.N. Şimşir, Şehit Diplomatlarımız [Our fallen-martyr diplomats] (1973–1994) (2000), 2 vols.

since 1992[3], and more recently the virulent anti-Turkish stance of Anders Breivik in his manifesto[4] and the various campaigns or attacks by Armenian nationalists[5]. Instead of easing the tensions, the article fuels them through the provocative[6], defaming[7], irredentist[8] remarks of its author who harbours in his writings the colours of a political pamphleteer.

On this sensitive issue our main objective is to restore much-needed understanding and fair as well as reconciliatory dialogue between the Armenian and Turkish people and all interested parties, including scholars[9].

'The right to truth' encompasses all aspects of the truth and all the pages of history; in short, 'a just memory'. Thus, initiatives for dialogue between those who defend different views should be promoted. In this respect, the creation of joint commissions provided for by the protocols between Armenia and Türkiye will no doubt serve the cause of reconciliation, even if parties to the conflict insist on highlighting their views on the different aspects of 'their truth'. We believe, like the French philosopher Paul Ricoeur, that history is not frozen or rigid forever, that assessments categorized as historical truth cannot be conclusive, and that assertions relating to historical knowledge develop. Consequently, research into history is continuous.

---

3 A. Constant, L'Azerbaïdjan (2002), at 343–344 and *passim*.

4 'Norwegian Hitman Was Obsessed With Türkiye', turquieeuropeenne.eu, 4 August 2011, available at: http://www.turquieeuropeenne.eu/norwegian-hitman-was-obsessed-with-türkiye.html.

5 E.g., Çevik-Ersaydı, 'Dehumanization in Cartoons: A Case Study of the Image of the Turk in Asbarez Newspaper', 24 Rev Armenian Studies (2011) 103: '[r]eviewing and shaping the already traumatized Diaspora identity with hostile feelings towards another group will most likely result in an unresolved trauma. … The image of the Turk within Diaspora Armenians could be summarized as being worthless, inhuman, murderer, barbaric and savage'. See also Gauin v. Nissanian, judgment of the Tribunal de Grande Instance, Lyon, of 27 Apr. 2010, available at: www.turquie-news.com/IMG/pdf/JugementTGILyon27042010.pdf.

6 Like the recurrent comparison between the late Ottoman Empire and Nazi Germany. On this point see Ataöv, 'The Jewish Holocaust and the Armenians', in T. Ataöv, Armenians in the Late Ottoman Period (2001), at 315–344, available at: https://web.itu.edu.tr/~altilar/tobi/e-library/TheArmenians/TheHolocaust.pdf; and Y. Güçlü, The Holocaust and the Armenian Case in Comparative Perspective (2012).

7 See Avedian, at 810: '[t]he Stalinist cleansing allowed Kemal effectively to eliminate all potential political rivals and opponents. This slander by the author is an unfortunate example which demonstrates the state of his mind. The whole world knows Mustafa Kemal Atatürk as one of the great leaders of the 20th century. On the political nature of the Kemalist regime see, among others, B. Lewis, The Emergence of Modern Türkiye. Third Edition (2002), at 290; M. Duverger, Les Partis politiques (1981), at 375–377; and S.R. Sonyel, Atatürk, the Founder of Modern Türkiye (1989).

8 See Avedian at 809: 'the demand … of the reunification of West Armenia and the Republic of Armenia in the Caucasus' reflects the irredentist dream of the Armenian nationalist to create 'Great Armenia'. Furthermore, at 812 Avedian says: '[m]ost of the total losses claimed were from Turkish Armenia'. 'Western Armenia', and/or 'Turkish Armenia' exist only in the minds of irredentist militant Armenians.

9 For comparative analyses consult Palabıyık, 'A Literature between Scientificity and Subjectivity: A Comparative Analysis of the Books Written on the Armenian Issue', IV Rev Armenian Studies (2007) 121, available at: www.eraren.org/index.php?Lisan=en&Page=DergiIcerik&IcerikNo=476; Yavuz, 'Contours of Scholarship on Armenian–Turkish Relations', XX Middle East Critique (2011) 231.

Paul Ricoeur[10], who has received international recognition with his book titled Memory, History, Forgetting, criticized the concept of 'collective memory' and pointed out that some ideologies have been formed under the auspices of this concept concerning the warning – frequently recalled by local and foreign scholars or politicians – about 'completing the task of memory'. Ricoeur emphasized that it is not the 'task of memory' but a 'study of memory' processes that should be developed in our minds. He further stated that discussions around 'rightful memory' create a difficult picture for those who are forced somewhere to remember their sorrows obsessively, and who may somewhere else equally face the position of those who tend to put completely out of their minds that conviction and punishment are the task of judges. Citizens must resist 'forgetting' and at the same time should possess a 'just memory'. The task of the historian is not to accuse or exculpate, but to understand; the 'study of memory' is open to improvement and its feature of *défamiliarization*[11] outweighs the task of memory.

As we address our comments to EJIL, we intend to focus mainly on the international law aspects of the question.

Why Türkiye does not Qualify the Tragic Events of 1915–1916 as Genocide?

A) 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide

The main charge by the author is that Türkiye refuses to recognize the 1915–1916 Armenian genocide. Let us examine whether such an accusation is legally sustainable. 'The concept of the "Armenian genocide" is being used in a historical and political rather than in a legal perspective. It has become a catchword which reveals deep scars in the Armenian collective memory. Learned legal discussions on the issue of genocidal intent are of little or no relevance to the perception by the Armenians of one of the most defining moments of their history.'[12]

The term 'genocide' is a legal term; it describes a crime specifically defined by the 1948 Genocide Convention and must be addressed accordingly. The existence of the crime of genocide can be legally determined only by the judges of a competent tribunal on the basis of the prescribed legal criteria and after a

10 P. Ricoeur, La mémoire, l'histoire, l'oubli (2000).

11 Defamiliarization or *ostranenie* (*остранение*) is the artistic technique of forcing the audience to see common things in an unfamiliar or strange way in order to enhance the perception of the familiar.

12 Longva, 'The Concept of Genocide in International Law, A Wound not Healed', Conference on Turkish–Armenian relationship, University of Oslo, 1 Feb. 2010.

fair and impartial trial. The Genocide Convention does not allow for convictions on the grounds of genocide by legislatures, scholars, pamphleteers, politicians, or others. Some historians, sociologists, politicians, and even political scientists who deal with these issues tend to describe almost any incident which involves a significant number of dead[13] as genocide; they sometimes purposely mislead those who are not familiar with the law; they created an 'Armenian taboo' and now they are prisoners of it[14]. Indeed:

To term the events of 1915 as genocide is to detach genocide from its legal definition and to use it for political or moral purposes. Whether it is sound to keep hammering on a legal term based on non-legal considerations is doubtful… it adds to a wrong conceptualization of the legal system and eventually could lead to a devaluation of the norm itself[15].

But Armenians and some of their supporters have deliberately set aside the legal aspects of the issue, because – they thought – it would weaken their genocide claims. They have chosen to adopt a dogmatic political approach to underline the tragic nature of the incidents so that they can make genocide claims more easily acceptable to the public[16].

B) Dolus specialis – Special Intent

The most important characteristic of the Genocide Convention is that for the crime of genocide to exist, acts must have been committed with the intent to destroy the protected groups as such. The mental or subjective element (*mens rea*) is a constituent of that crime. The concept of 'general intent', which is valid for ordinary crimes, is inadequate in the identification of acts of genocide.

Sociologically and psychologically, the intent 'to destroy a group as such' emerges in the most intensive stage of racism. Racial hatred is quite different from the ordinary animosity laced with anger, which parties engaged in a substantial dispute may feel towards one another. Racial hatred is a deeply pathological feeling or complicated fanaticism. Anti-Semitism is an example in this context[17].

13 W.A. Shabas, Genocide in International Law (2000), at 7; Lewy, 'Can There Be Genocide Without the Intent to Committ Genocide?', IX J Genocide Research (2007) 661 (a second edition of the article appears in G. Lewy, Essays on Genocide and Humanitarian Intervention (2012)).

14 A. İnsel and M. Marian, Dialogue sur le tabou arménien (2009).

15 Van der Linde, 'The Armenian Genocide Question and Legal Responsibility', 24 Rev Armenian Studies (2011) 123.

16 Aktan, 'The Armenian Problem and International Law', in Ataöv (ed.), supra note 6, at 263, available at: https://web.itu.edu.tr/~altilar/tobi/e-library/TheArmenians/InternationalLaw.pdf.

17 Ibid., at 270.

According to the Genocide Convention, the intent to destroy a group must be in the form of 'special intent', *dolus specialis*, beyond any doubt. This crucial aspect of the crime of genocide has been underlined by the International Court of Justice (ICJ) in paragraph 187 of its judgment in Bosnia Herzegovina v. Serbia and Montenegro[18]: the ICJ examined the allegations by Bosnia and Herzegovina and conducted long and detailed investigations regarding the alleged atrocities, the findings of which are grouped according to the categories of prohibited acts described in Article II of the Genocide Convention. With regard to killing members of the protected group, the Court found that massive killings throughout Bosnia and Herzegovina were perpetrated during the conflict. However, with the exception of Srebrenica, the Court was not convinced that those killings were accompanied by the specific intent on the part of the perpetrators to destroy the group of Bosnian Muslims in whole or in part. So, if the 'special intent' is not proven beyond all doubt, judicially an act cannot be qualified as genocide. The cases of civil war, rebellion, and mutual killings should not be confused with the crime of genocide.

C) A Competent Tribunal to Judge the Genocidal Acts

Moreover, the existence of the crime of genocide must be decided upon by a competent tribunal. Article VI of the 1948 Genocide Convention reads as follows:

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

The issue of a competent tribunal had been extensively debated by the International Preparatory Conference of the 1948 Genocide Convention. The question of determining a competent tribunal was resolved[19] after lengthy discussion, and the above- mentioned text was approved. During the

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

19 See Travaux préparatoires Doc. E/794, at 294 and 97, the meeting of the Conference, at 360 ff.

discussions, a proposal for 'universal repression' was rejected[20], universal repression allows the judging of the suspects by any tribunal of any state. Without a valid decision from a competent court, an act cannot legally be qualified as genocide.

The Turkish government and the overwhelming majority of Turks, as well as other governments[21] and many scholars or experts, reject the qualifying of the tragic events of 1915 as genocide, because the legal conditions incorporated in the 1948 Genocide Convention which are a sine qua non, especially the *dolus specialis*, the intent to destroy as such, were not fulfilled. We are of the opinion that the tragic events of 1915 may be labelled 'criminal acts enumerated as such by the Ottoman Penal Code'. Furthermore, some of these events are described by many authors as inter-ethnic killings[22].

On this occasion we would like to emphasize that the Minister of Foreign Affairs of Türkiye, Mr. Ahmet Davutoğlu, very clearly stated he was not insensitive to the sufferings of the Ottoman Armenians, but expected the same understanding from the Armenian side with regard to the plight of the Muslim

20 With regard to the 'Power to Exercise Universal Repression' or 'Universal Repression' (see 15 Apr. 1948. Doc. E/794, at 29–33) The Committee rejected a proposal in this respect (ibid., at32).Those rejecting the principle of universal repression argued as follows: 'universal repression is against the principles of traditional law; permitting the courts of one State to punish crimes committed in another state by foreigners will be against the sovereignty of the State; as genocide generally implied the responsibility of the State on the territory of which the crime was committed, the principle of universal repression would imply national courts to judge the acts of foreign governments. The result will be dangerous international tensions.'

21 The British government on many occasions officially declared its position on the matter. On 14 Apr. 1999 the Foreign Office spokesperson Baroness Ramsay of Cartvale said that 'the British government has not recognized the events of 1915 as indications of genocide'; on 7 Feb. 2001, acting on behalf of the British government, Baroness Scotland of Asthal declared: 'The government, in line with the previous British governments, have judged the evidence not to be sufficiently unequivocal to persuade us that these events should be categorized as genocide as defined by the 1948 United Nations on genocide. … The interpretation of events in Eastern Anatolia in 1915–1916 is still the subject of genuine debate among historians.' The UK government did not accept the 1915 events as qualifying as genocide. The Israeli government refused to accept the parallel between the Holocaust and the tragic events of 1915. The Ambassador of Israel, Rivka Kohen, in Yerevan declared on 7 Feb. 2002, during a press conference that 'the 1915 events couldn't be considered genocide because the main killings in these events were not planned and the Ottoman government had no intention to destroy a nation or a group of people as such. As a well-known fact many people from the Armenian and Muslim groups had lost their lives in these events. The Holocaust is unique. At this stage nothing should be compared with the Holocaust.' On 10 Apr. 2001 the Nobel Prize-winning Israeli Foreign Minister Shimon Perez said that 'the fate of Armenians in Anatolia was a tragedy, not genocide.' He added, 'Armenian allegations are meaningless. We reject attempts to create a similarity between the Holocaust and the Armenian allegation. If we have to determine a position on the Armenian issue it should be done with great care not to distort the historical realities.'

22 J. McCarthy, E. Arslan, C. Taşkıran, and Ö. Turan, The Armenian Rebellion at Van (2006), at 265: '[t]he slaughter of Muslims that accompanied the Armenian revolt in Van Province inexorably led first to Kurdish reprisals on the Armenian, then to a general and mutual massacre of the people of the East. The Armenian revolt began an intercommunal war, in which both sides, fearing their own survival, killed those who, given the chance, would have killed them. The result was unprecedented horror. History records few examples of mortality as great as that suffered in Van Province.'

Ottomans who equally suffered during the same tragic events[23]. The Turkish government has more than once declared that it was ready to consider and eventually accept the conclusion of historians and legal experts who will meet to study the tragic events of 1915–1916; but Yerevan refused[24]. Nevertheless, Ankara has since 2004 supported the Vienna platform, which in 2009 published a large compilation of documents[25]. Türkiye gave full access to its archives – unlike the Armenian Revolutionary Federation and the Armenian Patriarchate at Jerusalem – and, according to Dr Hilmar Kaiser, a supporter of the 'Armenian genocide' label, there is no evidence of deliberate destruction of Ottoman documents[26].

D) Other General Principles of International Criminal Law on Internationally Wrongful Acts

Those who refer to internationally wrongful acts in the context of the events of 1915 should also take into consideration the following principles of international law:

1- Nulla crimen sine lege[27] **and** *Nulla poena sine lege*[28]

The governing principles of criminal law are also valid for the crime of genocide: these are *nulla crimen sine lege*, which means no crime shall exist without law, and *nulla poena sine lege*, which means no person shall be punished without a law foreseeing such punishment.

---

23 'WWI Inflicted Pain to Everyone, Davutoğlu Says', *Hürriyet Daily News*, 30 Dec. 2011, available at: www.hurriyetdailynews.com/wwi-inflicted-pain-on-everyone-davutoglu-says.aspx?pageID=238&nID=10325&NewsCatID=338; 'Türkiye "Ready to Share Pain" With Armenians', *Hürriyet Daily News*, 1 Mar. 2012, available at: www.hurriyetdailynews.com/Türkiye-ready-to-share-pain-with-armenians.aspx?pageID=238&nID=14993&NewsCatID=338.

24 E.g., Anatolian News Agency, 11 Apr. 2005; 'Yerevan Rejects Turkish PM Erdogan's Dialogue Letter', *Turkish Weekly*, 14 Apr. 2005, available at: https://web.archive.org/web/20131004232232/http://www.turkishweekly.net/news/8050/; interview with Recep Tayyip Erdoğan by Charlie Rose, 27 Sept. 2007, available at: https://charlierose.com/videos/15527; 'Türkiye's Proposal Clears Last-Minute Snag in Zurich',; Gunter, Armenian History, supra note 2, at 125–129.

25 Atılgan and G. Moumdjian (eds), Archival Documents of the Viennese Armenian-Turkish Platform (2009).

26 'We should be really careful about not mixing information. Anything about the CUP archives is sheer speculation. We don't have any indication that they have been destroyed': Hilmar Kaiser, interview given to *Aztag*, 22 Sept. 2005, available at: http://headoverhat.blogspot.com/2007/06/interview-with-hilmar-kaiser.html. See also 'Historian Challenges Politically Motivated 1915 Arguments', *Turquie Europeenne*, 23 Mar. 2009, available at: http://turquieeuropeenne.eu/historian-challenges-politically-motivated-1915.html; Güçlü, 'Will Untapped Ottoman Archives Reshape the Armenian Debate?', XVI Middle East Q (2009) 25, available at: www.meforum.org/2114/ottoman-archives-reshape-armenian-debate.

27 Rome Statute of the International Criminal Court Art. 22.

28 Ibid., Art. 23.

2- Ne bis in idem

The principle *ne bis in idem*[29] means that no person shall be tried with respect to conduct which formed the basis of crimes for which the person has already been convicted or acquitted by a competent court.

The Turkish government and the great majority of Turks do not deny that Ottoman Armenians, together with Muslims and other Ottoman citizens, were the subject of a great tragedy[30] during the events of 1915–1916, that they lost their lives, property, families, and homes. During the relocation or transfer of a population within the borders of Ottoman territory, a number of military personnel or civil servants and other members of the population committed crimes despite orders being given by the Ottoman government to protect the lives and property of the displaced Armenians.

3- The 1915–1916 Trials by the Ottoman Government for Crimes against Ottoman Armenians

In this respect it should be emphasized that the criminality associated with the tragic events and the relocation of the Ottoman Armenians in 1915–1916 was addressed by the Ottoman judiciary. Individuals or members of the groups who attacked the Armenian convoys and officials who exploited the Armenian plight and neglected their duties or abused their powers were court-martialled and punished.

In 1915, more than 20 Muslims were sentenced to death and executed for such crimes[31]. Following a report by Talat Pasha, the Ottoman government created three commissions[32] to investigate the complaints of Armenians and the denunciations of civil servants. As a result, in March–April 1916, 1,673 Muslims – including captains, first and second lieutenants, commanders of gendarme squads, police superintendents, and mayors – were remanded to courts martial. Sixty-seven were sentenced to death, 524 were sentenced to jail, and 68 received other punishments such as forced labour, imprisonment in forts, and exile. The rest were not sentenced. Since the author of the article to which we are replying stresses the alleged ‘confiscation’ of Armenian property by the Ottoman state, it is not unimportant to notice that several people

29 Ibid., Art. 20.

30 Shimon Perez, Statement of Apr. 2001: ‘[w]hat happened to the Armenians was a tragedy, but not genocide.’

31 Lewy, supra note 13, at 111.

32 Y. Halaçoğlu, Facts on the Relocation of Armenians. 1914–1918 (2002), at 84–86; H. Özdemir and Y. Sarınay (eds), Turkish–Armenian Conflict Documents (2007), at 294.

were sentenced to death for plunder, and that other death sentences were justified not only by murders, but also by robberies[33].

4- The Malta Investigation

In 1919, the Ottoman government asked its Spanish, Dutch, Danish, and Swedish counterparts to send impartial investigators into the Anatolian events of World War I. The request was in vain because of British pressure[34].

Furthermore, the occupying British forces took 144 Ottoman officials to Malta to try them in a tribunal for presumed war crimes and crimes against Armenians. The author misrepresents the case of those 144 Ottoman officials interned in Malta from 1919 to 1921. They were released after more than two years of unsuccessful investigation by a British prosecutor and his staff. The occupying powers had not found enough evidence in the British, US, and Armenian archives, or in the Ottoman documentation seized by the British army. The statement by the author that the archives had been destroyed does not reflect the truth. It is known that at that time the British government relied on an Armenian researcher, Haig Khazarian, in its hunt for incriminating evidence against Ottoman officials taken to Malta. The British also requested the US government's help for this purpose, but received the response that there was not enough evidence. If even the slightest evidence existed in the hands of the British authorities – enough to incriminate the prisoners in Malta – the trials would surely have taken place of the Ottoman citizens who were sent to Malta to face trial[35].

Malta's prosecutor refused to use the material of the courts martial of 1919–1920. Indeed, the trial of the ministers in 1919 was legally null and void, since it took place in the form of a court martial. According to the Ottoman Constitution, the ministers could be tried only by the High Court for crimes committed in the exercise of their responsibilities. As early as 1919, the right to appeal the sentences was denied. The courts martial of 1919–1920 did not allow cross-examination, the right to which exists even at Guantanamo. In April 1920, Damat Ferit Pasha even banned the defendants from hiring a

33 Y. Halaçoğlu, The Story of 1915. What Happened to the Ottoman Armenians? (2008), at 82–87; Lewy, supra note 13, at 112; Sarınay, 'The Relocation (Tehcir) of Armenians and the Trials of 1915–1916', XX Middle East Critique (2011) 308.

34 Halaçoğu, supra note 32, at 99 and annexes XX–XXI.

35 Lewy, supra note 13, at 122–128; Şimşir, 'The Deportees of Malta and the Armenian Question', in Armenians in the Ottoman Empire and Modern Türkiye (1912–1926) (1984), at 26–41; B.N. Şimşir, Malta Sürgünleri (2009); Sonyel, 'Armenian Deportations: A Re-Appraisal in the Light of New Documents', Belleten, Jan. 1972, at 58–60; S.R. Sonyel, The Displacement of Armenians: Documents (1978).

lawyer. After the final fall of Damat Ferit, the rights to appeal and hire a lawyer were restored. All the surviving convicts of April–October 1920 appealed their convictions, and they were acquitted of all or most of the charges. These decisions took place when Istanbul was still occupied by the *Entente*[36].

Malta's prosecutor did not accept the allegations against the Ottoman Special Organization (SO) unit. Actually, the Special Organization took no part in the forced Armenian displacements and massacres, and no observer of World War I accused that unit of crimes against Armenians. Many years after World War I, Mr. Dadrian, followed by Mr. Akçam, seriously distorted their material and invented references to the SO which actually do not exist in the records. For instance, they inverted purely and simply the sense of the Memoirs of Arif Cemil Denker, an officer of SO during World War I, seriously distorted the Memoirs and the statements and another officer, Eşref Kuşçubaşı, and falsely alleged that the courts martial of 1919–1920 found the Ottoman SO guilty of Armenian deportation and massacres. Mr Dadrian and Mr Akçam also ignored the relevant Ottoman military documents[37].

5- The Eastern Front

According to the author:

Türkiye continued the same internationally wrongful acts, even expanding the massacres beyond its own borders into the Caucasus and the territories of the independent Republic of Armenia…

We assume that the author wants to refer to the 1920 Turco-Armenian war. Much has been written about that tragic period. One of the correct evaluations of that period was made by the then Prime Minister of Armenia, Hovannes Kachaznuni. He wrote:

Despite these hypotheses there remains an irrefutable fact. That we had not done all that was necessary for us to have done to evade war. We ought to have

36 F. Ata, İşgal İstanbul'unda Tehcir Yargılamaları (2005); Lewy, supra note 13, at 79–82; Şahin, 'A Scrutiny of Akçam's Version of History and the Armenian Genocide', XXVIII J Muslim Minority Affairs (2008), at 307, available at: www.tc-america.org/files/news/pdf/Erman-Sahin-Review-Article.pdf.

37 Ata, supra note 36, at 193, 199, 201, and 204; Erickson, 'Armenian Massacres: New Records Undercut Old Blame', XIII Middle East Q (2006) 67, available at: www.meforum.org/991/armenian-massacres-new-records-undercut-old-blame; Lewy, supra note 13, at 82–88 and 221; Şahin, supra note 36, at 310–312; Şahin, 'Review Essay: The Armenian Question', XVII Middle East Policy (2010) 000, at 151, 153, and 162, n. 48, available at: www.turkishcanadians.com/wp-content/uploads/armenian_question.pdf; S.J. Shaw, The Ottoman Empire in World War I (2006), i, at 373–409; Terzioğlu, 'The Armenian Deportation in Line With National and Foreign Sources of Information', in S. Erez and M. Saray (eds), Uluslarası Türk-Ermeni İlişkileri Sempozyumu (2001), at 321–358.

used peaceful language with the Turks whether we succeeded or not, and we did not do it. …With the carelessness of inexperienced and ignorant men we did not know what forces Türkiye had mustered on our frontiers. When the skirmishes had started the Turks proposed that we meet and confer. We did not do so and defied them[38].

We would strongly recommend that those who are interested in the realities of that time to consult this book. This may help them refresh their memories. Furthermore, we should add that the Russian, US, British, and Turkish archives are full of documents which prove the atrocities committed by the Armenian forces in eastern Anatolia during that period, a fact which some leaders of the Armenians are proud of and do not deny[39].

After the end of the Turco-Armenian War, the Kars Treaty was signed on 13 October 1921 by the delegates of Armenia, Azerbaijan, Georgia, Russia, and Türkiye. The intervention of the then Minister of Foreign Affairs of Armenia, Mr. Muravian, who attended the Kars Peace Treaty Conference on 22 September 1921, is also worth mentioning to reflect the Armenian position at that point. He said:

We have not come here with antagonistic feelings and we have no intentions of presenting here the controversial issues we have inherited from the former nationalist governments. We are only admirers of the brave struggle which the preserving people of Türkiye engaged in. We carry a sincere wish, and we are absolutely convinced that a nation which defends its country will be victorious and the enemy will be defeated[40].

6- Is the War of Independence a Myth Invented by Kemalists?

The author alleges that '[t]he "War of Independence" is a myth invented by Kemalists; that it was not against the occupying Allies, but rather a campaign to rid Türkiye of remaining "non-Turkish elements"'. Even Taner Akçam does not assume such an absurd[41] stance. The author should ask himself why France,

38 H. Kachaznumi, The Armenian Revolutionary Federation Has Nothing to Do Anymore (1955), at 9–10, available at: https://fatsr.org/wp-content/uploads/2021/04/The-Armenian-Revolutionary-Federation-Has-Nothing-to-Do-Anymore-New-York-Armenian-Information-Service-1955.pdf.

39 Ermeniler Tarafından Yapılan Katliam Belgeleri/Documents on Massacre Perpetrated by Armenians (2001), 2 vols.; K. Schemsi, Turcs et Arméniens devant l'histoire (1919), available at: https://louisville.edu/a-s/history/turks/turcs_et_armeniens.pdf. See also n. 54 and 55; and A. Ter-Minassian, 1918–1920. La République d'Arménie (2006), at 216.

40 K. Gürün, The Armenian File (2007), at 339 (1st English edn, 1985).

41 For a comprehensive study of this war see S.J. Shaw, From Empire to Republic: The Turkish War of National Liberation, 1918–1923. A Documentary Study (2000), 5 vols.

the UK, Italy, Greece, and other powers signed the Treaty of Lausanne which ended World War I and the War of Independence if this war was a myth.

The Kemalist movement was by no means hostile to the non-Muslims and was supported, not only by most of the Turkish Jews[42], but also by a portion of Istanbul's Armenians, like the Karabetian Society and the Deputy Director General of the Ottoman Bank (promoted Director General during World War I), Berç Keresteciyan (1870–1949), future deputy of the Turkish National Assembly from 1935 to 1946[43].

Contrary to the author's false allegations, the National Liberation Government even tried to keep the Christian population of Cilicia at the end of 1921 – in vain, because of the Armenian nationalist propaganda[44]. Similarly, the exodus of most of the Christians of western Anatolia is chiefly due to the scorched earth policy of the Greek army in 1922[45]. Most of the allegations of 'massacre' against the National Liberation Movement were proven to be false[46].

42 S.R. Sonyel, Minorities and the Destruction of the Ottoman Empire (1993), at 439–441.

43 M.K. Öke, The Armenian Question (2001), at 196–202 and 210–216; Öke, 'The Response of the Turkish Armenians to the "Armenian Question" (1919–1926)', in Bosphorus University (ed.), Armenians in the Late Ottoman Empire and Modern Türkiye (1984), papers presented to the Congress of the Middle Eastern Studies Association (1983), at 71–88; Shaw, supra note 41. iii, at 1050. See also Rapport hebdomadaire, 23–29 Mar. 1920, 15–21 June 1920, Service historique de la défense nationale (SHDN), 4 H 58, dossier 1.

44 Télégramme du général Gouraud au ministère des Affaires étrangères, 24 Oct. 1921; télégramme du ministère au Haut-Commissaire à Beyrouth, 3 Nov.; télégrammes du général Pellé au ministère, 5, 15, and 23 Nov. 1921; lettre du ministère à Franklin-Bouillon, 12 Nov. 1921, Archives du ministère des Affaires étrangères (AMAE), P 17785; Commandement supérieur, Levant – Journal des marches et des opérations, 1921, at 456–469, SHDN, 4H 47, dossier 1; Bulletin périodique n° 39, 5 Dec. 1921–5 Jan. 1922, SHDN, 4 H 49, dossier 1; Bulletin de renseignements n° 279, 17–21 Nov. 1921, 4 H 61, dossier 3; Y. Güçlü, Armenians and the Allies in Cilicia (1914–1923) (2010), at 140–156 and 210–216.

45 Rapport du père Ludovic Marseille, Sept. 1922; Télégramme du colonel Mougin au général Pellé, 8 Sept. 1922; télégramme du général Pellé au ministère des Affaires étrangères, 8 Sept. 1922; télégramme de Raymond Poincaré à Athènes, Londres, Rome, Washington, 9 Sept. 1922; télégramme de l'ambassadeur de France à Londres au ministère des Affaires étrangères, 12 Sept. 1922, AMAE, P 1380.

46 American investigations: Güçlü, supra note 6, at 124–127; Lowry, 'American Observers in Anatolia circa 1920: The Bristol Papers', in Bosphorus University, supra note 45, at 42–58; French investigations: Rapport du commandant Labonne, 7 Dec. 1919; le chef de bataillon Labonne, en mission à Afioun-Karahissar, à Monsieur le général Commandant en chef des armées alliées [Franchet d'Esperey], 2e bureau, 1919, SHDN, 7 N 3210; Rapport du lieutenant de Vaisseau Rollin, chef du 19 Oct. 1920, AMAE, P 16674; British accounts: Sonyel, 'How Armenian Propaganda Nurtured a Gullible Christian World In Connection With the Deportation and "Massacres"', Belleten, Jan. 1977, at 167–168. See also Bulletin de renseignement n° 285, 11–13 Dec. 1921, SHDN, 4 H 62, dossier 3; Général Pellé au ministère, 8 Sept. 1922, Télégramme de l'ambassadeur français à Londres, 12 Sept. 1922, AMAE, P 1380.

7- Pacta sunt servanda and lex specialis Principles Governing the Liabilities and Legal Responsibilities of the Ottoman State and of the Republic of Türkiye

After World War I and the War of Liberation, Türkiye concluded international agreements to put an end to the wars and insurgencies which had disrupted the country's and region's peace since 1914. Some of these agreements contained amnesty clauses. The amnesties aimed to cover the humanitarian dimensions of the tragic past.

To ignore these agreements and declarations contradicts the *jus specialis* principle provided for in Article 55 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts and also the principle of *pacta sunt servanda*.

Let us briefly examine the Lausanne, Kars, and Ankara treaties as well as the agreement between the US and Türkiye on all compensation demands.

A- The Treaty of Lausanne

The Treaty of Lausanne, signed on 24 July 1923, included a declaration of amnesty according to which Turkish nationals, and reciprocally nationals of the other signatory powers of the Treaty of Lausanne, who were arrested, prosecuted, or sentenced prior to 20 November 1922 benefited from an amnesty.

In addition, the Treaty of Lausanne, in ending the war between Türkiye and other powers, decreed that former Ottoman citizens who resided in countries that were separated from Türkiye by Article 31 of the Lausanne Treaty and who had automatic ally gained citizenship of those countries by means of Article 30 would have the right within two years to choose Turkish citizenship. Through these decrees, all the Armenians who were on that day outside the borders of Türkiye and who retained Turkish citizenship, and those Armenians who were in those countries separated from Türkiye, obtained the right to return to Türkiye if they so wished. Article 6 of the Amnesty Declaration attached to the Lausanne Treaty states regarding the same subject:

The Turkish Government which shares the desire for general peace with all the Powers, announces that it will not object to the measures implemented between 20 October 1918 and 20 November 1922, under the protection of the Allies, with the intention of bringing together again the families which were separated because of the war, and of returning possessions to their rightful owners.

It is apparent that this Article concerned the individuals who were forced to emigrate and who returned to their homes during the period of armistice and occupation. At that time, Türkiye announced that the implementation of the measures proclaimed under the occupation powers, would be maintained without modification. According the US archives[47], 644,900 Armenians returned and settled in Anatolia after the war, even before the Treaty of Sevres was signed. The Treaty was not ratified and did not enter into force[48]. By returning to Ottoman territories in 1918–1919, many Armenians regained some of the property they had left behind during the 1915 transfer of population. For instance, the number of properties returned by 30 April 1919 was recorded as 241,000. This number included approximately 98 per cent of the immovable property[49]. Records also state that some problems and injustices occurred during the application of the regulations[50]. The possibility of judicially challenging these injustices continues to exist. Two recent decisions of the local courts in Adana and in Sarıyer (Istanbul) which returned properties to one Lebanese and one Turkish citizen of Armenian origin prove that those who possess appropriate documents may present their cases to a competent court, and if unsatisfied take the file to the European Court of Human Rights.

B- Liquidation of the Ottoman Debts and Other Economic Clauses of the Treaty of Lausanne

Finally, Articles 46–63 of the Lausanne Treaty were about the liquidation of the debts of the Ottoman State. The Republic of Türkiye paid all the Ottoman debts.

According to Article 58 of the Treaty of Lausanne, the parties to the treaty reciprocally renounced all claims for the loss and damage suffered between 1 August 1914 and 6 June 1924 as a result of acts of war or measures of requisition, sequestration, disposal, or confiscation.

Articles 65–72 of the Treaty incorporate economic clauses which protect the rights and legal interests of those Ottoman subjects who were the subject of relocation. Article 74 of the Treaty contains special provisions with regard to insurance policies. The following take into account those provisions.

47 NARA, T1192 R2.860J.01/395; verified by the Armenian Patriarch.

48 'Yusuf Halaçoğlu Cevap Veriyor', Taraf (newspaper), 23 June 2008.

49 Prime Ministry Ottoman Archives (BOA), UMVM 159/21, lef.3.

50 'Tehcirden Dönenlerin Malları' ('Properties of Those Returning from the Relocation'), Sosyal Tarih, Sept. 1994, at 45–48; Bakar, 'Malların İadesi' ('Returning of properties') in H. Özdemir (ed.), Türk-Ermeni İhtilafı Makaleler ('Papers on the Turko-Armenian Conflict) (2007), at 327–339. See enactment of 8 Jan. 1920. Md. 33 bTakvim-i Vekayi 12 Kanunu Sani 1336 N° 3747 BOA.MV. 245/15 Düstur II Tertip.C.II. at 553–554.

C- Moscow and Kars Treaties

The Moscow Treaty of 16 March 1921 was signed between Türkiye and Russia. Thereafter, the Treaty of Kars was concluded between Türkiye, Armenia, Azerbaijan, and Georgia on 13 October 1921. The Treaty of Kars was signed before the Treaty of Lausanne settled the conflicts between Türkiye and Armenia as well as the other Caucasian republics. That Treaty stated in Article 15 that 'each of the Contracting Parties agrees to promulgate a complete amnesty to citizens of the other Party for crimes and offenses committed during the course of the war on the Caucasian front'.

The 'murders and atrocities' were by no means limited to actions of the Turks and other Muslims against Armenians. The investigation by Captain Emory H. Niles and Arthur E. Sutherland in eastern Anatolia in 1919 led them to conclude '[f]irst, that Armenians massacred Moslems with many refinements of cruelty, and second that Armenians are responsible for most of the destruction done to towns and villages'[51].

D- The Ankara Treaty with France

Some of the tragic events took place in territories occupied by France, where Armenian groups cooperating with France massacred the Muslim population. The Ottoman Muslims retaliated. The Ankara Treaty signed on 20 October 1921 between France and Türkiye had foreseen the parties promulgating a total amnesty for the crimes committed in those occupied territories. Article 5 of the Ankara agreement reads as follows: '[b]oth sides will announce a general amnesty in the evacuated area, following the occupation of this area'.

Once again, the amnesty was far from concerning only Turks. French courts martial sentenced many Armenians for banditry, robbery, rape, and assassination against Turkish civilians, and more generally the large scale of atrocities and destruction – by arson in particular – is confirmed by many French, British, and American sources, in addition to the Turkish ones[52].

---

51 McCarthy, 'The Report of Niles and Sutherland', XI. Türk Tarih Kongresi (1990) 1809, at 1850 (emphasis added), available at https://louisville.edu/a-s/history/turks/Niles_and_Sutherland.pdf. For other sources see, e.g., Gauin, 'The Convergent Analysis of Russian, British, French and American Officials Regarding the Armenian Volunteers (1914–1922)', 1 Int'l Rev Turkish Studies (2011–2012) 18, available at: https://www.academia.edu/6856777/The_Convergent_Analysis_of_Russian_British_French_and_American_Officials_Regarding_the_Armenian_Volunteers_1914_1922_.; S.J. Shaw and E.K. Shaw, History of the Ottoman Empire and Modern Türkiye (1978), ii, at 322–323 and 325.

52 M. Bergès, La Colonne de Marach et quelques autres récits de l'armée du Levant (1924), at 56, 81–82, 89, and 142–143; Gauin, supra note 51, at 34–41; Güçlü, supra note 6; McCarthy, supra note 1, at 202–208; Lewy, supra note 13, at 107–108; Shaw, 'The Armenian Legion and its Destruction of the Armenian Community in Cilicia', in Ataöv (ed.), supra note 6, at 155–206, available at: https://web.itu.edu.tr/~altilar/tobi/e-library/TheArmenians/ArmenianLegion.pdf.

E- Lex specialis

Article 55 of the Draft Articles on the Responsibility for Internationally Wrongful Acts adopted by the International Law Commission at its 53rd session (2001) recognizes and stipulates that the responsibility of a state with regard to the existence of an internationally wrongful act is governed by special rules of international law (*lex specialis*) if such special rules are provided for by bilateral or multilateral treaties and/or other arrangements.

With regard to the international responsibilities of Türkiye, the above-mentioned treaties of Kars, Ankara, and Lausanne constitute *lex specialis* in legal terms[53].

F- Claims Settlement Agreement with the United States

The Republic of Türkiye, which settled the issue of Ottoman debts in accordance with the Treaty of Lausanne, also paid US$899,840 (dollars of the 1930s) to the US government for distribution to its citizens on the basis of the Agreement of 24 December 1923 and Supplemental Agreements, concluded and implemented between the US and Türkiye[54]. The Supplemental Agreement of 25 October 1934 concluded by the two governments provided for the settlement of the outstanding claims of the nationals of each country against the other; Article II of the agreement is as follows:

The two Governments agree that, by the payment of the aforesaid sum [$1,300,000], the Government of the Republic of Türkiye will be released from liability with respect to all of the above-mentioned claims formulated against

53 Assistant Professor Dr Sadi Çaycı, 'Ermeni sorununun hukuksal boyutu' (The legal dimension of the Armenian question), available at: http://www.eraren.org/bilgibankasi/tr/index2_1_2.htm.

54 American-Turkish Claims Settlement Under the Agreement of December 24, 1923 and Supplemental Agreements between the United States and Türkiye: On December 24, 1923 Opinion and report, prepared by Fred K. Nielsen (1937). Türkiye and the USA concluded an agreement with regard to the settlement of claims of their citizens. A joint commission was created to examine the claims. 898 dossiers were laid before the Commission by the US government. No claims by Turkish citizens against the US were presented to the commission. The dossiers of the claims had to contain the documents establishing the nature, origin and justification of each claim. The claims had to be submitted by 15 Feb. 1934. The US government had the right to submit up to 15 Aug. 1934 other documents in support of claims (Nielsen Report, at 9). According to Nielsen, the author of the report, '[t]hese provisions are in harmony with international practice in relation to such matters. The following type of stipulations is found in numerous claims agreements: The high contracting parties engage to consider the result of the proceedings of the (claims settlement) commission as a full, perfect and final settlement of every claim upon either Government arising out of any transaction of a date prior to the exchange of the ratifications of the present convention; and further engage that every such claim, whether or not the same may have been presented to the notice of, made, preferred or laid before the said commission': Nielsen Report, at 15, our emphasis).

it and further agree that every claim embraced by the Agreement of December 24, 1923, shall be considered and treated as finally settled[55].

The last US report in 1937 finally estimated that the principal and interest amounted to US$899,840[56]. It is remarkable that not a single claimant with an Armenian name was considered by the American civil servants to have made a credible case of seizure and/or destruction of property[57].

8- Conclusion: Türkiye did not Renege on its Obligations under the 1948 Genocide Convention

The fact that Türkiye does not recognize the 1915–1916 events as a crime of genocide does not violate the 1948 Convention. One should emphasize that if Armenia had seen the slightest evidence of Türkiye's responsibility in the matter, it would have attempted to bring the case before the ICJ many years ago.

It should be clear from the above that:

1. the Turkish Republic paid all the Ottoman debts;

2. the tribunals of the Ottoman state tried those who infringed Ottoman laws during the relocation of the Ottoman Armenians;

3. amnesty was declared for all other suspects and/or criminals.

We believe that no one now has the right to make any kind of demand by Türkiye regarding the events which took place before the signing of the above-mentioned Moscow, Kars, Ankara, and Lausanne Treaties[58] and the Claim Settlement Agreement with the US.

Finally, we are of the opinion that those who complain of an internationally wrongful act for which the Turkish Republic is responsible may be well advised to take their complaints to the relevant international institutions, like the UN, the ICJ[59], the Council of Europe, or any other similar establishment, instead of making very questionable accusations.

---

55 S. Kardeş, Tehcir ve Emval-I Metrûke mevzuatı ('Relocation and Legislation on Abandoned Property') (2008).

56 Nielsen, supra note 54, at 780–782. See also Çiçek, 'The 1934–1935 Turkish–American Compensation Agreement and Its Implication for Today', 23 Rev Armenian Studies (2011) 93.

57 Nielsen, supra note 54.

58 K. Gürün, The Armenian File, at 360–379.

59 Tacar, 'An Invitation to Truth, Transparency and Accountability: Toward "Responsible Dialogue on the Armenian Issue"', 22 Rev Armenian Studies (2010), p. 135.

IN THE EUROPEAN COURT OF HUMAN RIGHTS

THE GRAND CHAMBER

(Application No. 27510/08)
Dr. Doğu Perinçek v Switzerland

Dr. Perinçek's Observations on the Merit of the Case in the light of the Government of Switzerland's Request for Referral and having regard to the Chamber's Judgement of 17 December 2013

Drafted by Pulat Y. Tacar and Hakan Yavuz

WRITTEN OBSERVATIONS OF THE APPLICANT

TABLE OF CONTENTS

I. The Chamber Correctly Held that Swiss Courts Violated Perincek's Freedom of Expression for Convicting Him of Genocide Denial Under Article 261 of the Swiss Penal Code.

In its well-reasoned judgement of 17 December 2013, the European Court of Human Rights ("the Court") established the following main points in accordance with case-law:

1. The freedom to express information and ideas on sensitive and debated issues presents a foundational distinction between a tolerant, pluralistic and democratic society, and a totalitarian regime (para. 52).

2. A crucial distinction exists between the denial of historical facts, notwithstanding the issue of whether they can be said to be well-established or not, and the rejection of a legal characterization of an event (para. 117).

3. Rejection of a legal characterization of an historical event as "genocide" is not equivalent to Holocaust denial (para. 117).

4. Denying that the Holocaust constitutes a genocide cannot be compared to a refusal to describe the events of 1915 as constitutive of a genocide because the facts concerning the former have been established in an international court of law while the latter have not (para. 117), and because unlike Holocaust denial, those engaged in the historical debate surrounding the Armenian tragedy do not pursue anti-democratic or racist objectives.

5. Dr. Perinçek's rejection of label of genocide as an apt legal characterization for the said events was not intended to incite hatred against the Switzerland's Armenian community or Armenians anywhere else (paras. 52, 119).

6. The crime of genocide is strictly construed in international law, and cannot be determined according to public wishes and/or the open-ended and vague notion of consensus (para. 116).

7. In any event, a general consensus qualifying the Ottoman Armenian suffering as genocide can not be identified (paras. 116-117).

8. The prosecution and conviction of Dr. Perinçek was not necessary in a democratic society because there was no pressing social need to restrict Dr. Perinçek's freedom of expression in a country which is foreign to the events of 1915 (para. 126).

9. The margin of assessment of the Swiss authorities to interfere with Dr. Perinçek's freedom of expression is limited in a situation where the discussion focuses on historical events in a third country which took place close to a century ago (para. 113).

10. The margin of assessment of the Swiss authorities to interfere with Dr. Perinçek's freedom of expression is limited because of, in particular the public interest in the speech of Dr. Perinçek (para.113)

11. In the context of the debate on a subject of general interest, the interference with the freedom of expression risks dissuading others from contributing to the public discussion of issues that are of interest to community life (para. 127)

12. The Court does not arbitrate the facts that compose the genuine historical controversy of the Ottoman Armenian tragedy. Rather, the Court is restricted to reviewing the application of laws of national jurisdictions in light of the Article 10 (paras. 99, 111).

A. Freedom of expression

13. At the heart of the matter before the Court is the right to free expression as defined by Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention") and the identification of those conditions under which that right may be constrained. The jurisprudence of the Court confirms that freedom of expression is fixed at the very core of the Convention (para. 98). In the well-known case of *Handyside v. the United Kingdom*, the Court declared that "Freedom of expression constitutes one of the essential foundations of such a [democratic] society, one of the basic conditions for its progress and for the development of every man."[1] Article 10 § 2 limits the exercise of this right only insofar as it may undermine the democratic foundations of society.

14. The Court decided that the Swiss Government failed to demonstrate that the public interference with Dr. Perinçek's freedom of expression either pursued a legitimate public objective as required by Article 10 § 2 or was "necessary in a democratic society." The judgment of the Court also indicates that the Swiss Government failed to show that

1 *Handyside v. the United Kingdom*, 7 December 1976, Series A no. 24, para. 49.

the interference was prescribed by law because the relevant Criminal Code § 261 bis was neither accessible nor foreseeable. Additionally, the Swiss Government did not provide a convincing argument a "pressing social need" or that its interference with Dr. Perinçek's rights was proportional to the aim it pursued.

15. The jurisprudence of the Court clearly indicates that the margin of discretionary powers cannot be used to criminalize the dispute over the legal characterization of historical facts or events. The Swiss Court used such a discretionary power in a way that undermined freedom of expression and inquiry, which are indispensable values and defining features of a democratic society. Professor Jean-François Flauss argues that "freedom of expression is not only a subjective right of the individuals against the State, but is also an objective fundamental principle for life in a democracy. That is, it is not an end unto itself, but a means toward the establishment of a democratic society; freedom of speech is necessary for the full development of social democratic ideals."[2]

16. The development of a democratic society depends on a free and accessible political debate over those issues that are related to the general public interest. Political debates help develop citizens' capacities, which significantly contributes to a democratic society. John Stuart Mill argued in *On Liberty* that the freedom of free exchange of ideas would facilitate finding the truth about controversial and divisive issues, and would help the public to differentiate weak opinions from stronger ones.[3] According to Mill, even the most outrageous opinion provides an opportunity to test our ideas and sharpen our arguments and thus provides a public benefit. Mill's argument finds voice in *Thornhill v. Alabama*, in which the court recognized that "the freedom of speech and of the press … embraces at the least the liberty to discuss publicly and truthfully all

2 Jean-Francois Flauss, "The European Court of Human Rights and the Freedom of Expression," *Indiana Law Journal*, 84 (2009), p. 814. This principle has been oft endorsed by the United States Supreme Court: *See Cohen v. California*, 403 U.S. 15, 24 (1971): "[Freedom of expression] is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests."

3 J. S. Mill, *On Liberty,* ch. 2, Longman, Roberts & Green, 1869: "[A government or individuals] … who desire to suppress [an opinion], of course deny its truth; but they are not infallible. They have no authority to decide the question for all mankind, and exclude every other person from the means of judging. To refuse a hearing to an opinion, because they are sure that it is false, is to assume that their certainty is the same thing as absolute certainty. All silencing of discussion is an assumption of infallibility. Its condemnation may be allowed to rest on this common argument."

matters of public concern, without previous restraint or fear of subsequent punishment."[4] This right extends not only to offensive or disagreeable ideas; it also covers hateful speech. "Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth."[5] Dr. Perinçek's controversial speech stirred up a general public debate both in Switzerland and abroad, not only on the legal characterization of the events of 1915, but also over the role of law to criminalize certain interpretations of controversial historical events such as the violence in Eastern Anatolia during the course of World War I ("WWI"). This general political debate, along with academic debates carried out in various journals and blogs, aims to promote the progress of a democratic society where different opinions are freely expressed and evaluated.[6]

17. Governments that seek to penalize certain expressions based on historical research undermine the citizens' will to participate in academic and political debates. Attempts to canonize a political opinion formed by historical research that may be controversial would therefore undermine the freedom to communicate information, and ultimately would destroy the most fundamental aspect of a democratic society, freedom of expression.

18. Moreover, the public has a right to be aware and informed of historical facts and the different interpretations of historical events, so that it can form its own judgment. By criminalizing Perinçek's legal characterization of the events of 1915, the Swiss Government infringes upon the public's right to be informed and thereby undermines another basic value of a democratic society.

19. The Swiss Government's application of Article 261 bis of the Swiss Penal Code is a form of *dictature de la pensée unique*, the sanctioning of one single opinion above all others. While a dispute over the legal

4 *Thornhill v. Alabama*, 310 U.S. 88, 101 (1940).

5 *Garrison v. Louisiana*, 379 U.S. 64, 72 (1964).

6 Paolo Lobba, "A European Halt to Laws Against Genocide Denial? In Perinçek v. Switzerland, the European Court of Human Rights Finds that a Conviction for Denial of Armenian 'Genocide' Violates Freedom of Expression (April 28, 2014)." European Criminal Law Review, Vol. 4, Issue 1 (2014), 59-77. Dick Voorhoof, "Perincek Judgement on Genocide Denial," http://echrblog.blogspot.com/2014/01/perincek-judgment-on-genocide-denial.html Henri Decoeur, "The Judgment of the European Court of Human Rights in Perinçek v. Switzerland: Reducing Genocide to Law," Cambridge Journal of International and Comparative Law, 27 January 2014, http://cjicl.org.uk/2014/01/27/echr-reducing-genocide-law/.

characterization of a genuine historical controversy does not pose a threat to freedom of expression, a law that criminalizes one viewpoint while promoting the other surely does. Creating such an "official historiography" of the Ottoman Armenian suffering during the said events is antithetical to an open debate and the freedom of inquiry.

20. The Court held in *Lehideux*, *Chauvy* and *Monnat* that Article 10 of the Convention includes the right to debate to find historical truth. It also emphasized the principle that the Court has no role to arbitrate historical debates.[7] Additionally, the Court has repeatedly affirmed the principle that freedom of expression covers shocking, offensive or disturbing ideas that are related to historical debate, "a sphere in which it is unlikely that any certainty exists and in which the dispute is still ongoing."[8] By revising and updating the understanding of history in light of new archival documents and methods, a democratic society evolves and opens the way toward important democratic rejuvenation. Many societies enrich contemporary political debates and offer solutions to their present problems by openly debating past experiences and events. E. H. Carr, in his famous book, *What is History*, argues that history "is a continuous process of interaction between the historian and his facts, an unending dialogue between the past and the present."[9] Carr argues that historical studies should serve to broaden the public's understanding of the past and that there is no single history about the past as the values of society change along with new methods.[10] Indeed, the debates over the causes,

7 *Lehideux and Isorni v. France*, 23 September 1998, para. 55, *Reports of Judgments and* Decisions 1998-VII; *Chauvy and Others v France*, no. 64915/01, 29 June 2004, para. 69; *Monnat v Switzerland*, App 73604/01, 21 September 2006, para. 57. More legal discussion of these cases, see Lauren Pech, "The Law of Holocaust Denial in Europe: Toward a (qualified) EU-wide Criminal Prohibition," in Ludovic Hennebel and Hochmann, eds., *Genocide Denial and the Law*. Oxford University Press, (2011), p. 218.

8 *Chauvy and Others v. France*, no. 64915/01, § 69, ECHR 2004-VI, and *Lehideux and Isorni v. France*, 23 September 1998, § 47, *Reports* 1998-VII). *Monnat v Switzerland*, no. 73604/01, 21 September 2006, para. 63. *See Virginia v. Black*, 538 U.S. 343 (2003) (finding that "The hallmark of protection of free speech is to allow 'free trade in ideas'-even ideas that the overwhelming majority of people might find distasteful or discomforting.")

9 "Study the historian before you begin to study the facts. . . . The facts are really not at all like fish on the fishmonger's slab. They are like fish swimming about in a vast and sometimes inaccessible ocean; and what the historian catches will depend, partly on chance, but mainly on what part of the ocean he chooses to fish in and what tackle he chooses to use – these two factors being, of course, determined by the kind of fish he wants to catch. By and large, the historian will get the kind of facts he wants. History means interpretation." E. H. Carr, *What is History,* Penguin , (1987), p. 23.

10 Ibid., p. 30. The American Historical Association, founded in 1884 agrees. Its president described the importance of continual learning and interpretation in the September 2003 edition of the association's newsletter, Perspectives. He wrote, "The 14,000 members of this Association, however, know that revision is the lifeblood of historical scholarship. History is a continuing dialogue between the present and the past. Interpretations of the past are subject to change in response to new evidence, new questions asked of the evidence, new perspectives gained by the passage of time. There is no single, eternal, and immutable 'truth' about past events and their meaning. The unending quest of historians for

processes and consequences of the events of 1915 still continue between historians and the public at large, contributing not only to democratic development but also to the understanding of current political relations.[11]

21. The Court has always upheld the principle of the freedom of expression in regard to hotly debated historical events. Most importantly, the Court avoided becoming an "arbiter" by refusing to discuss the content or the legal characterization of these contentious historical debates. Furthermore, the availability of history to constant public and academic discussions is an essential component to what enriches democratic culture today. The Second Chamber has similarly disavowed "to pronounce, either on the materiality of the massacres and deportations suffered by the Armenian people at the hands of the Ottoman Empire beginning in 1915, nor on the appropriateness of legally describing these facts as "genocide", in the meaning of Article261^{bis}, paragraph 4, of the penal code." (para. 111). Indeed, the Court has no jurisdiction to discuss either the content or the characterization of the events of 1915. The issue before the Court is then to uphold the freedom of expression that is the essential feature of a well-functioning democratic society.

B. Distinction between historical facts and legal characterization

22. Dr. Perinçek did not deny the existence of the events that are at the heart of the historical controversy or the Ottoman Armenian suffering; he simply refused to qualify these events as the crime of genocide as defined under international law with its material and

understanding the past—that is, 'revisionism'—is what makes history vital and meaningful." Available at http://www.historians.org/publications-and-directories/perspectives-on-history/september-2003/revisionist-historians. Certainly the Court must also acknowledge the profound incompatibility between legal and historical approaches to evidence. Although criminal law demands a threshold of proof that is "beyond reasonable doubt," historians deal in "broader frame of probabilities." Richard Ashby Wilson, *Writing History in International Criminal Trials*, Cambridge University Press (2011), p. 6.

11 Guenter Lewy, *The Armenian Massacres in Ottoman Türkiye: A Disputed Genocide*. The University of Utah Press, (2005). When Türkiye and Armenia agreed to establish an International Historian Commission to study the events of 1915, the international media welcomed the decision, see "Türkiye and Armenia: When History Hurts," *The Economist*, Aug. 6-12, 2005, p. 26. Condoleezza Rice, then the Secretary of State reiterated the point two years later, telling Congress, "I think that these historical circumstances require a very detailed and sober look from historians. And what we've encouraged the Turks and the Armenians to do is to have joint historical commissions that can look at this, to have efforts to examine their past, and in examining their past to get over their past." Congressional transcripts, United States House of Representatives, Appropriations Subcommittee on State-Foreign Operations, Mar. 21, 2007; Associated Press, Mar. 21, 2007; United Press International, Mar. 21, 2007.

mental elements.[12] More specifically, Dr. Perinçek did not deny the tragic events of 1915; rather, he challenged the *mens rea* element of the alleged crime, refusing to accept that the Ottoman government had the specific intent to destroy Ottoman Armenians.

23. Professor William Schabas, the former president of the International Association of Genocide Scholars (IAGS), has stated, "It is not enough to say that the phenomenon of genocide has always been present. We have to demonstrate that the crime of genocide was recognized at law. Otherwise we are confronted with the fundamental principle *nullum crimen sine lege* – [and] criminal laws do not apply retroactively. This principle is in all of the international human rights conventions, and most national constitutions."[13] It is up to a competent tribunal –designated by law– to decide on the qualification of an act as genocide depending on the relevant facts. Characterization of genocide absent such a determination by a competent tribunal not only violates settled principles of international law, but also encourages the legislation of history by states to further unwholesome domestic agendas. Moreover, the concept of genocide was not recognized as a matter of international law until 1948. Furthermore, as pointed out by Christian J. Tams, *et al*, "states that joined the treaty [the Convention on the Prevention and Punishment of the Crime of Genocide] at a later stage only are bound *pro future*, not for acts, facts, or situations prior to their ratification or accession."[14]

24. Amnesty International has always been critical of the political use of genocide and has argued that denial legislation, i.e., attempt to install historical truth by law, violates the freedom of expression. For instance, in October 2006, the organization issued a statement

12 Although the Swiss Court labeled the tragic events of 1915 as "deportations," Dr. Perinçek, like many Ottoman historians, utilizes the Turkish word *tehcir*, more closely meaning a forced relocation of a population *within* national boundaries. Indeed, the Ottoman Law that regulated the relocation of the Armenian population, is commonly called the *Tehcir Kanunu.* Dr. Perinçek, like almost all Ottoman historians, agree that Ottoman government's relocation of large numbers of Armenian civilians during WWI to its southern provinces outside of the war zone tragically resulted in mass suffering and death for many Armenians.

13 William Schabas, "Commentary on Paul Boghossian, 'The Concept of Genocide,'" *Journal of Genocide Research* (2010), 12 (1-2), pp. 94-95.

14 Christian J. Tams, Lars Berster and Bjorn Schiffbauer, *The Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary*. Verlag C.H. Beck oHG, (2014), p. 44. Many governments, such as the German government, have made public their view that the Convention "does not possess retroactive effect." See Deutscher Bundestag (German Federal Parliament), Document No 17/1956 (2010), 5: "Die Konvention über die Verhütung und Bestrafung des Völkermordes vom 9. Dezember 1948 ist am 12. Januar 1951 in Kraft getreten. Für die Bundesrepublik Deutschland ist sie seit dem 22. Februae 1955 in Kraft. Sie gilt nicht rückwirken."

criticizing the French National Assembly's adoption of a bill that would make it a crime to contest that the events of 1915 constituted a genocide, since "the proposed law has the effect of criminalising those who question whether the Armenian massacres constituted a genocide—-a matter of legal opinion- rather than whether or not the killings occur—a matter of fact."[15]

25. The Court underlined the fact that genocide is a well-defined and strictly legal concept and it could only be adjudicated by a competent court. This is one of the main reasons why Dr. Perinçek does not accept the qualification of the said events as genocide.

C. Distinction between the Holocaust and the Armenian case

26. In the matter of the Holocaust, an expression of denial challenges the existence of specific historical facts, not their interpretation. In instances where the Holocaust is denied, it is not only the qualification of the Holocaust as genocide that is being denied but the very existence of historical facts such as gas chambers or the mass murder of European Jews.

27. The legal characterization of the Holocaust had been established by an international court. Nazi crimes have a clear legal basis, provided by the Statute of the Nuremberg Tribunal. For the Holocaust, the legal characterization and the facts are now indistinguishable. The European Court makes a clear distinction between "clearly established historical facts"—like the Holocaust[16] and facts that are part of "ongoing debate among historians."[17] In fact, the European Court has ruled that the freedom of expression does not include a right to deny those "clearly established historical facts" such as the Holocaust only because of the clear anti-Semitic and/or anti-democratic intent of those denying its existence. To the contrary, the tragic events of 1915 are hotly debated both among historians and

15 Amnesty International, Public Statement: "France: Amnesty International Urges France to Protect Freedom of Expression," AI Index: EUR 21/009/2006 (Public), 18 October 2006. "France: Genocide denial bill threatens the freedom of expression," Amnesty International, http://www.amnesty.org/en/news/france-bill-genocide-denial- threatens-freedom-expression-2012-01-24-0.

16 *Lehideux and Isorni v. France*, 23 September 1998, para. 53 and 47, *Reports of Judgments and* Decisions 1998-VII; Garudy v France. 24 June 2003, para. 28.

17 *Lehideux and Isorni v. France*, 23 September 1998, para. 47, *Reports of Judgments and* Decisions 1998-VII; *Chauvy and Others v France*, no. 64915/01, 29 June 2004, para. 69; *Monnat v Switzerland*, App 73604/01, 21 September 2006, para. 57.

the general public (See Section I, E.4.) and those debating these events cannot be said to pursue racist or anti-democratic objectives.

28. The social climate in modern-day Europe is such that the denial of the Holocaust is a phenomenon of a unique nature. The Court agreed with the Turkish Government's argument that "the denial of the Holocaust is today the main driving force of anti-Semitism," and stated that "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." (para. 119).

D. No pressing social need to protect from incitement

29. In consideration of the history of the persecution of Jews in Europe, Holocaust denial is considered a sign of current social developments in Europe that might lead to the rationalization of a similar crime. It is also considered a sign of racial hatred. Being that there is no known history of persecution of Armenians in Europe, despite the presence of large Turkish communities throughout Europe, Dr. Perinçek's words posed no threat to the Armenian community and did not reflect any worrisome social trend against Armenians.

30. Dr. Perinçek's choice of words rejecting the legal characterization of the Ottoman Armenian tragedy as genocide might have been found provocative by the Swiss Court; however, it nevertheless opened a platform of ideas that is necessary for a democratic society. Moreover, it has been demonstrated that provocation may be an important component of political discourse in a democratic society.[18]

31. Anti-Semitism has been a part of European history and it continues to be a major threat to the public order.[19] As explained above, Dr. Perinçek's speech cannot be compared to Holocaust denial because the Holocaust is a "clearly established historical fact."

18 *Sanocki v Poland*, Application No. 2894/03 (Eur. Ct. H.R. July 17, 2007). *See Terminello v. Chicago,* 337 U.S. 1, 4 (1949) ("[A] function of free speech … is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, … is nevertheless protected against censorship or punishment, unless shown likely to reduce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.") (internal citations omitted).

19 *Garaudy v. France*, 2003-IX Eur. Ct. H.R. 397.

E. No general consensus on the characterization of the events

32. The Court found that the general consensus concept, as considered by the Swiss courts, did not justify a conviction of Dr. Perinçek because of the following:

(a) The Swiss Federal Court admits that the Swiss authorities and the scientific community are not unanimous on the legal description applicable to the Armenian tragedy.

(b) The Federal Council (the Swiss Government) has repeatedly refused to acknowledge the events of 1915 as a case of genocide.

(c) The Swiss Council of States has not acknowledged the said events as a case of genocide. Only the National Council (the Lower House of the Swiss Federal Parliament) considered the said events to be genocide.

(d) Though approximately 20 states have "recognized the Armenian genocide," all of these acknowledgments been political in nature, not legal. Tellingly, the legislative debates in these states including declarations of what the legislature considered the facts of history, eschewing any historical debate or assessment of minority viewpoints. Likewise, Article 261 of the Swiss Penal Code makes no specific reference to the Armenian case as genocide; rather, it designates "genocide" without specifying the specific acts the legislature had in mind.

33. The historical research on the Armenian case is still ongoing and no consensus among the scholars yet exists. Moreover, recognizing the need for further study of the matter the Governments of Türkiye and Armenia agreed in 2009, *inter alia*, to establish a joint commission to conduct "an impartial scientific examination of the historical records and archives to define existing problems and formulate recommendations."[20] Directly equating the allegations of genocide to the Holocaust risks undermining the legacy of the Holocaust and trivializing the Nazi crimes. Dr. Perinçek's speech is based on solid legal grounds and historiography of the events of 1915. The terms he employed did not inflict injury, breach the peace, or incite hatred

20 Protocol on the Development of Bilateral Relations Between the Republic of Türkiye and the Republic of Armenia, signed in Zurich on 10 October 2009. The Swiss government mediated the negotiations that led to the signing of this agreement. At present, neither the Turkish nor Armenian national legislatures have taken the requisite steps to compose the commission, which has come to be called, the Joint Historical Commission.

or violence against any ethnic, religious, or racial group. Dr. Perinçek was exercising his freedom of expression, and this exercise did not conflict with any other values that are essential to the functioning of a democratic society.

34. Most Ottoman historians reject the characterization of the events of 1915 as genocide.[21] Indeed, one of the hotly debated subjects of the late Ottoman historiography is the Armenian-Ottoman conflict and the resultant suffering by Ottoman Armenian civilians in 1915-1916.[22]A democratic society after all is defined by pluralism and open-mindedness and the "freedom of expression… is applicable not only to information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb."[23]

35. As Jeremy Salt explains in his journal review of Edward Erickson's *Ottomans and Armenians: A Study in Counterinsurgency*, many historians consider the relocation or deportation of the Ottoman Armenians during WWI as an action to hinder all forms of support to the invading Russian troops and to the Armenian insurgents. Salt recounts that referring to many other examples from history, Erickson demonstrates that in all the cases the rationale has been "clearing away of a civilian population to deny insurgents any and all forms of support." According to Salt, Erickson also looks at the "Ottoman Empire as a Russian-backed insurgency took root in 1914 and swelled into a general movement across the Eastern Provinces in 1915." [24]

36. The following quotes effectively challenge the Swiss government's claim that there is a general consensus regarding the labelling the Armenian tragedy as genocide:

---

21 Bernard Lewis of Princeton University, Justin McCarthy of the University of Louisville in Louisville, Carter V. Findley of Ohio State University, Malcolm Yapp of SOAS, University of London, Hew Strachan of Oxford University, Norman Stone of Oxford University and Bilkent University, Michael Gunter of Tennessee Tech University, Guenter Lewy of University of Massachusetts Amherst, Kemal H. Karpat of University of Wisconsin-Madison, Edward Erickson of the Marine Corps University, Hasan Kayali of University of California-San Diego, Sukru Hanioglu of Princeton University, Feroz Ahmad of University of Massachusetts at Boston, Muhammed Filipovic of Sarajevo University, Ivo Banac of Yale University, Jacob Landau of Hebrew University, Sean McMeekin of Koc University, Jeremy Salt of Bilkent University.

22 M. Hakan Yavuz, "Contours of Scholarship on Armenian-Turkish Relations," *Middle East Critique*, 20:3 (2011): 231-251. This article documents competing and conflicting seven epistemic communities over the events of 1915 and 1916 in terms of theoretical and methodological approaches.

23 *Hertel v. Switzerland*, 1998-VI Rur.Ct.H.R. 2298, 2329.

24 Jeremy Salt, "The Armenian 'Relocation': The Case for 'Military Necessity,'" *Review of Armenian Studies* 29 (2014), pp. 66-67. Edward Erickson, *Ottomans and Armenians: A Study in Counterinsurgency*. Palgrave Macmillian, (2013).

(a) Bernard Lewis, a distinguished scholar of Ottoman history, who currently holds the title Cleveland E. Dodge Professor of Near Eastern Studies, Emeritus, at Princeton University, stated:

"[N]owadays the word "genocide" is used very loosely even in cases where no bloodshed is involved at all… What happened to the Armenians was the result of a massive Armenian armed rebellion against the Turks, which began even before war broke out, and continued on a larger scale. Great numbers of Armenians, including members of the armed forces, deserted, crossed the frontier and joined the Russian forces invading Türkiye. Armenian rebels actually seized the city of Van and held it for a while intending to hand it over to the invaders. There was guerrilla warfare all over Anatolia. And it is what we nowadays call the National Movement of Armenians Against Türkiye. The Turks certainly resorted to very ferocious methods in repelling it. There is clear evidence of a decision by the Turkish Government, to deport the Armenian population from sensitive areas. Which meant naturally the whole of Anatolia. Not including the Arab provinces which were then still part of the Ottoman Empire. There is no evidence of a decision to massacre. On the contrary, there is considerable evidence of attempts to prevent it, which were not very successful."[25]

(b) Hew Strachan, a prominent scholar of military and international diplomatic history, who currently holds the title Chichele Professor of the History of War at the University of Oxford, stated:

"In 1894-6 Armenian revolutionary activity had culminated in violence which had been bloody and protracted. Moreover, it was a movement which enjoyed Russian patronage… At least 150,000 Armenians who lived on the Russian side of the frontier were serving in the Tsar's army… On 16 April 1915, as the Russians approached Lake Van, the region's Ottoman administrator ordered the execution of five Armenian leaders. The Armenians in Van rose in rebellion, allegedly in self-defence. Within ten days about 600 leading members of the Armenian community had been rounded up and deported to Asia Minor.. . It is impossible to say precisely how many Armenians died… The difficulty of dispassionate analysis is compounded, rather than helped, by the readiness of Armenians and others to use the word 'genocide'."[26]

25 C-Span2, via Youtube: http://www.youtube.com/watch?v=qG70UWESfu4.

26 Hew Strachan, *The First World War*, Viking (2004), pp. 112, 114. Lewis and Strachan are not alone in questioning the use of the concept of crime of genocide as applied to the suffering of Armenians in the Ottoman Empire in 1915-1916. Among those who have independently come to similar conclusions are

(c) Margaret Mildred "Meta" Ramsay, a British peer who holds the title Baroness Ramsay of Cartvale, stated in the British House of Lords:

"[T]he Government believes that the right approach – the most constructive approach – to dealing with the historical legacy of atrocities against the Armenian people is for us to urge the peoples of the region to look to the future…We are not suggesting that we or they should deny the past or fail to learn its lessons. I do not believe that the peoples of Armenia and Türkiye can do that. We should allow them the space to resolve between themselves the issues which divide them."[27]

(d) Patricia Janet, a British peer who holds the title Baroness Scotland of Asthal, and who served as the Parliamentary Under-Secretary of State at the Foreign and Commonwealth Office between 1999 and 2001, and as the Attorney General for England and Wales between 2007 and 2010, stated in the British House of Lords:

"The British Government condemned the massacre of 1915-16 at the time and viewed the sufferings of the Armenian people then as a terrible tragedy. The current Government in no way dissents from that view. But in the absence of unequivocal evidence to show that the Ottoman administration took a specific decision to eliminate the Armenians, British Governments have not recognised the events of 1915-16 as genocide."[28]

(e) Shimon Peres, former Prime Minister and President of the State of Israel, stated while serving as Israel's Foreign Minister in April 2001:

"Armenian allegations are meaningless… We reject attempts to create a similarity between the Holocaust and the Armenian

---

Arend Jan Boekestjin of Utrecht University, Netherlands, Youssef Courbage of the National Institute of Demographic Studies, Paris, France, Paul Dumont, of Marc Bloch University, Strasbourg, France, Bertil Dunér of the Swedish Institute of International Affairs, Stockholm, Sweden, Gwynne Dyer, Canadian Military Historian and Journalist, Philippe Fargues of the National Institute of Demographic Studies, Paris, France, Yitzchak Kerem of Hebrew University of Jerusalem, Guenther Lewy of the University of Massachusetts, Heath W. Lowry of Princeton University, Andrew Mango, of the University of London, Michael E. Meeker of the University of Washington, Stephen Pope, former Oxford modern-history scholar, Michael Radu of the Foreign Policy Research Institute, Elizabeth-Anne Wheal of Cambridge University, Brian G. Williams of the University of Massachusetts at Dartmouth, Gilles Veinstein of the Collège de France.

27 *Hansard*, "Armenian Massacre, 1915," HL Deb 14 April 1999 vol 599 c830; http://hansard.millbanksystems.com/lords/1999/apr/14/armenian-massacre-1915#S5LV0599P0_19990414_HOL_170).

28 *Hansard*, "Armenian Massacre, 1915," HL Deb 13 July 2000 vol 615 c49WA; http://hansard.millbanksystems.com/written_answers/2000/jul/13/armenian-massacre-1915#S5LV0615P0_20000713_LWA_43).

allegations. Nothing similar to the Holocaust occurred. It is a tragedy what the Armenians went through but not a genocide… Israeli should not determine a historical or philosophical position on the Armenian issue. If we have to determine a position, it should be done with great care not to distort historical realities."[29]

(f) Rivka Kohen, stated on behalf of the Israeli Foreign Ministry in February 2002, while serving as the Israeli Ambassador to Armenia:

"Israel recognizes the tragedy of the Armenia's [Armenians] and the plight of the Armenian people. Nevertheless – the events cannot be compared to genocide – and that does not in any way diminish the magnitude of the tragedy."[30]

CHAPTER II: RESPONSE TO THE GOVERNMENT OF SWITZERLAND'S ALLEGED JUSTIFICATION FOR REFERRAL

37. Turning to the legal basis of the request for referral, the Swiss government believes that the Chamber's judgement "raises serious questions concerning the interpretation and application of the Convention," and provides the 3 following reasons:

(a) The judgement raises questions that are new and have not yet been considered by the Court, and thus of a magnitude that justify a review by the Grand Chamber

(b) The judgement unduly reduces Switzerland's margin of discretion under the case-law of the Court.

(c) The judgement creates artificial distinctions.

Dr. Perinçek respectfully disagrees that these reasons justify review by the Grand Chamber.

A. New Issue Raised

38. The Swiss Government's referral to the Grand Chamber contains several statements that might be misleading in the passage titled "Reminder of the circumstances of the case:"

29 "Peres: Armenian Allegations are Meaningless," *Turkish Daily News*, 10 April, 2001.

30 http://asbarez.com/46402/israeli-foreign-ministry-questions-veracity-of-genocide-says-proof-needed/

(a) "… he [Dr. Perinçek] publicly claimed that the Armenians were the aggressors of the Turkish people…" This strategic and selective use of Dr.Perinçek's speech might make Dr. Perinçek appear as having an extreme opinion, as though he were suggesting that only the Armenians were the aggressors. This is certainly not true.

(b) "…the arguments of the applicant have seriously undermined the identity of the members of the Armenian community since the latter precisely define their identity in terms of their history, marked by the events of 1915." The Swiss Government did not in any way establish as fact that the Armenian identity was seriously undermined by Dr. Perinçek's arguments. However, the Swiss government presents this as a matter of fact even though the Court's found no "pressing social need" served by Switzerland's prosecution of Dr. Perinçek. Furthermore, the Swiss Government disregards that Dr. Perinçek was expressing his opinion on the basis of historical and legal research, and any reference to the Armenians was not made in an effort to define history for the Armenians but to defend his own conclusions.

39. In paragraph 4 of the referral, the Swiss Government states that the present case

"is the first case which concerns the massacres and deportations where the Armenian people were the victims and that Raphael Lemkin had in mind when he coined the term genocide. It raises two fundamental legal issues which the Court has never addressed…[1] the legal characterization of such events and the scope of freedom of expression when a State Party to the Convention criminalizes the denial of genocide in the context of the fight against racism."

This assertion, however, relies on a false premise. First, if the Swiss referral means that the Court has not ruled on the legal characterization of the events of 1915, the Court has made very clear that establishing the legal qualification of any crime - including the crime of genocide- is outside the sphere of the Court's competence (para. 111). The competent courts with regard to the crime of genocide are enumerated in the Articles VI and IX of the Genocide Convention. Second, the jurisprudence of the Court is well-established on the scope of freedom of expression. This is not a case where the denial of genocide was criminalized in the context of the fight against racism. Dr. Perinçek did not express himself in a manner that incites hatred and the Swiss government failed to prove a "pressing social need" to restrict his freedom of expression.

40. As far as the Swiss claim about Lemkin is concerned, regardless of whether Lemkin had the Ottoman Armenians in mind when the term genocide was introduced for the first time in 1944 in his book, *Axis Rule in Occupied Europe*, the book mentions Armenians not even once, despite its mention of numerous other historical events to which Lemkin would apply his new theory. Perhaps even more important for present purposes is the fact that, Lemkin's definition of genocide was far broader than that which eventually was codified in the Genocide Convention in December 1948; his concepts of "political" and "cultural" genocide, for example, were roundly rejected during the convention's drafting.[31]

41. Professor William Schabas, former president of the IAGS, puts Lemkin in proper context when he concludes that "courts are no more interested in what Lemkin thought about the scope of the term genocide than they are in what Kant or Montesquieu thought about murder and rape. It's not really relevant. Legal terms are adopted by lawmakers. Preventing and prosecuting genocide is not about fidelity to the original vision of Raphael Lemkin. His 1944 book is not our gospel."[32] This illustrates the modern trend among scholars and political activists to no longer consider Lemkin either a reliable historian or the final word when it comes to interpreting the Genocide Convention.

42. In the Court's decision, the dissenting judges stated the following: "In an interview given to CBS in 1949 that is available on the Internet, Raphael Lemkin, who invented the term 'genocide' and who was the inspiration for the Genocide Convention, said the following: 'I became interested in genocide because it had happened to the Armenians, and their situation had been completely ignored at the Versailles Conference: their executioners were guilty of genocide, and they were not punished'" (p.80, para. 29). The existence of the interview has led to an over-emphasis on Lemkin by those who seek to recognize the Armenian tragedy as genocide. In an interview on the Genocide Convention for Italy, Lemkin is asked (p. 2, question 2): "When did you first become interested in Genocide?" His response: "From my very young days when I read the book, 'Quo Vadis' by Sienkiewicz as a Polish school boy, about the destruction of the early Christians by the Roman Emperors. I asked my Mother why the Christians did not call the police. She said that the police

31 *See* Anson Rabinbach, "Raphael Lemkin's Concept of Genocide," *IP Journal* (Spring 2005), p. 72.

32 William Schabas, "Commentary on Paul Boghossian, 'The Concept of Genocide,'" *Journal of Genocide Research* (2010), 12 (1-2), p. 96.

[cou]ldn't help them since Nero was in the arena. She gave me books to read on cases of Genocide such as Carthage, and the Mongol Invasions. I devoured these books and became so interested in the problem that I made a vow as a child to become a lawyer and to make a law to prevent reoccurances [reoccurrences] of these acts."[33] Meaning, in contrast to his statement from 1949, cited by the dissenting judges, Lemkin stated the reasons for his interest in genocide without mentioning the Armenians. This shows that Lemkin's recollection of the reasons for his interest in genocide may have been subject to changes according to considerations of time and place, therefore not reliable.

43. In a description of a book project titled, "Introduction to the Study of Genocide," Lemkin wrote the following in third-person (p. 5, "Summary of Progress"): "As to the progress already made, the applicant wishes to stress that he has examined and even partially written up nine cases of genocide in Antiquity (Canaanites, Assyrians, Egypt, Greece, Celts, Carthage, Early Christians, Pagans, Gaul), twelve in the Middle Ages (Goths, Huns, Vandals, Vikings, Charlemagne, Albigeneses [Albigenses], Valdenses, England, Jews, Mongols, Moors, the French in Sicily), and forty-one cases in Modern Times." (Box 2, Folder 1). Three separate papers outline three parts in Lemkin's project, and list the following as cases of genocide: "Part I. Antiquity 1. Biblical Genocide. 2. Assyrian Invasion[s]. 3. Genocide against the Early Christians. 4. Genocide against the Pagans. 5. Carthage. 6. Genocide in Gaul. 7. Genocide against the Celts. 8. Genocide in Egypt. 9. Genocide in Ancient Greece." "Part II. Middle Ages 1. Genocide against the Albigenses. 2. Charlemagne. 3. Genocide in Medieval England. 4. Genocide by the Goths. 5. Genocide by the Huns. 6. Genocide against the Jews. 7. Genocide by the Mongols. 8. Genocide against the Moors and Moriscos. 9. The French in Sicily. 10. The Spanish Inquisition. 11. Genocide against the Valdenses. 12. Genocide by the Vikings. [added in handwriting:] 13. Crusades." "Part III. Modern Times 1. Genocide by the Germans against the Native Africans. 2. Assyrians in Iraq. 3. Belgian Congo. 4. Bulgaria under the Turks. 5. Genocide against the Greeks. 6. Chios. 7. Greeks under Franks. 8. Greeks in Exile from Turkish Occupation. 9. Genocide by the Greeks against the Turks. 10. Genocide against the Gypsies. 11. Hereros. 12. Haiti. 13. Hottentots. 14. Hugenots. 15. Hungary under the Turks. 16. Genocide against the American Indians. 17. Ireland. 18. Genocide by the

33 Raphael Lemkin papers, Manuscripts and Archives Division, The New York Public Library, box 1, folder 2, transcribed by Tal Buenos for his pending dissertation at the University of Utah.

Janissaries. 19. Genocide by the Japanese against the Catholics. 20. Genocide against the Polish Jews. 21. Genocide against Russian Jews. 22. Genocide against Jews in S.W. Africa. 23. Genocide against Rumanian Jews. 24. Korea. 25. Latin America. 26. Genocide against the Aztecs. 27. Yucatan. 28. Genocide against the Incas. 29. Genocide against the Maoris of New Zealand. 30. Genocide against the Mennonites. 31. Nuremberg Trials. 32. Parsis. 33. Serbs. 34. Slavs. 35. Smyrna. 36. South Africa. 37. Genocide against the Stedinger. 38. Tasmanians. 39. Armenians. 40. S.W. Africa. [added in handwriting:] 41. Natives of Australia."[34] Meaning, the Armenians are listed as 39th among many cases of modern genocides, in addition to cases in antiquities and the middle ages. Therefore, the question is asked: is it reasonable to claim that legal characterizations should be in agreement with all 41 cases in modern history that Lemkin considered to be genocide? One might also wonder whether denying the characterization of any of the other 40 examples Lemkin listed, excluding the Holocaust, could be considered a violation of Article 261.

44. A further reason the Swiss Government raises with respect a "new issue" is that the case concerns the scope of freedom of expression when a state party to the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter "Convention on Discrimination") criminalizes the denial of genocide in the context of the fight against racism. However, there is no reason to believe, and the Swiss Government has not given one, that government control, via the penal law, over debates on genocide prevents racism, particularly in the way described by the Convention. As explained in further detail below, the Convention on Discrimination calls on state parties to declare illegal and prohibit activities that promote racial discrimination. (Article 4 of the Convention). Implicit is the important distinction between criminalizing *activities that promote* racial discrimination, as the Convention calls for, and criminalizing speech on a genuine historical controversy that is of general interest. Racial discrimination is defined in Article 1 §1 of the Convention as:

> any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

34 Ibid., box 2, folder 1. More on these folders and the lists of genocides, see Steven L. Jacobs, "The papers of Raphael Lemkin: a first look," *Journal of Genocide Research* (1999), 1 (1), 113-114.

45. The Swiss Government has also not shown at any point that statements expressing disagreement with the genocide label in the Ottoman Armenian case is an activity that promotes or incites racism, as defined above, against the Armenian community in Switzerland. To disagree with one of the two chambers of a parliament-mandated label is not to incite hatred against Armenians in a way that impairs their rights or freedoms.

B. Undue Reduction of Switzerland's margin of Appreciation

46. The Swiss Government's second main argument that the Court unduly reduced the margin of assessment of the State Party is not justified because the Swiss Government failed to establish necessity for government interference.

47. In paragraph 5, the Swiss Government questions the Court's judgement to reduce Switzerland's margin of assessment, by challenging the Court's statement that Dr. Perinçek's speech "was of a historical, legal and political character." In addition, Switzerland argues in paragraph 7, that because Dr. Perinçek repeated that "he would never change his position, even if a neutral committee one day stated that the genocide of the Armenians indeed existed" his "behaviour shows an attitude of denial." The freedom of expression is not conditioned on one's commitment to have an opinion change according to another person's or a group of persons' opinion. The main disagreement between the Swiss government and Dr. Perinçek as well as the second Chamber concerns the issue of who has jurisdiction to determine the legal characterization of the events.[35]

48. It is not reasonable to expect a trained lawyer such as Dr. Perinçek to agree to replace the decision of a competent tribunal, as specified in Articles 6 of the Genocide Convention, that is qualified to determine the legal characterization of facts with that of a "neutral committee." Such a proposal is surely not consistent with the Genocide Convention. Moreover, the term "neutral commission" is impossibly vague, and certainly nothing upon which to base Switzerland's allegation of denialism. It would be similarly absurd to stigmatize Dr. Perinçek as a "racist" because he refuses to accept a suggestion that discredits one of the cornerstones of the Genocide Convention.

35 Pulat Y. Tacar, "Perincek v Switzerland Judgement of the European Court of Human Rights, *Review of Armenian Studies*, (2014), 29, pp. 55-115.

49. In paragraphs 8-11, the Swiss Government argues that while the Court held that Dr. Perinçek "expressed his opinions as a politician to contribute to the public discussion of issues affecting the life of the community," the political controversy itself "does not deal with the internal policy of Switzerland," and is mainly "related to the politics of his home state." Thereby, the Swiss Government seeks to distance itself from the political issue, and appear as a party that is merely concerned about the social consequences of having Dr. Perinçek exercise of his freedom of expression without being restricted by the duties and responsibilities this freedom brings. But the Swiss Government's argument looks studiously at the margins of the matter without looking at its centre: Swiss law addresses genocide denial and Dr. Perinçek was speaking on Swiss soil about whether an event qualifies as genocide. This cannot be seen as solely related to Dr. Perinçek's home state.

50. Furtheremore, article 261.bis of the Swiss Penal Code has also been a contreversial matter in Switzerland. The Swiss Minister of Justice, Mr. Blocher, during an official visit to Türkiye stated that the Swiss Government had the intention of revising Article 261.bis of the Swiss Penal Code, because that legislation was incompatible with freedom of expression[36]and was hindering historical research. The statements of a Government member officially visiting another country have a certain value in many countries of the world. During his official visit The Swiss Minister of Justice and Police, Mr. Blocher said that he was - *ad nauseum*- disturbed and embarrassed because of a legal pursuit conducted in Switzerland against Professor Yusuf Halaçoğlu, who in a meeting in Switzerland rejected the allegations of Armenian genocide (Professor Halaçoğlu was at that time the chairperson of the Turkish Historical Society). Minister Blocher has been critized in Switzerland by the opposition because of these statements made in Türkiye.[37]

---

36 Swissinfo.ch. *of 06.10.2006 http://www.swissinfo.ch/eng/blocher-insist-on-revised-anti-racism-law/5488572. March 5, 2007*

37 Blocher remarks cause a strom in Switzetland, Oct.4.2006, Swiss İnfo

No.484770; http://www.swissinfo.ch/eng/expert-questions-blocher-anti-racism-remarks/5586298; "Cabinet rebukes justice minister" Swissinfo Oct.18.2006, No.5509272; "Blocher insists on revised anti-racism law , Swiss Info. Oct.6.2p07 No. 5488572; Le Temps:14.11.2006, "Genocide des Armeniens, les juristes de la Conféderation dans le flou";NZZ,14.11.2006: Translated from German : " The Director General of the Ministry of Justice , Mr. Michael Loepold said about the eventual amendement of the anti- racism law : *actually, because of the wording of the law, the judges are unable to decide on the genocide crime*" ;Départment fédéral de justice et police:" Le Conseiller fédéral a constaté qu'il existait un rapport de tension entre la liberté d' 'expression et l'article 261 bis du Code pénal suisse" http://www.ejpd.admin.ch/ejp/fr/hodme/dokumentation/mi/2006/2006-10-04.encoded,05.10..2006; see also the article of Prof. Norman Stone in Weltwoche from 26 Octobre 2006 under :" It was not genocide";Ministry re-examines genocide definition" Nov.12.2006 Swiss Info 562142;

51. The debates in Switzerland and across Europe over the legal characterization what happened to the Ottoman Armenians 1915 show that the subject matter of Dr. Perinçek's comments are part of a political controversy that is ongoing outside of Dr. Perinçek's home state. The Court correctly concluded that Dr. Perinçek expressed his opinions as a scholar and a politician, and these expressions contributed to the public discussion of issues affecting the life of the community. The expressed concern of the Turkish community of Switzerland over the meaning and consequences of these public debates also renders the subject matter of Dr. Perinçek's comments a Swiss political issue.

C. Artificial Distinctions

Finally, the Swiss government's claim that the outcome of the procedure was affected by the Court's three "artificial and unconvincing" distinctions, is thoroughly rebuttable.

1. Disputing Events as Such vs. Legal Characterization of Genocide

52. As stated in paragraphs 12-14 of the referral, the first distinction drawn by the Court is between disputing "the events as such" and "their legal characterization as genocide." Relying on *Garaudy v .France*, the government argues that a conviction for genocide denial, when motivated by racism, should not depend on the difference of a legal characterization of events, but be justified "by the dignity of victims and their families." Dr. Perinçek disputes the legal characterization of genocide, but not the existence of a tragic past event. As described in further detail below, there is a meaningful difference between denying crimes, and their attendant characterizations, judged by a legal tribunal, and the characterization of events which have not been judged—especially when genocide includes the "difficult to prove" element of intent.

53. According to the Swiss Government, the Court disregarded that Dr. Perinçek considers the genocide claim to be an "international lie;" that he accused the Armenians of having "attacked the Turkish State;" and that he supports "the ideas of Grand Vizier Talak [Talat] Pasha who was convicted of killings of Armenians by a Turkish court-martial". Comparing this to Holocaust denial, the government interprets these statements as "alleg[ations] that the victims falsified history" (para. 14). The Swiss Government argues these statements

illustrate that Dr. Perinçek is motivated by racism and that his speech should be judged according to how it affects "the dignity of the [alleged] victims and their families," regardless of the distinction between legal characterizations. Contrary to the above, Dr. Perinçek's statements can be reasonably explained as lacking a racist motive. Dr. Perinçek 's characterization of the claims of genocide as an "international lie" was motivated by his professional identities as (a) a doctor of law; (b) a socialist politician; and (c) an author- historian who has produced a number of manuscripts.

(a). As a doctor of law: Dr. Perinçek knows that genocide is a legal principle, a codified crime, and agrees with the decision of the Court that "reducing genocide to the law" is the best way of keeping the relevance of the "crime of crimes" in international criminal law. The Genocide Convention of 1948 aims to prevent genocide and defines the constituting elements of the crime stressing "special intent" as the most important aspect. The Genocide Convention also specifies that genocide is to be prosecuted by the court of the country where the crime took place or "by such international penal tribunal" (Article VI) and its application against states delegated to the International Court of Justice (Article IX). With respect to genocide allegations, Dr. Perinçek underlines two fundamental constitutive principles of law: no crime without law and no punishment without law. The Genocide Convention does not allow legislators, scholars, pamphleteers, politicians, or other individuals to establish the existence of genocide without the final decision of a fair trial by the competent tribunal. Dr. Perinçek defends this legal definition of the crime of genocide, and rejects its political use by different groups to promote their narrow interests, which obstructs the ways of a democratic society where all views must be given a chance to compete for the greater public good. Dr. Perinçek's position on this issue has received support in an article posted by the Cambridge Journal of International and Comparative Law ("CICL"): "Brandished as a rhetorical and political weapon, the term 'genocide' has been used, misused and abused *ad nauseum* by a variety of actors seeking to further particular agendas. Yet this word should not be ascribed more significance or meaning that it actually has. Genocide remains above all a legal construct – nothing more, and nothing less."[38]

38 Henri Decoeur, "The Judgment of the European Court of Human Rights in Perinçek v. Switzerland: Reducing Genocide to Law," *Cambridge Journal of International and Comparative Law*, Posted on 27 January 2014; http://cjicl.org.uk/2014/01/27/echr-reducing-genocide-law/

(b) As a socialist politician: Dr. Perinçek is the outspoken leader of a socialist political party in Türkiye, which was disbanded, and revised under the Workers' Party. He and his party reach out to the minorities and marginalized groups. He defines his socialist convictions as anti-imperialist and pro-social justice. Dr. Perinçek's usage of the phrase "international lie" is directed less against Armenian activists, and more against the legal characterization of the events by what he considers imperialist powers. His views are meant to highlight the politics rather than the historicity surrounding the events of 1915. It is not an allegation that "victims falsified history." According to Dr. Perinçek, the politics of the "Armenian Question" in the Ottoman Empire was a major component of the hegemonic discourse. He believes that the public, intellectual, and academic discussions on the events of 1915 are not devoid of power politics today, and that the politicization of the issue in Western parliaments owing to the efforts of the Armenian lobbies across the world is reflective of this age-old pattern of forming discourse and manipulating public opinion. By framing the legal characterization of the events as an "international lie," Dr. Perinçek attempted to draw attention to the extent of politics that surround historical memory formation. As a socialist, Dr. Perinçek believes in the brotherhood of nations and argues that the way to describe the past correctly is through growing cultural and intellectual rapprochement among nations, including the Turks and Armenians, and not by following initiatives of some foreign powers.

(c) As a historian and a prolific author: Dr. Perinçek has continually studied the collapse of the Ottoman Empire and its planned partition by the major European powers in the WWI period. Dr. Perinçek is knowledgeable about the genuine historical debate surrounding the Armenian tragedy acknowledges that there is no consensus among historians with respect to the legal characterization of these events. In his writings and speeches on the partition of Anatolia by major European powers, Dr. Perinçek has always argued that those who characterize the events of 1915 as genocide are part of the ongoing power struggle to silence the subaltern (economically marginalized) perspectives about the aims of WWI.

54. It is well-documented that some Armenians did indeed carry out attacks on the Turkish state. Armenian extremists committed high profile terrorist attacks in the 1970s, 1980s, and 1990s, killing of 46 people and injuring hundreds.[39] As recent as August 2014, an Armenian man, with ties to radical Armenian groups, opened fire

39 It is not Dr. Perinçek's intention to compare these attacks to Ottoman Armenian suffering in 1915-1916.

against the Turkish Embassy in Moscow. Sadly, numerous attacks either claimed by or later linked to Armenian extremists were carried out in Switzerland: in 1976 (1 bomb attack), 1977 (Turkish ambassador assassinated, 1 additional bomb attack), 1978 (2 bomb attacks), 1979 (1 bomb attack), 1980 (attempted assassination of Turkish ambassador, 3 bomb attacks, 2 attempted bomb attacks), 1981 (Turkish diplomat assassinated, 5 additional bomb attacks), 1982 (2 bomb attacks). The attacks were led by the Armenian Secret Army for the Liberation of Armenia ("ASALA") and the Justice Commandos for the Armenian Genocide ("JCAG"), militant organizations that seek to force Türkiye to recognize an Armenian genocide, pay reparations, and cede territory to Armenia.[40] These terrorist groups assassinated the Turkish ambassadors in Vienna, Paris, the Vatican, and Belgrade; the consul generals and consuls in Los Angeles and Sydney; the wife of the ambassador in Madrid and the 17 years old son of the Turkish ambassador in the Haag; and about 40 more Turkish diplomats and their family members in different cities around the world were assasinated. Futhermore, bloody attacks were directed to Paris Orly and Ankara Airports. These attacks crippled the Turkish diplomatic service and necessitated the introduction of new security measures by Türkiye in its airports and embassies. Dr. Perinçek, along with some of the Turkish public, associate the forcing of the term genocide upon the Turkish people with these attacks that targeted innocent people because of their nationality in order to weaken the image of Türkiye as an international actor. Thus, Dr. Perinçek's statement regarding Armenian attacks on the Turkish state is documented and does not in any way imply that his statements were motivated by racism.

55. The Swiss Government does not specify which of Talat Pasha's "ideas" are claimed to be supported by Dr. Perinçek. Regarding Talat Pasha's conviction, the Swiss Government admits in paragraph 15 that, indeed, "no international court has explicitly recognized that the events of the years of 1915 to 1917 constituted genocide," and so neither was Talat Pasha associated with that legal characterization. In other words, the very mention of support for Talat Pasha does not necessarily indicate that Dr. Perinçek supports every act and speech of Talat Pasha.

56. The claim in paragraph 14 of the Swiss referral request relies on an inaccurate comparison between the Armenian tragedy and the

40 Francis P. Hyland, *Armenian Terrorism: the Past, the Present, the Prospects*, Westview Press, (1991). Michael M. Gunter, "Pursuing the Just Cause of Their People": A Study of Contemporary Armenian Terrorism. Greenwood Press, (1986).

Holocaust, to argue that Dr. Perinçek committed racial defamation and incitement of hatred by alleging that the "victims falsified history." The majority of the Court's judges have already stated that there is no comparison between Holocaust denial and the dispute of genocide as the legal characterization in the Armenian case because anti-Semitic and anti-Armenian sentiment in Europe are not on the same level when one considers the social and historical context: "… the act of refusing to use the legal qualification given to the 1915 events is not in and of itself an act of such a nature that would be capable of inciting racial hatred toward the Armenian people" (Concurring Opinion, p. 61). The Swiss Government cannot demonstrate otherwise.

57. Switzerland relies on *Garaudy v. France* for the proposition that the Court should uphold convictions for denial of "a genocide" based on the "dignity of victims and their families," and not necessarily on differences of legal characterizations of a historical fact. (Referral, para. 14). The Court argues that the conclusion that Holocaust denial is one of the "most serious forms of racial defamation of Jews and of incitement of hatred to them" is based not on differences of the legal characterization of a historical fact, but rather is the "dignity of victims and their families." (Referral,para 14). Switzerland over-simplifies and misreads the *Garaudy* judgment. *Garaudy* involves consideration of two separate offenses: denial of a crime against humanity for publishing material that denied established Holocaust crimes, and incitement to racial hatred for publishing materials that criticized the Jewish community and State of Israel. With respect to the conviction of denial of crimes against humanity, the Court held that Article 17 barred his Article 10 claim. It argued that the applicants materials denied established crimes that had had been the subject of a final ruling by the Nuremberg International Military Tribunal (i.e. the existence of gas chambers in Auschwitz). The Court's consideration was not based on the differences of legal the characterization of a fact or the "dignity of the victims", but on the denial that established events happened. With respect to the racial defamation conviction based on publications that criticized the State of Israel and the Jewish community, the Court held that censorship of these materials was justified by the government's aim of "protection of the reputation and rights of others," as well as "the prevention of disorder and crime." Thus, the Court only upheld the French government's censorship on the basis of protecting the reputation of others when the publications directly criticized the Jewish community and intentionally incited hatred towards them. There is no such parallel here to the facts of the Perinçek matter. The

Swiss Government conflated the Court's jurisprudence in *Garaudy* regarding denial of specific, established crimes with the separate offense of inciting racial hatred of the Jewish community. Notably, Dr. Perincek has not been convicted of racial discrimination or incitement to racial hatred.

2. Explicit Recognition of the Holocaust by an International Court vs. lack Thereof for the Armenian Tragedy

58. As stated in paragraphs 15-17, the Swiss Government challenges another distinction the Court makes between the explicit recognition of an international court in the Holocaust context, and the lack thereof in the Armenian case. Switzerland argues that this distinction is artificial the "nature of the atrocities" have been established. It points to the Turkish court martials in 1919-20 as proof and acknowledgment of unfavorable facts. (Referral, para. 15).

(a). The statement of the dissenting judges relied on by the Swiss government that "the killing and destruction of the Armenians resulted from the decision taken by the Central Committee of the Ittihat" neither depicts the full picture of what happened, nor does it define the legal concept of genocide. The Swiss government may claim that what "the Turkish! courts" ruled at the time serves as "reliable evidence acknowledging unfavourable facts or conduct," but those (Ottoman *not* Turkish) courts neither applied the modern definition of genocide nor provided any procedural protections that are today the hallmark of a fair judicial system.

(b). In 1915, the Ottoman Government was sensitive to the individual crimes committed by some of its officials in their handling of the Armenian population, and initiated court proceedings that resulted with more than 20 Muslims sentenced to death and executed for plunder, murders, and robberies.[41] Following a memorandum dated September 1915 by Talat Pasha,[42] the Ottoman government created three investigatory commissions to investigate the complaints of

41 Yusuf Sarinay, "The Relocations (Tehcir) of Armenians and the trials of 1915-16," *Middle East Critique*, (2011), 20 (3), pp. 299-316.

42 The Swiss Federal Tribunal decision (para.5.2.) maintains that "Talat Pasha was historically, with his two brothers, the initiator and the driving force of the genocide of the Armenians". Minister Talat has no brothers. The degree of his responsibility with regard the tragic events of 1915-1916 is still discussed among historians. We feel obliged to add this correction in order to underline -among many others- the existence of non- verified data in the verdict of Swiss tribunals.

Armenians against some civil servants and local citizens and identify the responsible people and refer them to court martial. As a result, on March-April 1916, 1673 persons, including captains, first and second lieutenants, commanders of gendarme squads, police superintendents and mayors were remanded to courts martial. Of these, 67 were sentenced to death, 524 were sentenced to jail, and 68 received other punishments such as forced labour, imprisonment in forts, and exile. Several of them were sentenced to death for plunder, and other death sentences were justified not only by murders, but also by robberies.[43]

(c). Moreover, in compliance with the demands of the Allied Powers after WWI and the Armistice of Mudros, the defeated Ottoman government established courts-martial to try individual officials, as well as other functionaries, with charges of specific crimes committed against Armenians and subversion of the constitution by leading the Ottoman state into the war. The courts martial, which lasted from 1919 to 1922, did not condemn the Ottoman government but rather persecuted those individuals who misused government authority. It is important to note that the prosecutor in the courts martial actually justified the decision to relocate Armenians – in consideration of the Armenian unpatriotic activities during WWI – and criticized the way in which the relocations were carried out and their tragic consequences. The activities of the Ottoman Armenian groups at the time included: disruptions of Ottoman communication and supply lines, smuggling of armament into Ottoman land, collusion with the Ottoman state's enemies, and plots to assassinate Ottoman leaders.[44] In other words, the rulings of Ottoman courts during and after WWI convicted individual criminals who did not fulfil their duty, killed innocent people, and stole properties. Therefore, claimed of impunity regarding the criminal actions of individual officials are false, as are the attempts to turn these convictions of individual offenders into a legal evidence for the crime of genocide.

(d). In 1919, occupying British forces sent 144 Ottoman officials to Malta to try them in a tribunal for presumed war crimes and crimes against Armenians. They were released after more than two years of

43 Sarınay," The Relocation (Tehcir)," p. 308.

44 Michael A. Reynolds, *Shattering Empires: The Clash and Collopse of the Ottoman and Russian Empires, 1908-1918*, Princeton University Press, (2011), pp. 144-150. Lewy, *The Armenian Massacres*, p. 117.

unsuccessful investigations by a British prosecutor and his staff.[45] During the Malta prosecutions, the British government found the information on the events of 1915 to be so unreliable that they were unable to use it as evidence.[46]

59. In paragraph 16, the Swiss Government expresses surprise at the importance the Court attaches "to the recognition of genocide by an international court" because "four of the seven judges of the Chamber stressed that Raphael Lemkin had precisely in mind the massacres and deportations of 1915 when he coined the term genocide." As explained above, it is outrageous to suggest that Lemkin's vision of what should count as genocide carries more weight than the Genocide Convention itself, which states that the charge of genocide may only be "tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction," or in case genocide is alleged by one state against another, by the International Court of Justice.

60. The Swiss Government further claims in paragraph 16 that "the characterization as 'genocide' does not necessarily depend on the pronouncement of a prior conviction for that crime" because the Charter of the Nuremberg International Military Tribunal did not mention the term genocide in 1945 after it had already been coined. This reflects two basic misunderstandings by the Swiss Government. First, the purpose of the Genocide Convention was not to label the systematic extermination of European Jews as "genocide" but to prevent a similar event from ever happening again. Therefore whether the term genocide was applied in the trials of Nazi Germans after WWII is immaterial. Second, Holocaust denial, which almost universally betrays its purveyor's anti-Semitism, is not the same as denial of the aptness of the genocide characterization to other historical events. Indeed, those who have been accused of Holocaust denial have never made claims that the Holocaust should not be legally characterized as genocide but rather that the events that comprise the Holocaust did not occur. In other words, cases of Holocaust denial have not required debate on the legal characterization of Holocaust as genocide, while other accusations of denial likely do.

45 Lewy, supra.at122-128; Şimşir "The deportees of Malta and the Armenian Question", in Armenians in the Ottoman Empire and Modern Türkiye (1912-1926) (1984) Boğaziçi University Publications pp. 26-41; Pulat Y. Tacar and Maxime Gauin, "State Identity, Continuity, and responsibility: The Ottoman Empire the Republic of Türkiye and the Armenian Genocide; A reply to VahagnAvedian," *European Journal of International Law*, (2012), 23 (3), pp. 828-829.

46 Lewy, *The Armenian Massacres*, p. 126.

61. Finally, in paragraph 17, the government argues that the legitimacy of implementing a penal provision dependent on "a multitude of consensuses" is unprecedented. (Referral, para. 17). The Court's jurisprudence on freedom of historical research, debate, political speech, and expression mandate that room is given for historical research and debate, and it is most necessary when a state seeks to control a debate on history, particularly if no international tribunal has ruled on the matter.

62. In paragraph 17, the Swiss Government states that "The distinction made between this case and the Holocaust is thus questionable." Steven T. Katz, the advisor to the International Holocaust Remembrance Alliance in association with the Council of Europe, who was the founding director of the Elie Wiesel Center for Judaic Studies and holds the title Alvin J. and Shirley Slater Chair in Jewish and Holocaust Studies at Boston University, clearly stated that the Armenian tragedy "is not the Holocaust," for three main reasons: "Neither Islam nor Turkism is predicated on inelastic, biologistic concepts, both possess absorptive capacities that create existential as well as socio-political possibilities unavailable in Nazism… Secondly, the Armenian deportations were not uniform events of total annihilation… Thirdly, the enacted policy of deporting Armenians was not universally applied within the borders of Türkiye."[47] Such a comparison is false and offensive; it disregards the history of Jews in Europe and the current social conditions in which they suffer from anti-Semitism.

3. Recognizing Armenian Tragedy as genocide vs. Criminalizing its Denial

63. As stated in paragraphs 18-19, the third distinction the Court's makes that is challenged by the Swiss Government is between recognizing the Armenian case as genocide on the one hand, and criminalizing its denial on the other. The Swiss Government is under the impression that if only "a part of the people of Switzerland" and one chamber of the Swiss Parliament consider the Armenian tragedy to be legally characterized as genocide then it should mean that while in Switzerland no one has the right to freely express a difference of opinion regarding this legal characterization. The notion that public

47 Steven T. Katz, "The Uniqueness of the Holocaust: The Historical Dimension," in Alan S. Rosenbaum (ed.), *Is the Holocaust Unique? Perspectives on Comparative Genocide*, Westview Press (1996), pp. 34-36.

support and political networking should allow a state to legislate the criminalization of certain opinions on history should be rejected. Such practice by a state would violate freedom of expression as a core value of a democratic society, a value enshrined by Article 10 of the Convention. Furthermore, the state would run the risk of harming those minorities in Europe who are really exposed to hatred, and whose identity as members of a group may be threatened by laws such as this one. It is not the "denial of genocide" that Switzerland is looking to criminalize, but the freedom to express one's opinion on the history of a third country by nationals of this country.

CHAPTER III: THE CHAMBER ERRED IN HOLDING THAT DR. PERİNÇEK CONVICTION UNDER ARTICLE 261 OF THE SWISS PENAL CODE DOES NOT VIOLATE ARTICLE 7

64. The following is a point of disagreement with the Court's judgement: In its conclusions, the Court found that Article 7 of the Convention was not violated, even though both Dr. Perinçek and the judges of the concurring opinion maintained that he could not have predicted his words to be judged as being criminally reprehensible. The Court's conclusion states that "[t]he grievance drawn from Article 7 does not raise any question different from those that have been reviewed by the Court within the perspective of the grievance related to Article 10 of the Convention, particularly regarding the existence of a legal basis for the interference at issue," and that "there is no basis for separately reviewing the admissibility or the grounds of the grievance based on Article 7 of the Convention" (paras. 131-133).

65. Previous similar statements by other Turkish citizens rejecting the legal characterization of the events as genocide did not lead to a conviction. Therefore, one would hardly expect Dr. Perinçek to foresee a decision contradicting the acquittal of Bern-Laupen.

66. The Swiss Senate had failed to agree on the issue of whether or not the events of 1915 should be classified as genocide. In August 2005, the President of the Senate's Foreign-Affairs Committee, Peter Briner, reportedly stated that the Armenian case "would not be subject of a plenary session" and that "it was not parliament's job to decide whether the killings constituted genocide."[48]

48 "Senate Washes Its Hands of 'Genocide' Question," *Swissinfo*; http://www.swissinfo.ch/eng/senate-washes-its-hands-of—genocide—question/4655584

67. There is no decision by a competent court that considers the Armenian tragedy of 1915 to be a case of genocide perpetrated by the Ottoman state.

68. Taking all of this into consideration, it seems reasonable that Dr. Perinçek's legally oriented mind would not predict that a rejection of the legal characterization of the Armenian tragedy as genocide would be a crime under Swiss law.

69. The judges representing the concurring opinion have stated that "In the case in hand, the applicant could not predict that his words would be judged as criminally reprehensible. Previously, comparable statements had led to prosecution, but their perpetrators were acquitted. It could therefore be inferred, at least in lower jurisdictions, that the presumption subsequently made by the Federal Court regarding the commonly admitted meaning of the term genocide was not clear. Similarly, the two chambers of the Swiss parliament fail to agree on the issue of whether or not the Great Crime should be classified as genocide" (p. 57).

70. The judges representing the concurring opinion argue that the violation of Article 7 of the Convention does indeed raise a separate question worthy of an official statement recognizing its violation in Switzerland. While it is true that Dr. Perinçek may be equally protected by Article 10's guarantee of the freedom of expression, it is important to note as a matter of principle that Article 7 was also violated. It would be of great significance to the Turkish people and many in the European community to know that according to the Court, Dr. Perinçek could not have been found guilty of a criminal offence because "genocide denial" did not constitute a criminal offence at the time of Dr. Perinçek's speech.

CHAPTER IV: THE DISSENTING OPINION CONTAINS FACTUAL ERRORS RELIED ON BY THE SWISS GOVERNMENT IN ITS REFERRAL

71. With great respect for the views of the honourable judges Vučinić and Pinto de Albuquerque, their dissenting opinion contains certain factual errors relied on by the Swiss government in support of request for referral.

72. Judges Vučinić and Pinto de Albuqueque used the phrases "Turkish," "Turkish Empire," and the "Turkish Government" in reference to the

Ottoman State, and inaccurately described "Ottoman" actions of the Ottoman Government as "Turkish" and incorrectly attributed them to the "Turkish Government."[49]

73. The following quotations are taken from the written opinion of the two dissenting judges. The addition in bold letters is suggested in order to correct the statements:

(a) Contrary to the statement in the dissent, the characterization of the Armenian tragedy as genocide was **never** "acknowledged by the Turkish government itself" (p. 63, para. 3). The verdicts of the Ottoman courts condemning the perpetrators of the acts of attempting to change the constitutional order by using force were based on Ottoman Penal Law and are not tantamount to a finding of genocide, which is a crime that did not exist at the time.

(b) Similarly, "the Parliamentary Assembly of the European Council" **did not** acknowledge that the Armenian tragedy should be characterized as genocide (p. 67, para. 8). Rather, certain members of the Parliament issued individual statements in an effort to incriminate Türkiye and denigrate Turks. On April 24, 2013, in the Assembly's most recent declaration with respect to the Armenian tragedy, only 26 out of a total of 318 members of the Assembly supported the campaign to characterize the events as genocide. Thus, the individual statements of some members are inconsequential and do not reflect the view of the majority.

(c) Futhermore, "the Sub-Commission on Prevention of Discrimination and Protection of Minorities (United Nations)" **did not** acknowledge that the Armenian tragedy should be recognized as genocide (pp. 67-68, para. 8). On the contrary, the sub-committee refused to "receive" the report written by the Rapporteur (Whitaker) and deleted the words "approve" and "receive" from the draft proposal. It also deleted the words praising the quality of the report. The sub-committee also refused to transfer the report to the Human Rights Commission and voted to delete the parts that thanked and congratulated the Rapporteur.[50]

49 See: "Turkish government," p. 63, paras. 3, 4 and p. 64, para. 6; "Turkish Empire," p. 66 ,para 7; "Türkiye," p. 71, para. 13 and p. 80, para. 29; "Turkish crimes against humanity," p. 64, para 6 [For correct quote, see: William A. Schabas, *Genocide in International Law: The Crimes of Crimes*, Cambridge University Press (2003), p. 16].

50 UN Doc E/CN:4.Sub2/1985; E/CN.4/sub2/1985/SR 36, pp. 30-31, paras. 30, 39, 57-58, 65-66d.

(d) In "the United States of America, the Ninth Circuit Court" **did not** make a statement acknowledging the genocide. (p. 68, para. 9). The Ninth Circuit simply stated that there was no federal policy that *banned* the states from employing the term. Moreover, Dr. Perinçek finds peculiar that the dissenting judges failed to note that on 23 February 2012 the full court by a vote of 11-0 *reversed* its prior decision and declared unconstitutional a California statute that sought to create special rights for "Armenian genocide victims" precisely because the statute attempted to define an Armenian genocide in contravention of U.S. federal policy.[51] Finally, on 11 May 2013, the Solicitor General of the United States urged that the Supreme Court not review the case, and the Court complied.[52]

(e) The dissenting judges also misstate the 29 January 1993 ruling in *Krikorian v. Department of State*,[53] contorting it to support a supposed U.S. policy to acknowledge an Armenian genocide. The case actually concerned a freedom of information request and the court's ruling in no way confirmed the allegation of the plaintiff that the Department of State had agreed to acknowledge an Armenian genocide.

(f) The "Armenian genocide" has **not** been recognized by the governments listed (p. 68, para. 10). With the exception of the French government, the recognitions were made either by parliaments, senates, local or municipal assemblies. Some of the governments listed have in fact issued statements to clarify that there has been no official recognition of the Armenian tragedy as genocide.

---

51 *Movsesian* v. Victoria Versicherung AG, 670 F.3d 1067 (9th Cir. 2012) (*en banc*), cert. denied, 133 S. Ct. 2795 (2013).

52 11 May 2013, Armenian Weekly: (Obama asks Supreme Court not to hear genocide-era insurance claims). The text of the Solicitor General's brief can be accessed at http://www.ataa.org/press/Movsesian-US.pdf

53 *Krikorian v. Department of State*, 948 F.2d 461 (D.C. Cir. 1993). In August 1982, the U.S. Department of State, in its monthly magazine, "Department of State Bulletin," printed a five-page article entitled, "Armenian Terrorism: A Profile." The article included a note that read, "Because the historical record of the1915 events in Asia Minor is ambiguous, the Department of State does not endorse allegations that the Turkish Government committed a genocide against the Armenian people. Armenian terrorists use this allegation to justify in part their continuing attacks on Turkish diplomats and installations." The note was retracted by the State Department in May 1983 because it contradicted U.S. policy not to comment in any manner on a purely historical proposition. An individual, Mr. Krikorian filed a freedom of information request regarding the retraction. The court case cited states only that the note was voluntarily retracted, not that U.S. policy had in any way changed.

(g) The Swiss Government never officially stated that the tragic events of 1915 should be characterized as genocide (p. 69, para. 11).[54]

(h) It is in conflict with Article 6 of the Genocide Convention and with the Framework Decision 2008/913/JAI of the Council of the European Union to claim that "all acts of genocide" and thereby "genocide denial" may be determined "officially" by "3)... any court in the Nation," by "4)... any other constitutional body, such as the President, National Assembly or national government of the Nation," or "5) whenever some social consensus exists concenring the factuality..." (p. 73, para. 18).

CHAPTER V: THE EUROPEAN SOCIAL CONTEXT SURROUNDING THIS CASE SHOULD BE CONSIDERED IN THE GRAND CHAMBER'S DECISION

It is hereby suggested that the Grand Chamber consider the European social context surrounding this case in its discussion.

74. The Swiss government cited to the United Nations Convention on the Elimination of All Forms of Racial Discrimination, which was ratified in New York on December 21, 1965, to justify its claim that Swiss law protects the Armenian community from Dr. Perinçek's view on history, and that a refusal to accept the legal characterization of the Armenian tragedy as genocide amounts to racial discrimination against the Armenian community. The Court rejected this claim.

75. The Court rightfully stated that Dr. Perinçek's "words were not likely to incite hatred or violence" (para.119). While the Court found that Dr. Perinçek's "statements were likely to be provocative," which is protected by the freedom of expression, it added that "the dismissal of the legal characterization of the events of 1915 was not likely in and of itself to incite hatred against the Armenian people" and that "the interested party has not been prosecuted or punished for incitement to hatred" (paras. 51-52).

76. With these in mind, it is significant to consider whether the Swiss government's offensive and false accusations of racism against Dr. Perinçek is itself reflective of racism. Dr. Perincek is a leading

54 See footnote 50.

political activist against racism both in Türkiye and outside. To recognize his anti-racism activities, he was invited to deliver a number of lectures in Europe and also nominated to a number of awards. The European Federation of Journalists (FIDEJ) and The International League Against Racism nominated Dr. Perincek for the "Golden Feder" award and invited him to Luxembourg on 13-15 November 1991 where he delivered lectures. Dr. Perincek spent 13 years in jail for his struggle for the equality of citizens of Türkiye, including his advocacy of labor rights and the rights of marginalized groups such as Kurds, Alevis, and Christian minorities. In his search for justice in Türkiye, he won two cases at the European Court. In Dr. Perinçek v. Türkiye (no. 46669/99) Violation Article 6 § 1), the ruling indicates that Dr. Perincek was convicted in Türkiye for his defense of the equal political treatment of the Turks and Kurds. The European Court ruled in favor of Dr. Perincek that the Turkish authorities violated the Article 10 of the Convention. Dr. Perincek is a tireless fighter for democracy and human rights in Türkiye and outside. In light of his history of political activism, it is absurd to construe Dr. Perincek as a racist, as the Swiss referral tries to argue.

77. There is no single event of violence against approximately 5000 Armenians who are living in Switzerland. However, Muslims in general and Turks (around 130,000) in particular, have been the targets of a series of attacks by different right-wing groups, as well as some radical Armenian groups.

78. A complaint was filed in 2010 by two NGOs for human rights (TRIAL - Swiss Association Against Impunity, and the Society for Threatened Peoples) against Denis Ramelet and Nicolas de Araujo, who published articles on April 2008, in a newspaper The Nation. These articles 1) denied the killings of 8000 Muslim (Bosniak) men; 2) the rape of Muslim women by nationalist Serbian forces; 3) the existing of concentration camps such as Trnopolje and Omerska; and 4) the infamous marketplace bombing by the Serbian forces on February 5, 1995. This post-Holocaust European genocide against Bosnian Muslims, which was legally established by the decisions of the ICJ of 26 February 2007 and a series of decisions of the ICTY, was ridiculed and these legally established facts were denied.

79. On 8 March 2011, the Vaud public prosecutor ordered the criminal investigation against two editors under Swiss Penal Code 261 bis. Although the Prosecutor concluded that the authors violated the Penal Code 261 bis by denying the genocide in Srebrenica, they were not convicted because the prosecutor concluded that they were not motivated by racism. Therefore, "it lacks an element of the offense"

since the accused authors did not insult or intend to harm the victims. In this case, the Swiss Court thus decided not to convict these authors who denied the most horrendous post-Holocaust genocide in the heart of Europe, many of whose victims continue to live in Switzerland and other parts of Europe and are living victims of the aforementioned acts. In contrast, the Swiss referral argues that Dr. Perincek was motivated by racism. When compared to the Bosnian case which is an established historical fact supported by a number of court rulings, however, the events of 1915 which took place a century ago are still hotly debated by historians and legal scholars, as highlighted by the Second Chamber decision.

80. These two contradictory applications of the same law raise a number of troubling questions about the Swiss criminal justice system in general and highlight the politicized nature of the particular statute which is being used to prosecute Dr. Perincek in particular. The fact that a clear case of the denial of a legally established genocide which took place recently at the heart of Europe was dismissed by the Swiss court system, while Dr. Perincek, an academic, politician, and human rights activist, who merely questioned the legal qualification of the tragic events of 1915 a century ago gets labeled as a racist, indicates serious flaws in the application of Swiss law. Therefore they represent a clear violation of fundamental legal doctrines concerning equality and universal standards before the law. The two cases are prima facie examples of how dangerously flawed the statute being used to prosecute Dr. Perincek for thought crimes is and how the politicized double-standards involving different cases and sets of victims makes a mockery of basic elements of equality before the Swiss, EU, and international law.

CHAPTER VI: CONCLUSION AND ADDITIONAL TIME IS REQUIRED TO ADDRESS SUBMISSION BY THIRD-PARTY INTERVENERS

Conclusions

81. Dr. Perinçek finds the following to be the main issues before the Grand Chamber:

    (a) The expression of opinion over the events of 1915 does not require an interference with the right to freedom of expression in a democratic society, as stated in Article 10 of the Convention and affirmed by the decision of the Court.

(b) The refusal to use a particular legal characterization of the events of 1915 does not constitute a racial discrimination against the Armenian community, as articulated by the Court, but merely an expression of a legitimate political view within an historical debate.

(c) The meaning of the crime of genocide, as specified in the Genocide Convention and affirmed by the decision of the Court, is reduced to law, and is not charged according to considerations of consensus, state legislation, or the opinion of Raphael Lemkin.

(d) The Ottoman court decisions during and immediately after WWI, which convicted individual officials for individual crimes against Ottoman Armenians, cannot be construed retroactively as a legal basis for claims regarding the crime of genocide that came into legal effect in international law decades later.

(e) In the context of the debate on a subject of public interest, the interference with the freedom of expression risks dissuading others from contributing to the public discussion of issues that are of interest to community life, as highlighted by the Court.

(f) There is no pressing social need to interfere with the right to freedom of expression on behalf of the Armenian community in Switzerland due to the lack of any political or social trends of hostility toward that community in Switzerland, as stated by the Court.

Submissions

82. Dr. Perinçek requests that the Grand Chamber

(a) Uphold the admissibility of the applicant's complaint under Article 10 of the Convention.

(b) Uphold that Article 10 of the Convention had been violated by the respondent State.

(c) Rule that the respondent State must afford just satisfaction to the applicant.

83. Dr. Perinçek respectfully requests that he be afforded additional time to separately address the arguments put forward by any of the third parties which have been allowed to intervene in the present case.

PULAT Y. TACAR

(Retired Ambassador)

Born 1931 in İstanbul;

Graduated from the Faculty of Political Sciences Ankara; Master in the Faculty of Law, Paris.

Pulat Tacar joined the Ministry of Foreign Affairs of Türkiye in 1955. He served in Vienna; worked as international civil servant at the International Atomic Energy Agency until 1967; then he was appointed Consul General to Skopje (1969-1972), to Stuttgart and Munich (1972- 1978).

He served as Ambassador of Türkiye to Indonesia (1981-1984) Permanent Representative –Ambassador of Türkiye – to the European Communities in Bruxelles (1984-1987); Permanent Representative-Ambassador of Türkiye- to UNESCO (1989-1995).

After retiring from the foreign service, he was elected as member and later served as Co-Chairperson (1995- 2006) of the Executive Board of the Turkish National Commission for UNESCO.

A "biographical interview" has been published by the "İş Bankası Cultural Editions" No.41, on Ambassador Tacar's work, thoughts and ideas, under the title "Yaşam bir Rüyadır-Pulat Tacar Kitabı" (Life is a dream – A Book on Pulat Tacar).

The titles of some of its publications are:

"Non-Proliferation of Nuclear Weapons"; "Cultural rights. Proposal of a Model for Türkiye"; "UNESCO at its 50. Anniversary; is She Worthless Like Mozart?"; "Financing of the politics"; "Democracy and Terror" (*This book received the Yunus Nadi Social Sciences Award in 1999*)," The Lawsuit of Doğu Perinçek against Switzerland at the European Court of Human Rights- Freedom of Expression and the Quest for a Just Memory"; etc.

Translations from: Triandafil Djuvara "Hundred Projects for the Partition of Türkiye"; Guy Sorman: "The children of Rifaa: Muslim Moderns"; etc.

He published several essays and articles on "Relations of Türkiye with the EU", "European and Eastern Values", "Multiculturalism", "Governance of the Cultural Diversity", "Condescending Aspects of the Concept of Tolerance", "Cultural Rights", "The Legal Aspects of the Crime of Genocide," etc.