

MINISTRY OF JUSTICE

GREAT ROOM

CASE OF PERİNÇEK v. SWITZERLAND (Application No. 27510/08)

JUDGMENT

STRASBOURG

October 15, 2015

This ruling is final by virtue of article 44, section 2, of the Convention. It may be subject to editorial review. GENERAL STATE LAWYER DIRECTORATE OF THE STATE LEGAL SERVICE Translation carried out by María del Carmen Ordóñez López with professor María del Carmen Quesada Alcalá as tutor , by virtue of the Agreement signed by the National University of Distance Education, the Ministry of Justice and the European Court of Human Rights (ECHR)

The ECtHR and the Ministry of Justice are not responsible for the content or quality of this translation.

ii

MINISTRY OF JUSTICE PROCEDURE THE
FACTS
YO.

THE CIRCUMSTANCES OF THE CASE

A.The plaintiff B.The statements in question C.The criminal proceedings against the plaintiff in relation to these statements D.The 2008 criminal proceedings in Turkey against the plaintiff E.Other documents submitted by the parties to the proceedings

II.

RELEVANT DOMESTIC LEGISLATION

A.The Constitution of the Swiss Confederation B.Article 261bis of the Swiss Penal Code 1.The text of the article 2.Legislative history 3.Application in relation to statements about the events of 1915 and the following years before the plaintiff's case C.

Other relevant provisions of the Swiss Penal Code D.The non-binding motion (postulat) no. 02.3069 E.The Swiss Federal Court Act 2005

III.RELEVANT INTERNATIONAL AND EUROPEAN LEGISLATION A.General international law

1.Related to genocide
2.International Convention on the Elimination of All Forms of Racial Discrimination
3.

International Covenant on Civil and Political Rights

B.Relevant instruments and materials of the Council of Europe 1.Additional Protocol to the Convention on Cybercrime

2.Resolution (68) 30 of the Committee of Ministers 3.Recommendation 97/20 on "hate speech" of the Committee of Ministers
4.

Work of the European Commission against Racism and Intolerance

C.Relevant European Union law IV.COMPARATIVE LAW MATERIALS THE LAW

I. SCOPE OF THE CASE

II.APPLICATION OF ARTICLE 17 OF THE CONVENTION A.The ruling of the Chamber

B. Interventions before the Grand Chamber

1.The parts

iii

MINISTRY OF JUSTICE 2.

The third parties involved C.

The Court's assessment

III.THE ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION A.Article 16 of the Convention B.Justification according to Article 10 §2 of the Convention 1.Legality of the interference

(a) The Court's ruling

(b) Interventions before the Grand Chamber

(i) The parties (ii) The third parties involved

(c) The Court's assessment

(i) General Principles (ii) Application of the general principles to the present case

2.

Legitimate intention

(a) The Court's ruling

(b) Interventions before the Grand Chamber (i) The parties (ii) The third parties involved (c) The Court's assessment

(i) The "prevention of disorder" (ii) The "protection of the rights of third parties" 3. The need for interference in a democratic society

(a) The Court's ruling

(b) Interventions before the Grand Chamber

(i) The parties

(a)

The plaintiff (β)

The Swiss Government (ii) The third parties involved

(a) The Turkish Government

(β) The Armenian Government

(γ)

The French Government

(δ) The Swiss-Armenian Association

(ε)

The Federation of Turkish Associations of

Francophone Switzerland

(ζ)

The Coordinating Council of Armenian

Organizations in France (CCAF) (η)

The Turkish Human Rights Association, the Truth,
Justice and Memory Center and the International
Institute for Genocide Studies and

iv

MINISTRY OF JUSTICE Human Rights (θ) FIDH (ι)

The LYCRA

(κ)

The Center for International Protection

(λ)

The Group of Belgian and French academics (c) The Court's assessment (i)

General principles

(α)

On the application of the requirement of
Article 10 §2 of the Convention that any
intervention is necessary "in a democratic society" (β)

On the balance of articles 10

and 8 of the Convention (ii) Relevant

Case Law of the Court

(α)

Group identity and reputation of
ancestors

(β)

Incitement to violence and "hate
speech" (γ) Holocaust denial and other
statements related to Nazi crimes (δ)

Historical debates

(ε)

Cases against Turkey related to statements
about the events of 1915 and subsequent years

(iii) Application of the previous principles and jurisprudence to the present case

(α)

Nature of the plaintiff's statements

(β)

The context of the interference

Geographic and historical factors

Time factor

(γ)

The degree to which the plaintiff's statements violated the rights of members of the Armenian
community (δ)

The existence or lack of consensus between the High Contracting Parties (ε)

Could Swiss interference be considered
Was it mandatory in accordance with its international commitments?

(ζ)

Method used by Swiss courts to justify the conviction of the plaintiff

v

MINISTRY OF JUSTICE

(η)

Severity of interference (θ) Balance between the plaintiff's freedom of expression and the right of Armenians to have their privacy respected

IV. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION V.

APPLICATION OF ARTICLE 41 OF THE CONVENTION A. Damages B.
Costs and expenses

PARTIALLY CONCURRING OPINION OF JUDGENUßBERGER

Debates about history as part of freedom of expression

Points of disagreement with the majority opinion

Distinction between the Holocaust Tribunal's jurisprudence and the present case

Procedural violation of Article 10 of the Convention

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

YO.

Assessment of the plaintiff's statements II.Impact of geographical and historical factors
III.Impact of the temporal factor
IV.Lack of consensus
V.Absence of the obligation to criminalize said statements
VI.Balance of the rights in question

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

MINISTRY OF JUSTICE In the matter of Perinçek v.

Swiss,
The European Court of Human Rights, sitting in the Grand Chamber composed of:
Dean Spielmann, President, Josep Casadevall, Mark Villiger, Isabelle Berro, İşıl Karakaş,

Ján Šikuta,
Päivi Hirvelä,
Vincent A. De Gaetano,
Angelika Nußberger,
Linos-Alexandre Sicilianos,
Helen Keller,
André Potocki,
Helena Jäderblom,
Aleš Pejchal,
Johannes Silvis,
Faris Vehabović,
Egidijus Kūris, judges,
and Johan Callewaert, Deputy Secretary of the Plenary,
having deliberated in private on January 28 and July 9, 2015,
issues the following ruling, adopted on the last mentioned date:

2

MINISTRY OF JUSTICE PROCEDURE

1.

The case arose from the application (no.27510/08) filed on June 10, 2008 before the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention") by a Turkish national, Mr. Doğu Perinçek ("the plaintiff") against the Swiss Confederation.

2. The plaintiff alleges, in particular, that the criminal sentence and conviction imposed against him in Switzerland as a result of statements he made publicly in that country in 2005 violated his right to freedom of expression and not to be punished in the absence of law. 3. The complaint was referred to the Second Section of the Court (Rule 52 § 1 of the Rules of Court).

On November 12, 2013, a Chamber of this Section, composed of Guido Raimondi, President, Peer Lorenzen, Dragoljub Popović, András Sajó, Nebojša Vučinić, Paulo Pinto de Albuquerque and Helen Keller, judges, and Stanley Naismith, Secretary of the Section, declared the claim partly admissible and partly inadmissible, found a breach of Article 10 of the Convention, and decided that it was not necessary to conduct a separate examination of the admissibility or merits of the applicant's complaint relating to Article 7 of the Convention.

A concurring opinion by Judges Raimondi and Sajó and a partially dissenting opinion by Judges Vučinić and Pinto of Albuquerque were annexed to the House's ruling, delivered on December 17, 2013. 4. On March 17, 2014, the The Swiss Government requested that the case be referred to the Grand Chamber, under the terms of Article 43 of the Convention.

This request was accepted by a Plenary panel on June 2, 2014. 5. The composition of the Grand Chamber was decided in accordance with the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24. On October 15, 2014 , the Armenian Government, which had been authorized to intervene (see paragraph 7 below), asked Judge Keller to recuse herself from the case,

referring to his participation in the Chamber that had initially examined him.

On October 16, 2014, Judge Keller declined to recuse herself. On December 22, 2014, the Armenian Government requested the President of the Grand Chamber to remove Judge Keller from the case, again citing her participation in the Chamber that had originally examined the case. On January 7, 2015, taking into consideration the terms of Article 26 §§ 4 and 5 of the Convention and Rule 24 § 2(d), the President rejected said request.

On May 28, 2015, Judge Silvis, substitute, replaced Judge Lazarova Trajkovska, who was unable to participate in the continuation of the case (Rule 24 § 3).⁶ On June 3, 2014, the Swiss Government requested that the Grand Chamber to refrain from holding a hearing in the case or, otherwise, hold it in camera (Article 49 § 1, of the Convention and Rule 63 §§ 1 and 2).

On June 10, 2014, the Court decided,

3

MINISTRY OF JUSTICE in accordance with Rule 71 § 2, together with Rule 59 § 3, reject the request of the Swiss Government not to hold a hearing. On January 15, 2015, the Court also rejected the request of the Swiss Government to hold the hearing in camera.

7.The plaintiff and the Swiss Government submitted observations (Rules 59 § 1, and 71 § 1).Additionally, comments were received from intervening third parties by the Turkish Government, which had exercised its right to intervene in the case (Article 36 § 1 of the Convention and Rule 44 § 1(b)).Observations were also received from third parties interested parties from the governments of Armenia and France, who had been given authorization to intervene in the written procedure (Article 36 § 2, of the Convention and Rule 44 § 3), as well as from the following non-governmental organizations and persons, equally authorized : a) The Swiss-Armenian Association; b) The Federation of Turkish Associations of French-speaking Switzerland; c) the Coordinating Council of Armenian Organizations in France; d) The Turkish Human Rights Association, the Center for Truth, Justice and Memory and the International Institute for Studies on Genocide and Human Rights; e) the International Federation for Human Rights; f) the International League against Racism and Anti-Semitism; g) the Center for International Protection; and h) a group of Belgian and French academics.

The parties responded to these observations through their oral arguments at the hearing (Rule 44 § 6).⁸ The Armenian Government was authorized to participate in the hearing (Article 36§ 2 of the Convention and Rule 44 § 3).⁹ The hearing was held in public at the Human Rights Building in Strasbourg, on January 28, 2015 (Rule 59 § 3, and 71 § 2).

Appearing before the Court: a) For
the Swiss Government:

Mr.F.SCHÜRMANN, Head of the Section for the Protection of International Human Rights of the Federal Office of Justice, the Federal Police and the Ministry of Justice, Agent,

Professor D.THÜRER, Professor Emeritus of the University of Zurich, Lawyer, Mr.

J.LINDENMANN, Deputy Director, Directorate of Public International Law,
Federal Department of Foreign Affairs,
Mr.A.SCHEIDEGGER, Deputy Head of the Section for the Protection of International
Human Rights, Federal Office of Justice, Federal Police and Ministry of Justice,
The Mrs.

C.EHRICH, lawyer of the Section for the Protection of International Human Rights, Federal
Office of Justice, Federal Police and Ministry of Justice, advisors.b) For the applicant:

4

MINISTRY OF JUSTICE Mr.M.CENGIZ, lawyer,
Professor L.PECH, Professor of European Law, Middlesex University, lawyer.

c) For the Turkish Government, third party intervener:

Mr.E.İŞCAN, Ambassador, Permanent Representative of Turkey to the Council of Europe,
Agent,
Prof.S.TALMON, professor of law, University of Bonn, lawyer,
Mr.AMÖZMEN, legal advisor, Ministry of Foreign Affairs,
Mr.HE

DEMIRCAN, Head of Section, Ministry of Foreign Affairs,
Mr.M.YILMAZ, advisor, Permanent Representation of Turkey to the Council of Europe, advisors.d) For
the Armenian Government, interested third party:
Mr.G.KOSTANYAN, Attorney General, Agent, Mr.A.TATOYAN, Deputy Minister of Justice,
Deputy Agent,
Mr.

G. ROBERTSON QC,
Mr.A.CLOONEY, solicitor, lawyers
Mr.E.BABAYAN, Deputy Attorney General,
Mr. T. COLLIS, advisors. The plaintiff was also present. The Court heard the interventions
of the plaintiff, Mr. Cengiz, Prof. Pech, Mr. Schürmann, Prof. Thürer, Prof. Talmon, Mr. .

Kostanyan, Mr Robertson QC and Mr Clooney.THE FACTS

I. CIRCUMSTANCES OF THE CASE

A.The plaintiff

5

MINISTRY OF JUSTICE 10.The plaintiff was born in 1942 and lives in Ankara.11.The
plaintiff is a Doctor of Law and President of the Turkish Workers' Party.B.The
statements in question

12.

In 2005, the plaintiff participated in three public events in Switzerland. 13. The first event was a press conference held in front of the Chateaud'Uchy, in Lausanne (Canton of Vaud) on May 7, 2005. In the course of said press conference, the plaintiff made the following statement, in Turkish:

"Let me say to the European public in Bern and Lausanne: claims about the "Armenian genocide" are an international lie.

Can there be an international lie? Yes, Hitler was once the master of those lies, now it is the imperialists of the United States of America and the European Union!

Documentation in not only Turkish but also Russian archives refute those international lies. The documents show that the imperialists of the West and Tsarist Russia were responsible for the conflict between Muslims and Armenians.

The Great Powers, who wanted to divide the Ottoman Empire, provoked a group of Armenians, with whom we had lived in peace for centuries, and incited them to violence. The Turks and Kurds defended their land from these attacks. We must not forget that Hitler used the same methods – that is, the exploitation of ethnic groups and communities – to divide countries for his own imperialist purposes, causing people to kill each other.

The "Armenian genocide" lie was invented in 1915 by imperialists in England, France, and Tsarist Russia, who wanted to divide the Ottoman Empire during World War I. As Chamberlain would later admit, this was war propaganda... The United States of America occupied and divided Iraq with the Gulf Wars between 1991 and 2003, creating a puppet state in the north.

And then it incorporated the Kirkuk oil fields into this state. Today Turkey is forced to act as the guardian of this puppet state. We are cornered by imperialism. The lies about the "Armenian genocide" and the pressure related to the Aegean and Cyprus are interdependent and are designed to divide us and hold us hostage.

The fact that decisions have been made that even refer to our war of liberation as a "crime against humanity" demonstrates that the United States of America and the European Union have included the Armenian question among their strategies for Asia and the Middle East ...With their campaign of lies about the "Armenian genocide" the United States of America and the European Union have manipulated people with Turkish identity cards.

In particular, certain historians and journalists have been bought and hired by the American and German secret services to take them from one conference to another... Don't believe the lies like the ones that

Zurich) on July 22, 2005 to commemorate the Treaty of Lausanne of 1923 (Peace Treaty, signed in Lausanne on July 24, 1923 between the British Empire, France, Italy, Japan, Greece, Romania and the Serbo-Croat state -Slovenian, on the one hand, and Turkey, on the other, League of Nations Treaty Series, vol.

28, no.701).During that conference, the plaintiff spoke first in Turkish and then in German, and said the following:

"The Kurdish problem and the Armenian problem, first of all, were not problems and, above all, they did not even exist..." 15.Later, the plaintiff distributed copies of a treatise he authored entitled "The Great Powers and the Armenian Question" , in which he denied that the events of 1915 and the following years had constituted a genocide.

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

"...even Lenin, Stalin and other leaders of the Soviet revolution wrote about the Armenian question.

In their reports they said that no genocide of the Armenian people had been carried out by the Turkish authorities. At the time, these statements had no propaganda purpose. In secret reports the Soviet leaders said – and this is very important – and Soviet archives confirm that there were occasions of ethnic conflict, massacres and massacres between Armenians and Muslims at the time.

But Turkey was on the side of those who defended their homeland and the Armenians were on the side of the imperialist powers and their agents... and we urge Bern, the Swiss National Council and all parties in Switzerland: please be interested in the truth and stop the prejudices behind.This is my observation, and I have read every article about the Armenian question and they are mere prejudices.

Please put those prejudices aside and unite (?), what he said about these prejudices, and it is the truth: there was no genocide of Armenians in 1915. It was a battle between peoples and we suffered many casualties... the Russian officers of the time were very disappointed because the Armenian troops massacred Turks and Muslims.

These truths were told by a Russian commander..." C. The criminal proceedings against the plaintiff as a consequence of these statements

7

MINISTRY OF JUSTICE 17.On July 15, 2005, the Swiss-Armenian Association filed a complaint against the plaintiff in relation to the aforementioned demonstrations.

The investigation was later expanded to include two verbal statements as well. On July 23, 2005, the plaintiff was interviewed by the Winterthur public prosecutor in relation to statements he made at the Hilton hotel in Opfikon. On September 20, 2005, he was interviewed by a cantonal investigating judge in the Canton of Vaud.

18.On April 27, 2006, considering that the three statements made by the applicant fell within the scope of application of article 261bis§ 4 of the Penal Code (see paragraph 32 below), the competent investigating judge of the Canton of Vaud decided put the plaintiff on trial.

19.The trial took place before the Lausanne District Police Court (the Police Court) on 6 and 8 March 2007. 20.On 6 March the Court heard interventions from the plaintiff, the prosecutor and the Swiss Association -Armenia, which had become a civil party. The Court then proceeded to hear the testimony of six professional historians – one American, three French, one German and one British – and a sociologist whom the parties had called to provide evidence.

21.On March 8, 2007, the plaintiff's lawyer asked the Court to gather more evidence in relation to the events of 1915 and subsequent years. The Court rejected the request, finding that it was dilatory and would lead to the suspension of the proceedings.More Still, it was not necessary to gather more evidence on this point since the events had been analyzed by "hundreds of historians for decades" and had been "the subject of countless publications."

The Court had already heard the testimony of the historians called by the plaintiff and the civil party, whom they themselves considered to be the most competent in relation to the subject. It would, therefore, be superfluous to incorporate more evidence on this matter.22. On 9 March 2007, the Police Court found the applicant guilty of the offense under article 261bis § 4 of the Penal Code (see paragraph 32 below), sentencing him to pay a 90-day fine of 100 Swiss Francs (CHF) (62 euros (EUR) at the time), per day, suspending the sentence for two years, and a fine of 3,000 Swiss Francs (1,859 euros at the time), commutable to thirty days in prison and payment of the amount of 1,000 Swiss Francs (620 euros at the time) as compensation for non-pecuniary damages for the Swiss-Armenian Association.

The Court established the following:

"I. The accused. DoğuPerinçek was born in Gaziantep, Turkey, on June 17, 1942. He is a Turkish politician residing in that country. After approximately 10 months of employment in manual labor in Germany, between 1962 and 1963, he studied Law in Ankara University and obtained his doctorate in 1968.

He is the founder of a far-left newspaper.

8

MINISTRY OF JUSTICE 1969 founded the Revolutionary Party of Workers and Peasants of Turkey. DoğuPerinçek can be defined as a left-wing extremist, a follower of Lenin and Mao. He spent several years in prison in the 1980s as a result of his political ideas.

He is currently the General Chairman of the Turkish Workers' Party, which represents 0.5% of the Turkish electorate.DoğuPerinçek describes himself as an educated person with a very good knowledge of history.He speaks German fluently.In his personal life, the accused is married and He is the father of four children, three of whom are adults.

The defendant indicates that he receives an income of approximately 3,000 Swiss Francs per month. Part of his income comes from royalties and an age pension. He also benefits from his wife's income. He declares that his financial situation is healthy. He has never been criminally charged. sanctioned in Switzerland.

His criminal convictions in Turkey will not be taken into consideration because, as far as the Court is aware, these arose from political crimes. It should be noted that the European Court of Human Rights has ruled against Turkey on two occasions in cases involving the accused. Consequently, you will be treated as a person being prosecuted for the first time.

II.The facts and the legal framework

The case, in itself, does not present factual problems. For simplicity, the order of the cantonal investigating judge dated April 27, 2006 can be attached to this sentence by which he was put on trial, which specifies that he was subjected to process after an adversarial hearing and not in absentia.

On May 7, 2005 in Lausanne, and then on September 18 in Köniz, Bern, DoğuPerinçek publicly stated that the Armenian genocide was an international lie. The defendant also admits that on July 22, 2005, he said, in relation to the genocide Armenian, that the problem of the Armenians, like that of the Kurds, had never really been a problem and that the Armenian genocide had never existed (paragraph 2 of the order of submission to trial).

The facts are not disputed since DoğuPerinçek admits having denied the Armenian genocide. Consequently, the accused falls within the spectrum of article 261bis of the Penal Code, on the basis of which he is being prosecuted. DoğuPerinçek acknowledges that massacres were committed but justifies them in the name of the laws of war and maintains that the massacres were committed by both the Armenian and Turkish sides.

It also recognizes that the Turkish-Ottoman Empire displaced thousands of Armenians from the Russian borders to what are now Syria and Iraq, but categorically denies the genocidal nature of these deportations and maintains that, at best, these deportations were motivated by a security need. .The accused has even alleged

9

MINISTRY OF JUSTICE that Ottoman troops acted to protect Armenians in the conflict between the Ottoman Empire and Russia.

Furthermore, the accused has frequently said in public that the Armenians, or at least some of them, were traitors and were allied with the Russians against the troops of the Empire. The historians whom he has called to testify support, to varying degrees , the opinions of the accused. The historians whose testimony was offered by the civil party totally disagree with him.

In this context, it is noteworthy that in response to DoğuPerinçek's comments, the Swiss-Armenian Association filed a complaint against him on July 15, 2005. The Association's claims as a civil party will be considered later. As will the parts, the

The Court recognizes that denying, as such, the existence of a massacre, of whatever magnitude, is not expressly covered by article 261bis of the Penal Code.

As the law clearly states, the denial must refer to genocide, as defined, for example, by the International Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948, and Article 6 of the Rome Statute. In its allegations, the defense maintains that when drafting article 261bis of the Penal Code, Parliament only had in mind the genocide of the Jews during the Second World War.

The defense also argues that to enjoy the protection conferred by Article 261bis, a genocide must necessarily be recognized as such by an international court. And it emphasizes that the Armenian genocide has not been universally recognized, in particular, it has not been recognized by Turkey , and that certain historians share Perinçek's opinions.

The defense concludes that, first, since the situation is confusing and, second and more importantly, since the Armenian genocide has not been recognized by an international court of justice, DoğuPerinçek's denial of the Armenian genocide is not within the scope of article 261bis of the Penal Code.

The defense told the Court that it cannot act as a historian and noted in that sense that it had made an interlocutory request during the hearing for the Court to establish a neutral committee of historians to investigate whether the massacres of 1915-17 had constituted a genocide.

The civil party and the prosecutor agree that it is a necessary and sufficient condition for a genocide to be generally recognized and that it is up to the Court to take formal note of this international recognition. It is not necessary to become a self-taught historian. The courts decide on the facts And the law.

The civil party and the prosecutor consider that the Armenian genocide is a well-known fact, regardless of whether or not it has been recognized by an international court. The parties agree, at least, on one point, that is, that it does not correspond to the Court write history. The Court is of the same opinion as the parties.

There will, therefore, be no gaps in this ruling if it does not refer to the opinions of the historians who have given testimony or to the annexes provided by the civil party or the defense. 10

MINISTRY OF JUSTICE The first question that must be asked, then, is whether the genocides recognized by Swiss criminal law are only those recognized by an international court of justice.

The Court has various means at its disposal to answer this question. From the point of view of literal interpretation, article 261bis of the Penal Code refers only to genocide. It does not refer, for example, to "a genocide recognized by a international Court of Justice".

Nor does it specify "the genocide of the Jews to the exclusion of the genocide of the Armenians". Is this an omission by Parliament? The historical interpretation that the Court can also have available answers this question. According to the Official Gazette of the National Council, The legislators explicitly referred to the Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948 and cited, as an example, the genocide of the Kurds and Armenians (BO/CN Official Gazette/National Council 1993, p.

1076). From the historical perspective, then, it can be inferred that Parliament considered the Armenian genocide as an example when drafting article 261bis of the Penal Code (Comby Report). Therefore, it must be recognized that the legislators did not only have the genocide in mind of the Jews when they drafted article 261bis.

By expressly referring to the genocide of the Armenians and Kurds, Parliament also sought to demonstrate that it is not necessary for a genocide to be recognized by an international court of justice. As noted, there was an explicit reference to the Genocide Convention of 9 December 1948.

Jurists support this position. For example, according to Corboz (Bernard Corboz, Les infractions en droit Suisse, vol.II, p.304), genocide must be established. It can be inferred from this statement that it is necessary and sufficient that genocide be recognized, without it being necessary for it to have been recognized by an international court or some other supranational body possibly binding on the parties (an example could be a commission of historians with recognized international experience).

According to Trechsel (Stefan Trechsel, Kurzkommentar, ad Article 261 bis no.35), in the context of genocide denial, German legal theory openly recognizes the "Auschwitz lie" but the denial of other genocides is also covered by article 261bis of the Penal Code.

In his thesis, Guyaz reaches the same conclusion (Alexandre Guyaz, L'incrimination de la discrimination raciale, thesis Lausanne, 1996, p.300). The following section can be cited:
"Criminal law contemplates here a broader approach to revisionism, while article 261bis paragraph 4 is not limited to crimes against humanity committed by the National Socialist regime."

This broad spectrum has been unequivocally confirmed by the National Council which, in second reading, modified the text

eleven

French MINISTRY OF JUSTICE replacing the expression "genocide" with "a genocide", thus referring to all genocides that may, unfortunately, have occurred." It is, therefore, necessary and sufficient that a genocide has been committed.

But this genocide must be known and recognized: Corboz refers to an established genocide (Corboz, op.Cit.) What, then, is the situation in our country? As far as Switzerland is concerned, the

Court notes that the National Council has approved a non-binding parliamentary motion (postulat) recognizing the genocide (the Buman motion).

The motion was approved on December 16, 2003. As said before, the Armenian genocide served as the basis for the drafting of article 261bis of the Penal Code (Comby report). The parliamentary motion was approved against the opinion of the Federal Council, which He apparently considered the subject to be the province of historians.

And yet, this is the same Federal Council that expressly cited the Armenian genocide in its March 31, 1999 position on the Convention on the Prevention and Punishment of the Crime of Genocide, which would serve as the basis for the current article 261bis of the Penal Code criminalize genocide (Feuillefederale (FF-Federal Gazette), 1999, pp.

4911 et seq).The University of Lausanne has used the Armenian genocide as an example in a published work on humanitarian law. History textbooks deal with the Armenian genocide. It should also be mentioned that the governments of Vaud and Geneva have recognized the Armenian genocide : on July 5, 2005, the Canton of Vaud did so, and on June 25, 1998, the Republic and Canton of Geneva did so, whose president at that time was MichelineCalmy-Rey, our current Minister of Foreign Affairs.

This quick glance allows the Court to conclude that the Armenian genocide is a historical fact established in accordance with Swiss public opinion. The current position of the Federal Council, which is characterized by its cautious if not inconsistent position, does not change anything. It is easy to understand why a government may prefer not to get involved in particularly sensitive issues.

The international repercussions that this case has had are notorious. Looking beyond our borders, several countries, including France, have recognized the Armenian genocide. To take just the example of France, according to Yves Ternon, the Law of January 29 of 2001 was based on the opinion of a group of approximately one hundred historians.

Item number 15 on the Defense list number 1, Jean-Baptiste Racine, in his book on the Armenian genocide says that the recognition of States has frequently occurred in response to initiatives from the academic community. These decisions do not They are therefore taken lightly, particularly as recognition of the Armenian genocide may adversely affect a particular country's relations with Turkey.

12

MINISTRY OF JUSTICE The Armenian genocide has also been recognized by international organizations. Without a doubt, it has been given little relevance in the United Nations. The only truly important reference is found in the Whitaker report (Jean-Baptiste Racine, op.cit .

p.73, item 96).The European Parliament, on the other hand, began to consider the Armenian question in 1981. The editor of the committee in question, whose report, in Jean-Baptiste Racine's opinion, was meticulously prepared, reported that:

"The events of which Armenians were victims in Turkey during the years 1915-17 must be considered genocide in accordance with the United Nations Convention on the Prevention and Punishment of the Crime of Genocide."

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

This genocide has also been recognized by the Council of Europe, which has approximately fifty member states and is dedicated to defending the values of democracy and human rights. Its headquarters in Strasbourg is also the headquarters of the European Court of Human Rights, which is responsible for the application of the 1950 Convention of the same name (on all these topics, consult Jean-Baptiste Racine, op.

cit.pp.66 et seq.) It must be admitted, then, that the Armenian genocide is an established historical fact. We must then ask whether DoğuPerinçek acted intentionally. This amounts to asking whether he could have believed, in good faith, that he was not acting incorrectly or, in other words, that he was not denying the obvious when he stated, on no less than three occasions, that the Armenian genocide had not existed and that it was an "international lie."

DoğuPerinçek has acknowledged during the investigation and trial that he knew that Switzerland, like many other countries, has recognized the Armenian genocide. Furthermore, he would never have called it an "international lie" if he had not known that the international community considers these events like a genocide.

He even stated that he considered the Swiss law unconstitutional. The accused is a Doctor of Law. He is a politician. He describes himself as a writer and historian. He is aware of the arguments of those who disagree with him. He has simply chosen to ignore them and proclaim that the Armenian genocide never happened.

DoğuPerinçek cannot, therefore, affirm, or believe, that the Armenian genocide did not happen. Furthermore, as the Prosecutor says in his arguments, DoğuPerinçek has formally affirmed that he will never change his position, even if a neutral panel one day concludes that genocide Armenian actually happened. It must be concluded, without a doubt, that for the

13

MINISTRY OF JUSTICE accused the denial of genocide is, if not an article of faith, at least a political slogan with markedly nationalist tones.

Legal doctrine is uniform in considering that there must be a racist motive. It is clear that DoğuPerinçek's motives appear to be racist or nationalist. This is very far from the historical debate. As the prosecutor notes, DoğuPerinçek speaks of an imperialist plan to undermine the Turkish greatness.

To justify the massacres, he resorts to the Law of War. He has described the Armenians as the aggressors of the Turkish people. He is a follower of TalaatPasha – the accused is a member of the committee of the same name – who, together with his brothers, was historically the initiator, instigator and driving force of the Armenian genocide.

DoğuPerinçek meets all the objective and subjective conditions established by article 261bis of the Penal Code. He must be found guilty of racial discrimination. III. The penalty DoğuPerinçek appears to be an intelligent and cultured person, which makes his foolishness even more incomprehensible. He is a provocateur.

He has behaved with a certain arrogance towards the Court in particular, and towards Swiss law in general. He is unable to add any mitigating circumstances. There are multiple crimes because the accused has discriminated against the Armenian people by denying their tragic history on three occasions in three different places.

His manner of acting corresponds to that of an agitator. The terms he uses, such as "international lie" are particularly virulent. In these circumstances, the Court agrees with the Prosecutor that a sentence of ninety days is an appropriate sanction for the conduct of the accused.

In his arguments, the Prosecutor proposed that the fine days be set at 100 Swiss Francs. It is noted in the section on personal information that DoğuPerinçek's financial situation is healthy. 3,000 Swiss Francs is, without a doubt, a good salary in Turkey. The accused was able to entrust his defense to the lawyer of his choice.

He traveled from Turkey to Switzerland and stayed at the Beau-Rivage Palace hotel for the duration of the trial (p.61). All of this reveals a certain level of financial affluence and the proposed fine of 100 Swiss Francs is far from excessive. Under the previous law, the Court would have been unable to make a favorable assessment of DoğuPerinçek's future conduct.

Now, the suspended sentence is the norm in the absence of unfavorable circumstances, which is not the case at hand. DoğuPerinçek is a foreigner in our country. He will return to his country. He was previously warned by the Court that if he persisted in his denial of the Armenian genocide would be subject to a new criminal investigation and would run the risk of a new conviction

14

MINISTRY OF JUSTICE with the crucial possibility of having the suspension of the sentence revoked.

The Court considers that this threat must be sufficient to prevent the accused from offending again, so the fine issued will be accompanied by a suspended prison sentence. The accused will receive a substitute fine of 3,000 Swiss Francs as a significant immediate penalty, the equivalent of thirty days in prison.

IV.Civil law claims and costs

The Swiss-Armenian Association, through its lawyer, claims 10,000 Swiss Francs as compensation for non-pecuniary damages and the same sum for the costs incurred in the criminal proceedings. In accordance with its statutes and the law (article 49 of the Code of the Obligations) the Swiss-Armenian Association has the power to demand compensation for damages not

pecuniary.

It is difficult to grant the association compensation of this kind because, by definition, associations do not have feelings. The Court will therefore limit itself to imposing a symbolic sum of 1,000 Swiss Francs as compensation. The case was complex enough to require legal assistance.

In view of the work carried out by this professional, the Court grants an amount of 10,000 Swiss Francs as a contribution to the civil party for the payment of fees. It is not appropriate to assign this sum directly to SarkisShahinian, who is the representative of the association. DoğuPerinçek will cover all costs of the case.” 23.

The plaintiff appealed the decision, requesting that it be invalidated and that additional investigative measures be taken to establish the status of the investigation and the position of historians on the events of 1915 and following. The Swiss-Armenian Association also appealed the decision, later withdrawing of the appeal.

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

“C.DoğuPerinçek duly appealed the original sentence. As a main argument, he has appealed on the basis of the alleged nullity and requested that additional investigative measures be taken to establish the current status of the investigation and the position of historians regarding the Armenian question .

Subsidiarily, he has filed an ordinary appeal seeking the modification of the sentence so that he is acquitted of the charge of racial discrimination of article 261bis § 4 second line, of the Penal Code,

fifteen

MINISTRY OF JUSTICE absolves him from paying costs and from any obligation to pay compensation or criminal costs to the complainant and the civil party.

The Swiss-Armenian Association, which had also appealed, has withdrawn its appeal and has filed a memorial.The legal framework

1.Since the appellant's application includes both an appeal based on the annulment of the sentence and an ordinary appeal, the Court of Cassation must determine in which order the arguments should be examined, according to their particular nature and the issues raised (Bersier , “Le recours a la Cour de cassationpenale du Tribunal cantonal en procedurevaudoise”, in JT 1996 III 66, pp.

Et seq., esp.pp.106 et seq.and the cited references; Besse-Matile and Abravanel, “Apercu de jurisprudence sur les voies de recours a la Cour de cassationpenale du Tribunal cantonal Vaudois”, in JT 1989 III, pp.98 et seq., esp.p.99 and the references cited there). In support of his arguments for annulment, the appellant invokes a violation of article 411, paragraphs (f), (g), (h) and (i) of the Code of Criminal Procedures.

These provisions are related to nullity arguments that justify the annulment of the sentence only if the irregularity found has influenced or could influence the sentence (Bersier, op.cit., p.78). The common practice is to first examine the arguments of the ordinary appeal and then those related to nullity (Bovay, Dupuis, Moreillon, Piguet, *Procédure pénale vaudoise*, Code annoté, Lausanne, 2004, no.

1.4.ad Article 411). The nullity arguments invoked by the appellant relate mainly to factual issues that should only be considered if they are relevant to the legal result. In this particular case, the Court must, first, consider the arguments of the ordinary appeal, that is, the meaning and scope of article 261bis of the Penal Code, and determine whether, in this particular context, the lower court could, exceptionally, carry out a historic trial (see Chaix and Bertossa, "The repression of discrimination raciale: L'ordre exception?" in SJ2002, p.

177, esp.p.184). I. Ordinary Appeal

2.(a) The appellant objects to the application of article 261bis of the Penal Code by the Court of first instance. He argues, first, that it is up to the courts to carry out the task of a historian and, as such, determine whether the genocide

16

Armenian MINISTRY OF JUSTICE took place, before applying article 261 bis.

In his opinion, said genocide has not been established. Therefore, he considers that the court has misinterpreted the concept of genocide and the scope of article 261bis in this regard. (b) In accordance with article 261bis § 4, of the Penal Code , a person commits a crime who publicly denigrates or discriminates against another person or group of people as a result of their race, ethnic origin or religion, in such a way that violates their human dignity, whether verbally, or through written material, images, gestures. , acts of aggression or any other means, as well as any person who for the same reasons denies, minimizes the importance or seeks to justify a homicide or other crimes against humanity.

Article 261bis of the Penal Code reflects in national law the commitments acquired by Switzerland when it signed the International Convention for the Elimination of All Forms of Racial Discrimination of December 21, 1965 (CEDR), which entered into force on December 29, 1965. 1994 (RS (Recueil systematique – Compendium of Federal Law) 0.104: Favre, Pellet Stoudmann, *Code penal annoté*, Second edition, Lausanne, 2004, no.

1.1.ad article 261bis of the Penal Code). The fact that article 261bis of the Penal Code finds its basis in a convention reflects the tendency to incorporate provisions of international treaties into domestic legislation. However, what distinguishes anti-crime legislation -racism is the fact that the national parliament decided that, in cases of genocide and other crimes against humanity, the law should go beyond the minimum standards set by the CEDR (Chaix and Bertossa, op.

cit.esp.p.179).(c) The term genocide is now defined by article 264 of the Penal Code. The courts responsible for the application of article 261bis § 4 of the Penal Code must be guided by

this definition, derived from the Convention to Prevent and Punish the Crime of Genocide of December 9, 1948.

However, its task is not to punish the genocide, but rather the people who deny its existence (Chaix and Bertossa, op.cit., esp.p.183). In relation to the scope of the term genocide, various authors point out that the Federal Council memorandum only refers to the genocide of the Jews during the Second World War (FF 1992 III 308; Chaix and Bertossa, op.

cit.esp.p.183).However, Parliament has clearly incorporated a broader concept of revisionism in article 261bis § 4 of the Penal Code, which is not limited to the denial of crimes against humanity committed by the regime. National Socialist.The Council

17

The National Ministry of Justice confirmed this extended spectrum unequivocally when, on second reading, it corrected the French text by replacing the expression "the genocide" with "a genocide" (Guyaz, L'incrimination de la discriminationraciale, thesis, Lausanne, 1996, p.

300).Parliament justified this change by arguing that the legislation should apply to all cases of genocide that could, unfortunately, have occurred, and citing the massacre of the Armenians as an example (BO/CN 1993, p.1076).Historically, Parliament therefore did not intend to restrict the application of article 261bis § 4 of the Penal Code to the genocide of the Jews.

In accepting the editorial change, he indicated that it should apply to all genocides, particularly that of the Armenians. In the case of the Armenian genocide, therefore, the courts do not need to rely on the work of historians to recognize its existence, since the case is specifically covered by the legislation and the purpose of those who adopted it, on the same basis as the genocide of the Jews during World War II.

It must, therefore, be recognized that the Armenian genocide is an established fact.(d) In this case, the court of first instance expressly stated that it did not intend to act as a historian, even though it did enter this territory in attempting to determine the general opinion of institutions in Switzerland and abroad on this issue.

It was unnecessary for him to do so, since the only relevant thing is the will of Parliament, which clearly expressed in the preparatory debates that the wording of article 261bis of the Penal Code contemplated the Armenian genocide. Therefore, it is wrong for the appellant to affirm, with reference to the memorandum of the Federal Council (FF 1992 III 308), that it is not established that the wording of article 261bis of the Penal Code is such that it covers the Armenian genocide.

The jurisprudence of the Federal Court is not decisive either because every case, to date, in which the issue has arisen has dealt with Jews in World War II and the revisionism associated with this issue. In the final analysis, while The Armenian genocide was recognized by Parliament itself as an established fact, there is nothing exceptional about this case that would require additional investigative measures or a historical perspective to determine whether a genocide was committed.

The appeal allegation based on the meaning and scope of the notion of genocide must be dismissed as unfounded.¹⁸

MINISTRY OF JUSTICE 3.(a) To constitute a crime, the conduct typified in article 261bis of the Penal Code must be intentional and motivated by hatred or racial discrimination; it is enough to have acted negligently (ATF (arrets du tribunal federal – Judgments of the Swiss Federal Court) 124 IV 125 point 2b, 123 IV 210 point 4c).

According to Corboz, the discrimination requirement must be interpreted strictly: the act must primarily reflect the mental state of the offender, who hates or despises members of another race, ethnic group or religion. Article 261bis should not apply in case of serious academic research or serious political debate devoid of racial animosity or prejudice (Corboz, *Les infractions en droitsuisse*, Volume II, Bern, 2002, note 37, on article 261bis of the Penal Code).

(b) In this case, the appellant attempts to explain his position in terms of a debate among historians that requires that freedom of expression be respected. He also claims that he has simply denied that the events in question constituted a genocide, without denying at no time the existence of massacres and deportations of Armenians, which he justifies with the law of war.

This argument is related to the subjective aspect of the crime, but is vitiated by the fact that the appellant ascribes to the term genocide the qualification of "international lie," which the court of first instance described as "particularly virulent." It should be noted, above all, this issue, that the statements in the case were made in public meetings with a markedly nationalist tone that bore little relation to a serious historical debate devoid of racial prejudices.

On these occasions, the accused, who describes himself as a writer and historian, simply ignored his opponents' arguments and declared that the Armenian genocide had never existed. The appellant, aware of the widespread acceptance of this proposition, only sought to make a political argument. , not historical, as he said, and it is no coincidence that these claims were made during events to commemorate the 1923 Treaty of Lausanne.

This Court, therefore, must validate the trial court's finding that the defendant's motivations were racist and nationalist. In the final analysis, the objection is not only to his rejection of the use of the term genocide, but also to the way in which this was expressed and the association of the cited texts, all of which demonstrates that DoğuPerinçek expressly and intentionally denied a historical fact that is considered established, that is, the Armenian genocide, on various occasions and without showing intentions to change His point of view.

19

MINISTRY OF JUSTICE This allegation must be dismissed as unfounded.4.(a) The appellant requests to be exempted from any obligation to pay compensation for non-pecuniary damages. (b) In accordance with article 49, paragraph 1, of the Code of Obligations, any person whose personality rights have been illegally violated may claim compensation for non-pecuniary damages, if justified by the severity of the violation and the perpetrator not

offers another form of satisfaction.

According to this article, the violation must exceed what a person should normally tolerate, either from the perspective of the duration of the conduct or the intensity of the harm suffered I (Bucher, Personnes physiques et protection de la personnalité, 4th edition, Basel, Geneva, Munich 1999, no.

603, p.141; Tercier op.cit.nos.2047 et seq.; Deschenaux and Tercier, op.cit.nos.24 et seq.p.93). The amount of compensation depends primarily on the severity of the violation – or, more specifically, on the severity of the physical or psychological suffering caused by the violation – and the probability that the payment of a sum of money will significantly reduce the non-pecuniary damage (ATF 125 III 269, point 2a, ATF 118 II 410, point 2a).

The courts have discretion to determine the level of compensation. By its very nature, compensation for non-pecuniary damage, to which a monetary value can only be attributed with great difficulty, cannot be determined with reference to mathematical criteria, to ensure that the determined quantity does not exceed a certain level; however, the compensation awarded must be equitable.

The Court in question must, then, ensure that the amount reflects the severity of the damage suffered and that the sum is not perceived as ridiculous by the victim (ATFD 125 III 269, cited above; ATF 118 II 410, cited above). The level compensation for non-pecuniary damage is a question of federal law that this court is free to examine (article 415, paragraphs 1 and 3 and article 447 paragraph 1 of the Code of Criminal Procedures).

Since the outcome depends, to a large extent, on the assessment of the circumstances, the appellate court must intervene in a circumspect manner, particularly when the court of first instance has misused its discretion by basing its decision on considerations other than those established by the applicable provisions, or by failing to take into consideration relevant information, or by establishing a manifestly inequitable level of compensation, by default or excess (ATF 125 III 269, cited above; ATF 188 II 410, cited above).

Nevertheless,

twenty

MINISTRY OF JUSTICE given that this is a question of equity – and not a question of the exercise of discretion in the strict sense, which would limit its power of review to situations of abuse or excess in the exercise of discretion – the court of appeal is free to decide whether the amount awarded takes sufficient account of the severity of the violation or is disproportionate to the intensity of the non-pecuniary damage suffered by the victim (ATF 125 III 269; ATF 123 III 10, point 4c/aa; ATF 118 410, cited above).

(c) In this case, the appellant was found guilty of racial discrimination, for which he has incurred civil liability. The lower court considered that it was difficult to award an association compensation of the order of 10,000 Swiss Francs for non-existent damage. pecuniary because, by definition, moral persons do not have feelings.

Therefore, it reduced the plaintiff's claim and established as compensation a symbolic sum of 1,000 Swiss Francs. This analysis is not arbitrary and the compensation awarded is appropriate. This allegation, as well as the entire ordinary appeal, are dismissed as unfounded.⁵ .(a)The appellant seeks to be relieved of any obligation to pay criminal costs.

(b) The plaintiff is a civil party in a dispute (article 94 of the Code of Criminal Procedure). The costs that civil parties may claim in accordance with article 97 of the Code of Criminal Procedure are awarded according to the principle established by article 163 § 2 of the Code, which states that the rules on expenses apply by analogy.

The right to costs is enshrined in cantonal procedural legislation. According to jurisprudence, civil parties are, in principle, only entitled to costs if the accused has been sentenced or ordered to pay damages (JT 1961 III 9) .The lower court has discretion to determine the level of costs payable to the civil party, the court of cassation only intervenes in that decision in case of manifestly incorrect application of the law or misuse of that discretion, particularly in relation to the level of costs awarded (JT 1965 III 81).

(c) In this specific case, an examination of the file demonstrates that all the necessary findings were met for an order for costs for the expenses incurred in the criminal proceedings. The lower court emphasized that the case was what

twenty-one

MINISTRY OF JUSTICE complex enough to justify the intervention of a lawyer and awarded the Armenian-Swiss Association the amount of 10,000 Swiss Francs for its expenses in the criminal process.

In view of the work carried out by the lawyer, the court did not exceed the limits of its discretion. This allegation, and the entire appeal for reasons of law, must be dismissed as unfounded. II. Appeal for reasons of nullity

1. Alleging the violation of article 411, paragraphs (f), (g), (h) and (i) of the Code of Criminal Procedures, the appellant submits that the judge does not have an adequate factual basis since the court did not take into consideration the documents provided and the testimony of certain historians.

He also mentions that there are doubts about the facts of the case or even an arbitrary evaluation of the evidence in relation to the quotes from certain historical works on the massacre of the Armenians. Finally, he bases his appeal for nullity on the fact that that the court rejected an interlocutory request for additional investigative measures to obtain documents and information aimed at clarifying the Armenian situation in 1915 and determining whether the term "genocide" could be applied to it or not.

These allegations should be dismissed as they relate exclusively to factual issues whose resolution would likely not influence the outcome (Bersier, op.cit., p.78). It is not necessary for courts to act as historians on the issue of genocide. Armenian,

since parliamentary debates demonstrate that its existence is considered proven (see point 2(c) above).

The appeal for reasons of nullity must be dismissed as unfounded. 2. In the final analysis, the appeal is unfounded, both for reasons of nullity and the ordinary appeal. Therefore, it must be dismissed in its entirety. Given the result of the appeal , the appellant must pay the costs of the second instance."

25.

The plaintiff appealed this sentence before the Swiss Federal Court requesting that the sentence be annulled and that he be absolved of all criminal and civil liability. In essence, he argued that, for the purposes of the application of article 261bis § 4 of the Penal Code and to examine the alleged violation of their fundamental rights, the cantonal courts had not sufficiently analyzed whether the factual circumstances had been such as to warrant that the events of 1915 and subsequent years be classified as genocide.

22

MINISTRY OF JUSTICE 26.In a ruling of December 12, 2007 (6B_398/2007), the Swiss Federal Court dismissed the appeal in the following terms

"3.1.Article 261bis § 4 of the Penal Code punishes the conduct of any person who publicly denigrates or discriminates against another person or a group of people on the basis of their race, ethnic origin or religion, in a manner that violates their human dignity, whether verbally, through written material, images, gestures, acts of aggression or by any other means, or who, for the same reasons, denies, openly trivializes or seeks to justify a genocide or some other crime against humanity.

An initial literal and grammatical approach demonstrates that the wording of the law (through the use of the indefinite article "a" genocide) does not expressly refer to any particular historical event. The law, therefore, does not prevent sanctioning the denial of other genocides. different from that perpetrated by the Nazi regime, nor does it explicitly classify the denial of the Armenian genocide as an act of racial discrimination under criminal law.

3.2.Article 261bis § 4 of the Penal Code was adopted when Switzerland acceded to the International Convention on the Elimination of all forms of Racial Discrimination of December 21, 1995 (RS 0.104). The wording initially proposed in the initiative presented by the Federal Council did not make explicit reference to the denial of a genocide (see FF 1992 III 326).

The crime of revisionism, or denial of the Holocaust, was initially intended to be included in the constitutive elements of the crime of dishonoring the memory of a deceased person that appeared in the fourth paragraph of the draft article 261bis of the Penal Code (Memorandum of the Federal Council of December 2 March 1992 concerning Switzerland's accession to the International Convention on the Elimination of All Forms of Racial Discrimination of 1965 and corresponding amendments to criminal legislation; FF 1992 III 265 et seq., esp.

308 et seq.). The memorandum does not contain any specific reference to the events of 1915. During the parliamentary debates, the Legal Affairs Committee of the National Council suggested including the following wording in article 261bis § 4 of the Penal Code “(...) or who for the same reasons seriously trivializes or attempts to excuse genocide or other crimes against humanity”... The French language editor of the Committee, National Councilor Comby, explained that there was a discrepancy between the German and French versions, pointing out that the wording obviously referred to any genocide and not just the Holocaust (BO/CN 1992 II 2675 et seq.).

The National Council, however, adopted the proposal of the aforementioned Committee in its terms (BO/CN 1992 II 2676). Before the Council of States, the proposal of the aforementioned Committee of Legal Affairs to maintain the wording of article 261bis § 4 of the Code Penal law approved by the National Council faced a proposal from Mr.

Küchler, who, however, did not question the phrase “or whoever for the same reasons seriously denies

23

MINISTRY OF JUSTICE trivializes or seeks to justify genocide or other crimes against humanity” (BO/CE (Official Gazette/Council of States) 1993 96; regarding the scope of this proposal, see ATF 123 IV 202, point 3c, p.

208 and Poncet, ibid.). This proposal was adopted without further reference in detail to the denial of the Armenian genocide during the debate. During the process of elimination of differences, the Legal Affairs Committee of the National Council proposed, through Mr. Comby, that the modifications introduced by the Council of States be adopted, with the exception of the fourth paragraph, where the Committee proposed the wording “a genocide”, in order to include any that could occur.

The French-language editor noted that some people had mentioned massacres of Kurds or other peoples, for example Armenians, and that those genocides should be included (BO/CN 1993 I 1075 et seq.). Furthermore, brief related comments were made. with the definition of genocide and how a Turkish citizen would refer to the Armenian tragedy, and it was also noted that the Committee did not intend the provision to apply to a particular genocide, but to all genocides, for example in Bosnia and Herzegovina (BO/CN 1993 I 1077; statement of Ms.

Gredelmeier). The National Council, finally, adopted the following wording for paragraph 4: “...or by other means, violates the human dignity of a person or group of people, due to their race, ethnic origin or religion or who, for the same reasons, denies, seriously trivializes or justifies a genocide” (BO/CN 1993 I 1080).

In subsequent parliamentary proceedings the National Council maintained this position, adopting the wording “a genocide” as a simple editorial modification to the French version, and the National Council finally endorsed the decision of the Council of States without any reference to the denial of the Armenian genocide. (BO/CN 1993 I 1300, 1451; BO/CE 1993 452, 579).

It is clear, therefore, from the aforementioned parliamentary procedures that article 261bis § 4 of the Penal Code does not apply exclusively to the denial of Nazi crimes but also to other genocides.... 3.4. However, these parliamentary procedures do not They can be interpreted to mean that the provision of the criminal legislation in question applies to certain specific genocides that the legislature had in mind when adopting it, as suggested in the judgment under appeal.

3.4.1. The desire to combat denialist and revisionist opinions in relation to the Holocaust was, without a doubt, a central factor in the drafting of article 261bis § 4 of the Penal Code. In jurisprudence, however, the Federal Court has maintained that the denial of the Holocaust objectively constitutes the factual element of the crime established in article 261bis § 4 of the Penal Code, since it concerns a historical fact generally recognized as proven (...ATF 129 IV 95, point 3.4.4., pp.

104 et seq.), despite the fact that the sentence in question does not refer to the historical intention of the legislature. Likewise, many authors have considered the Holocaust as

24

MINISTRY OF JUSTICE a matter of public knowledge for the criminal courts (Vest, Deliktegegen den öffentlichen Frieden, note 93, p.

157), as an incontrovertible historical fact (Rom, op.cit., p.140), or whose classification (genocide) is undoubted (Niggli, Discriminationraciale, note 972, p.259, who simply points out that this genocide was the one that motivated the introduction of the provision in question; for the same purposes see Guyaz, op.

cit.p.305). Only a few voices have referred to the intention of the legislature to recognize it as a historical fact (see, for example, Weder, Schweizerisches Strafgesetzbuch Kommentar (ed. Donatsch), Zurich, 2006, Article 261 bis §4, p.327; Chaix and Bertossa, op.cit.p.184). 3.4.2. The process of determining which genocides the legislator had in mind when he formulated the provision is, furthermore, purposeless in view of the literal interpretation (see point 3.1 above), which clearly shows that the legislator's intention was to favor an open drafting of the law in this sense, unlike the technical "memorial" laws such as those approved in France (Law no.

90-615 of July 13, 1990, known as the "Gayssot Law"; Law no.2001-434 of May 21, 2001, which recognizes human trafficking and slavery as a crime against humanity, known as the "Taubira Law"; Law 2001-70 of January 29, 2001, which recognizes the Armenian genocide of 1915).

The fact that Holocaust denial constitutes a crime according to article 261bis § 4 of the Penal Code therefore derives less from the legislator's specific intention to prohibit denialism and revisionism when he drafted this criminal law provision, than from the observation that there is a broad consensus on this matter, which the legislator undoubtedly took into consideration.

Nor is there, therefore, any reason to determine whether the legislator had or was inspired or guided by that intention in relation to the Armenian genocide (compare Niggli, Rassendiskriminierung, 2nd Edition, Zurich, 2007, notes 1445 et seq., pp. .447 et seq.). In fact, it should be noted in this context that, while certain aspects of the wording motivated heated debates among members of parliament, the classification of the events of 1915 did not provoke any debate in this context, and was finally mentioned only by two speakers when justifying the adoption of a French version of article 261bis § 4 of the Penal Code that would not result in an excessively restrictive interpretation of the text, which was not the case with the German text.

3.4.3. Legal doctrine and the courts have even deduced from the undeniable or indisputable nature of the Holocaust that it is not required to prove it in criminal proceedings (Vest, *ibid.*; Schleiminger, *op.cit.*, article 261bis § 4 of the Penal Code, note 60). Hence, there is no need for the courts to resort to the work of historians in this matter (Chaix and Bertossa, *ibid.*; unreported ruling 6S.698/2001, point 2.1).

Another consequence is that the basis thus determined for the criminalization of Holocaust denial determines the method that courts must adopt when considering the denial of other genocides. The first question that arises is,

25

MINISTRY OF JUSTICE then, if there is a comparable consensus around the events denied by the appellant.

4.The question raised, then, revolves around the facts. It is less related to the determination of whether the massacres and deportations attributed to the Ottoman Empire should be characterized as genocide and more related to the general opinion regarding such characterization, both among the public as within the community of historians.

This is how the position of the Police Court should be understood, which emphasized that its task was not to write history but to determine whether the genocide in question was “known and recognized” or, in fact, “proven” (see the judgment, point II, p.14) before forming an opinion on this factual issue (judgment, point II, p.

17), which constitutes an integral part of the ruling of the Cantonal Court (judgment of the Cantonal Court, point B, p.2).4.1.A conclusion of this nature on the facts is mandatory for the Federal Court...

4.2.As far as the decisive factual question is concerned, the Police Court not only based its opinion on the existence of political declarations of recognition, but also indicated that the opinion of the authorities who have made these declarations has been formed on the based on the opinion of experts (for example, a panel of approximately one hundred historians at the French National Assembly, when it approved the Law of January 29, 2001) or on reports considered thoughtfully argued and documented (European Parliament).

Thus, in addition to relying on the existence of political recognition, this line of argument takes note of the practical existence of a broad consensus in the community, which is reflected in political declarations and which is itself based on a broad consensus. scholar on the classification of the events of 1915 as genocide.

Along the same lines, it can also be noted that during the debate that led to the official recognition of the Armenian genocide by the National Council, reference was made to the international research published under the title *Der Völkermord an den Armeniern und die Shoah* (BO/CN 2003 2017, statement of Mr.

Lang). Finally, the Armenian genocide is one of the classic examples of the literature on international criminal law, and on genocide research (see Niggli, *Rassendiskriminierung*, notes 1418 et seq., p.440, and the numerous references therein cited; see also note 1441, p.

446, and its references). 4.3. To the extent that the briefs presented by the appellant seek to deny the existence of a genocide or the legal characterization of the events of 1915 as genocide – particularly by resorting to the nonexistence of a sentence or decision of an international court or special commission, or to the lack of irrefutable evidence that the facts correspond to the objective and subjective requirements established in article 264 of the Penal Code or the 1948 United Nations Convention, and arguing that until the date have only been officially recognized

26

MINISTRY OF JUSTICE three genocides – are irrelevant to the decision of this case, because it is necessary to establish, first of all, whether there is a sufficiently widespread consensus, especially among historians, to exclude the underlying historical debate on the classification of the events of 1915 as genocide of criminal proceedings related to the application of article 261bis §4 of the Penal Code.

The same can be said to the extent that the appellant accuses the Cantonal Court of having acted arbitrarily by not examining the arguments of annulment put forward in the cantonal appeal in relation to the same facts and investigative measures that the appellant had requested. Therefore, it is unnecessary to analyze their arguments, except to the extent that they relate directly to the existence or establishment of such a consensus.

4.4. The appellant notes that he has requested additional investigative measures to determine the current state of research and the position of historians worldwide on the Armenian question. His writings also seem, at times, to suggest that the appellant believes that there is no unanimity or consensus among States or historians regarding the classification of the events of 1915 as genocide.

However, the appellant's arguments are limited to expressing his own opinion, contrary to that of the cantonal authority. In particular, the appellant does not provide any specific evidence to demonstrate that the consensus identified by the Cantonal Court does not exist, much less that the court's findings are arbitrary.

Without a doubt, the appellant points out that several countries have refused to recognize the existence of the Armenian genocide. On this point it should be highlighted, however, that only 103 of 192 Member States voted in favor of United Nations Resolution 61 /L.53 which condemns Holocaust denial adopted in January 2007.

The mere observation that certain States refuse to declare in the international forum that they condemn the denial of the Holocaust is clearly insufficient to cast doubt on the existence of a general consensus on the genocidal nature of the events in question. Consensus does not imply unanimity.

The choice of certain States to refrain from publicly condemning the existence of a genocide or to vote in favor of a resolution condemning the denial of a genocide may reflect political considerations that are not directly related to those States' assessment of how they should be categorized. certain historical events and, in particular, cannot call into question the existence of consensus on this matter, especially among the academic community.

4.5 The appellant also argues that it would be contradictory for Switzerland to recognize the existence of the Armenian genocide while supporting the creation of a panel of historians within the context of its relationship with Turkey. This, in his opinion, demonstrates that the existence of the genocide does not is established.

However, it cannot be deduced either from the Federal Council's repeated refusal to recognize the Armenian genocide through an official statement or from the perspective

27

MINISTRY OF JUSTICE adopted – that is, the recommendation to the Turkish authorities that an international panel of experts be created – that the conclusion that there is a general consensus on the characterization of the events in question as genocide is arbitrary.

In accordance with the clearly expressed wishes of the Federal Council, its perspective is informed by the interest in urging Turkey to undertake a collective remembrance of its past (BO/CN 2001 168: response of Federal Councilor Deiss to the non-binding motion presented by the Mr.Zisyadis; BO/ CN 2003 2021 et seq.: response of Federal Councilor Calmy-Rey to the non-binding motion presented by Mr.

Vaudroz on the recognition of the Armenian genocide of 1915). This attitude of openness to dialogue cannot be interpreted as a denial of the existence of the genocide and nothing indicates that the support that the Federal Council expressed in 2001 for the idea of creating a international commission of inquiry did not respond to that same attitude.

It cannot be generally deduced that there is sufficient doubt among the community, especially in academia, about the classification of the events of 1915 as genocide, to affirm that the finding of that consensus is arbitrary.4.6.Thus, the appellant has not demonstrated how the Police Court acted arbitrarily in determining that there was widespread consensus, particularly among academics, on the classification of the events of 1915 as genocide.

It follows, then, that the cantonal authorities acted correctly in preventing the appellant from

open a historical and legal debate on this issue.⁵ With regard to the subjective element, the crime established in article 261bis §§ 1 and 4 of the Penal Code requires intentionality of the conduct.

In the rulings ATF 123 IV 202, point 4c, p.210 and 124 IV 121, point 2b, p.125, the Federal Court held that said intentional conduct must be motivated by considerations of racial discrimination. This issue, which has given rise to debate in legal doctrine, was later left open in the rulings ATF 126 IV 20, point 1d, especially on p.

26, and 127 IV 203, point 3, p.206. It can also be left open in the present case, as will be seen below. 5.1. Regarding intentionality, the Criminal Court found that the appellant, a doctor of Law, politician and self-taught writer and historian had acted with full knowledge of the consequences, stating that he would never change his position even if a neutral panel one day concluded that the Armenian genocide had, in fact, happened.

These findings regarding the appellant's internal will to deny genocide relate to questions of fact (see ATF 110 IV 22, point 2, 77, point 1c, 109 IV 47, point 1, 104 IV 36, point 1 and references)., which implies that they bind the Federal Court (section 105(1) of the Federal Court Act).

Furthermore, the appellant has not raised any issue in that regard. He has not sought to demonstrate that the factual findings were arbitrary or the result of a violation of his rights under the Constitution or the Convention, so there is no need to take consideration of this question (section 106(2) of the Federal Court Act).

It's not clear,

28

MINISTRY OF JUSTICE in any case, how could the cantonal authorities, who inferred the appellant's intentions from external considerations (cf. ATF 130 IV 58, point 8.4, p.62) have been able to ignore the concept of intentionality established by federal legislation? in relation to this issue.

5.2As for the appellant's motives, the Criminal Court found that they appeared to be racist and nationalist in nature and did not contribute to the historical debate, placing particular emphasis on the fact that the appellant had characterized the Armenians as aggressors of the Turkish people and who had claimed to be a follower of TalaatPasha who, together with his brothers, was the historical initiator and driving force of the Armenian genocide (Criminal Court ruling, point II, pp.

17 et seq.). It has not been disputed in the present case that the Armenian community constitutes a people or, at least, an ethnic group (regarding this concept, see Niggli, Rassendiskriminierung, 2nd ed., note 653, p.208)., which identifies itself through its history, marked by the events of 1915.

It follows, then, that the denial of the Armenian genocide – or the representation of the Armenian people as the aggressor, as suggested by the appellant – in itself constitutes a threat to the

identity of the members of this community (Schleiminger, op.cit.Article 261 bis of the Penal Code, note 65 and reference to Niggli).

The Criminal Court, finding that there were grounds related to racism, also ruled out that the position taken by the appellant belonged to the historical debate. These factual findings, which the appellant did not dispute in any way (section 106(2) of the Law of the Federal Court) are binding on the Criminal Court (section 105(1) of the Federal Court Act).

These provide sufficient evidence of the existence of motives that, beyond nationalism, can only be considered racial or ethnic discrimination. Therefore, it is unnecessary in the present case to resolve the doctrinal debate mentioned in point 6 above. In any case, the appellant has not raised any claims regarding the application of federal law in relation to this issue.

6.Additionally, the appellant seeks support in the freedom of expression enshrined in article 10 of the European Convention on Human Rights, in relation to the interpretation by the cantonal authorities of article 261bis §4 of the Penal Code. However, it appears from the documents of the interrogation of the appellant by the prosecutor of Winerthur/Unterland (July 23, 2005) that by making his public statements, particularly in Glattbrugg, the appellant intended to "help the Swiss people and the National Council" to rectify their mistake" (that is, the recognition of the Armenian genocide).

Furthermore, the appellant was aware that genocide denial was a crime and expressed that he would never change his opinion, even if a neutral panel were to one day conclude that the Armenian genocide had, in fact, taken place (Criminal Court ruling, point II, p. 17).It can be inferred from these aspects that the appellant was not unaware that describing the Armenian genocide as an "international lie" and expressly denying that the events of 1915 had the character of genocide did so.

29

MINISTRY OF JUSTICE susceptible to criminal liability in Switzerland.

The appellant cannot, therefore, draw any favorable conclusion from the lack of predictability that he vita. These considerations, furthermore, support the conclusion that the appellant, in essence, seeks, by means of provocation, that the authorities Swiss judicial authorities confirm his statement, to the detriment of the members of the Armenian community, who consider this issue central to the definition of their identity.

The sentence against the appellant seeks, then, to protect the human dignity of the members of the Armenian community, who identify themselves through the memory of the genocide of 1915. The criminalization of the denial of the genocide is, finally, a means for prevention of genocide for the purposes of article I of the Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature in New York on December 9, 1948 and approved by the Federal Assembly on March 9, 2000 (RS 0.311 .eleven).

7.For completeness, it should be noted that the appellant has not denied the existence of massacres and deportations (see point A above), which cannot be classified, even in an exercise of

moderation, as anything other than crimes against humanity (Niggli, Discriminationraciale, note 976, p.

262).Justifying these crimes, even by referring to the law of war or supposed security considerations, in itself will violate article 261bis §4 of the Penal Code, so that even from this perspective, regardless of whether these acts constituted or not a genocide, the appellant's conviction based on article 261bis §4 of the Penal Code is neither arbitrary nor violates federal legislation."

d.

The 2008 criminal proceedings against the plaintiff in Türkiye

27.In 2008, the applicant was arrested and charged in connection with the procedure known as Ergenekon (short descriptions of which can be found in NedimŞener v. Turkey, no.38270/11, §6, July 8, 2014; Şik v.

Turkey, no.53413/11, §10, July 8, 2014; Tekin v.Turkey (dec.), no.3501/09, §§3-16, dated November 18, 2014; and Karadağ v. Turkey (dec.), no.36588/09, §§3-16 of November 18, 2014).On August 5, 2013, the Istanbul Court of Justice sentenced him, along with other defendants, to life imprisonment.

An appeal was filed against the sentence and the matter is now pending before the Court of Cassation of Turkey (see Tekin, §17, and Karadağ, §17, both cited above, as well as Yıldırım v. Turkey (dec.), no. .50693/10, §14, of March 17, 2015). The applicant was released from preventive detention in March 2014.

E.Other material presented by the participants in the process

30

MINISTRY OF JUSTICE 28.In their third-party interventions, the Turkish Human Rights Association, the Truth, Memory and Justice Center and the International Institute for Genocide and Human Rights Studies referred to the online versions of two newspaper articles Turks.

The first, published in the Vatan newspaper on July 26, 2007, reported that after the murder of HrantDink, the applicant had sent an open letter to the Armenian Patriarchate of Istanbul in which he denounced the murder as a provocation by the United States of America. against Turkey and invited the Patriarchate to openly acknowledge that the United States of America had instigated it and thus, as leader of the Armenians in Turkey, set an example of how to defend the unity of the Turkish nation.

The second article, published in the newspaper Milliyet on May 19, 2007, did not mention the applicant, but instead described anonymous threats sent to Armenian schools in Istanbul related to the Armenian position regarding the events of 1915 and the following years. The article added that, in relation to these threats, the provincial director of education had sought to provide assurances to the Armenians and had asked the authorities to

will take preventive measures.

II.APPLICABLE DOMESTIC LEGISLATION

A.The Constitution of the Swiss Confederation

29.Article 7 of the Constitution of the Swiss Confederation of 1999, which replaced the Constitution of 1874, is entitled "Human Dignity" and states: "Human dignity must be respected and protected."

30.Article 16 of the Constitution, entitled "Freedom of Expression and Information," establishes, as applicable:

"1.

Freedom of expression and information are guaranteed. 2.Everyone has the right to form, express and share their opinions..."

31.Article 36 of the Constitution, entitled "Restrictions on Fundamental Rights", establishes: "1.Restrictions on fundamental rights must have a legal basis.

Significant restrictions must be based on federal law. The above will not apply in cases of serious and immediate danger when there is no other possible course of action.

2.Restrictions on fundamental rights must be justified by the public interest or the protection of the rights of others.

3.Any restriction on fundamental rights must be proportional.4.The essence of fundamental rights is inviolable."

31

MINISTRY OF JUSTICE B.Article 261bis of the Swiss Penal Code

1.Text of the article

32.Article 261bis of the Swiss Penal Code, entitled "Racial Discrimination", was adopted on June 18, 1993.

It is located in the chapter of the Code that deals with crimes against public peace (paix Pública). It came into force on January 1, 1995 and establishes:

"Any person who publicly incites hatred or discrimination against another person or group of people based on their race, ethnic origin or religion;

any person who publicly disseminates an ideology aimed at systematically denigrating or defaming members of a race, ethnic or religious group; any person who, with the same objective, organizes, promotes or participates in propaganda campaigns;

any person who publicly denigrates or discriminates against another person or group of people on the basis of their race, ethnic origin or religion in violation of human dignity, whether verbally or by written means, images, gestures, acts of aggression or by any other means , or any person who for the same reasons denies, seriously trivializes or seeks to justify genocide or any other crime against humanity;

any person who refuses to provide services to another person or group of persons on the basis of race, ethnic origin or religion when such services are directed to the public in

general;
will be punished with imprisonment of up to three years or a fine." 2.

Legislative history

33.The initiative to adopt the article came in the context of Switzerland's accession to the International Convention on the Elimination of All Forms of Racial Discrimination (CEDR – see paragraph 62 below) of 1965. In a memorandum dated March 2, 1992 and published in FF 1992 III 265-340, referring to the Swiss accession to this Convention and the consequent need to review its criminal legislation, the Swiss government considered the requirements arising from it, in particular from article 4 (see paragraph 62 below) and opined, on page 297, that with the exception of prohibiting discrimination by authorities (prohibited by article 4(c) of the CEDR), which was contemplated by article 4 of the Swiss Constitution of 1874, then in force, Swiss laws did not comply, or partially complied with the requirements of the CEDR.

34.The Swiss government referred, on pages 298-301, to the possible conflict between, on the one hand, the imposition of criminal sanctions for racist propaganda and ideologies aimed at defaming

32

MINISTRY OF JUSTICE or discredit parts of the population and, on the other, the constitutional rights to freedom of expression and association.

The government noted that the CEDR sought to resolve this conflict through the clause "taking into account the principles enshrined in the Universal Declaration of Human Rights" included in article 4. Swiss doctrine was largely of the opinion that these rights were of equal value and deserved equal protection.

The solution, therefore, was to balance them. Racial discrimination, being an attack on human dignity, violated the rights to personal liberty and equality before the law, and was prohibited by public international law. On the other hand, Rights to freedom of expression and association were important for political debate in a democratic society and should not be underestimated.

While the essence of these rights was not affected by the proposed criminalization of racial discrimination, these rights did prevent the criminalization of all types of expression contemplated by article 4 of the CEDR. In some cases this could lead, for example , to unjustified restrictions in sociological or ethnological studies.

The emphasis, then, had to be placed on the incitement to racial hatred and discrimination, contempt and denigration, which were the main and authentic harmful elements of the theories of racial superiority that led to racial hatred and xenophobia. This article allowed us to take into consideration fundamental freedoms when adopting criminal legislation aimed at ensuring compliance with the CEDR.

The special place occupied by the rights of freedom of expression and association in Western democracies in general and in Swiss semi-direct democracy in particular

largely justified this solution. It was then necessary to present a reservation to article 4 of the CEDR (see paragraph 63 below).

35.The proposed text of what would later become article 261 bis §4 was (*ibid.*, p.304): "Any person who publicly violates the human dignity of another person or group of people because of their race, ethnic origin or religion, whether verbally, in writing, in images, gestures, acts of aggression or by any other means, or any person who for the same reasons dishonors the memory of a deceased person... will be punished with imprisonment or a fine."

36.

According to the Swiss government memorandum (pp.308-09):

"Disgracing the memory of a deceased person has been included in the definition of the crime as a measure to counter the historical falsifications of revisionists whose pseudo-scientific works spread theories known as "the Auschwitz lie," which maintains that the Holocaust never happened. and that the gas chambers did not exist.

They also maintain that the number of Jews murdered was much less than six million and that, in addition, the Jews took economic and financial advantages from the Holocaust. The falsification of history cannot be considered a mere dispute between historians. It often hides a way of racist propaganda that is particularly dangerous when it is directed at young people during their formative period."

33

MINISTRY OF JUSTICE 37.

In subsequent debates in the Swiss Federal Parliament, a member of the National Council emphasized that neither the CEDR nor the new provision were limited to the Holocaust, but were concerned with combating xenophobia, racism, intolerance and anti-Semitism in general. (BO/CN 1992 VI 2650-79, p.

2654).The editor of the parliamentary committee in question referred to a discrepancy between the German version and the French version of the text and clarified, in the National Council meeting on December 17, 1992, that the intention was to refer "to all forms of genocide by mentioning the most representative example, that is, the Jewish Holocaust, but it is clear that all crimes of this nature must be condemned.

For this reason, the expression "any genocide" (*toutgénocide*) should be used instead of "genocide" (*le génocide*). (*ibid.*p.2675).In the following debates, on June 8, 1993, the drafter of the relevant committee of the National Council clarified the scope of what, thereafter, became article 261bis §4 of the Code Criminal, as follows (BO/CN 1993 III 1075-80, pp.

1075-76):

"The committee has considered the various points of disagreement between the Council of States and the National Council and has, finally, proposed that you... adopt the modifications presented by the Council of States, with the exception of the fourth paragraph, relating to the

genocide, in which the committee proposes to use the term "a genocide", to include any genocide that could, unfortunately, be committed.

Several speakers have referred to the massacres of the Kurds (specifically those committed by the former Iraqi regime) and other peoples, such as the Armenians. All of these examples of genocide must be considered. As for the criteria to be taken into account, there is a United Nations Convention to Prevent and Punish the Crime of Genocide.

It is necessary to refer to this international convention for the definition of the concept of genocide."

38.The national advisor Mrs. Grendelmeier confirmed this position in these terms (*ibid.p.1077*):

"The question of what constitutes a genocide was also discussed. It was mentioned that a Turkish citizen would probably not use the term "genocide" to define the dramatic events that affected the Armenian people.

The committee considered that using the term "genocide", genocide as a whole, instead of "the" or "a" genocide in particular, should become punishable everywhere, for example also in Bosnia and Herzegovina. When "A people are not only denied their right to exist, but are also driven, in practical terms, to extinction, this constitutes genocide and should be a crime." 39.

Article 261bis §4 was adopted by both chambers of the Swiss Federal Parliament on June 18, 1994, by 114 votes to 13 in the National Council and by 34 votes in favor and 0 against in the Council of States. However, having been questioned, he could only enter

3. 4

MINISTRY OF JUSTICE came into force once the Swiss citizens had confirmed it through a referendum (FF 1993 II 868-69).

The referendum was held on September 25, 1994. Turnout was 45.9%. 54.7% of the votes were in favor of the article, with 1,132,662 votes in favor and 939,975 votes against (Office fédéral de la statistique, Miroirstatistique de la Suisse, 1996, pp.378 et seq.). 40.Since the adoption of article 261bis of the Penal Code, sixteen proposals have been submitted to repeal it or restrict its scope.

All have been rejected by the Swiss Parliament.3.Application in relation to statements referring to the events of 1915 and subsequent years, before the applicant's case 41.Following the presentation to the Swiss Parliament of two petitions, the first, presented by Armenians in September 1995 and requesting recognition of the genocide character of the events of 1915 and the following years and, the second, presented by Turks in January 1996 and requesting the denial of recognition of said events as genocide, the Swiss Association- In April 1997, Armenia presented a complaint under the terms of article 261bis §4 against some of the signatories of the Turkish request.

42.On 16 July 1998, the Bern-Laupen District Court dismissed the action on the grounds that an association could not be a victim, unlike an individual, of acts

contrary to article 261bis §4. The Supreme Court of the Canton of Bern confirmed that ruling after the appeal filed on February 10, 1999 by the Association.

43. As a reaction to this ruling, on April 18, 2000, two Swiss citizens of Armenian ethnic origin filed a complaint under the terms of article 261bis §4 against twelve signatories of the Turkish request.⁴⁴ By ruling of September 14, 2001 The Bern-Laupen District Court acquitted the defendants, pointing out, among other things, that, unlike the Austrian and French laws on denialism, which only referred to the Holocaust, article 261bis §4 was not limited to one event. specific history.

However, having reviewed in some detail the position relating to the events of 1915 and subsequent years, the Court had decided to leave open the question of whether or not they qualified as "a genocide" in the terms of that article, while found that the accused should be acquitted in any case for failing to meet the mens rea requirements: since they had grown up and received their education in Turkey, they had denied that the events of 1915 and later constituted genocide due to the influence of the Turkish educational system and Therefore, without racist motivation.

35

MINISTRY OF JUSTICE 45. The two people who had filed the complaint appealed the ruling before the Supreme Court of the Canton of Bern, which dismissed the appeal by ruling of April 16, 2002, establishing that a private prosecutor could not initiate proceedings under the protection of the article 261bis §4 since this only protected public peace, not private interests, since the denial of a genocide could not, by itself, cause harm to a person, regardless of their personal history.

46. The subsequent appeal to the Swiss Federal Court was dismissed by ruling of November 7, 2002 (ATF 129 IV 95). The Court determined, among other things, that the crime established by article 261bis §4 was public order and only It protected individual rights indirectly.

Therefore, individual victims could not be part of the proceedings against the alleged perpetrator. Furthermore, the simple denial, serious minimization or attempts to justify a genocide within the scope of article 261bis §4 were not acts of racial discrimination. in the strict sense of the term.

While such statements could affect individuals, the damage, even serious, remained indirect.C. Other relevant provisions of the Swiss Penal Code

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

"Anyone who commits any of the following acts with the intention of destroying, in whole or in part, a national, racial, religious or ethnic group, will be punished with life imprisonment or a custodial sentence of at least ten years:

- (a) Deprive members of the group of life or cause them serious physical or mental harm;
- (b) Imposing on members of the group living conditions designed to cause their physical destruction, in whole or in part;

- (c) Order or take measures intended to prevent births within the group;
- (d) Forcibly transferring or causing the transfer of children from the group to another group."

d.

Non-binding motion (postulate) no.02.3069

48.On March 18, 2002, the national councilor, Mr. Jean-Claude Vaudroz, presented to the National Council a non-binding motion (postulate) aimed at recognizing the events of 1915 and subsequent years as genocide. When the duration of the assignment of Mr.

Vaudroz, on December 8, 2003, the proposal was taken up by Mr. Dominique de Buman. In favor of the motion it was said that the extermination of Armenians in the Ottoman Empire during the First World War had served as a reference in the adoption of the word "genocide" by Raphael Lemkin and that the rules incorporated in the subsequent convention clearly corresponded to the process of destruction suffered by the Armenian people.

To the

36

MINISTRY OF JUSTICE recognize it as a genocide, Switzerland would do justice to the victims, survivors and their descendants, preventing the commission of other crimes against humanity, and demonstrating its commitment to human rights, respect for minorities and international criminal justice .

Reference was made to other organizations that had recognized these events as genocide and the hope was expressed that the adoption of this motion would contribute to the establishment of a lasting peace between the Turks and the Armenians, which could only be based on a common understanding corresponding with historical truth.

49.On May 15, 2002, the Swiss Government expressed its opposition to the proposal, pointing out that, although on several occasions it had expressed its rejection of the tragic massacres and mass deportations that caused many victims among the Armenian population of the Ottoman Empire, its opinion was that this question corresponded to historical research.

He went on to say that, since the matter was related to a painful historical episode, it was the countries affected by it that had to make the greatest efforts to resolve it. Swiss foreign policy was focused on achieving reconciliation between Turkey and Armenia through political dialogue established in 2000 and focused mainly on human rights.

The adoption of the motion could put at risk the regular official dialogue that had been established. Although the promoters of the motion sought that it contribute to a lasting peace between Turkey and Armenia by directing a message of justice to the Armenian victims, its acceptance perfectly It could have the opposite result and increase the emotional baggage that already weighed on the relations between these two countries.

50.On December 16, 2003, after a flat debate, the National Council adopted the motion by 107 votes in favor, 67 against and 11 abstentions. The motion was numbered 02.3069 and reads:

"The National Council recognizes the Armenian genocide of 1915. Requests the Federal Council to take note and communicate its position through the usual diplomatic channels."

AND.

The Swiss Federal Court Law of 2005

51.Section 106(2) of the Swiss Federal Court Act 2005 states that the Federal Courts must not examine whether a violation of fundamental rights or cantonal or inter-cantonal law has been committed unless the appellant has raised and argued appropriately this question.

III.RELEVANT INTERNATIONAL AND EUROPEAN LAW

A.General International Law

1.Related to genocide

37

MINISTRY OF JUSTICE 52.The Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) (78 United Nations Treaty Series (UNTS) 277) was adopted at the General Assembly of the United Nations (UN) on December 9, 1948 and entered into force on January 12, 1951.

Switzerland acceded to the Convention on September 7, 2000, entering into force on December 6 of the same year (2121 UNTS 282). The relevant provisions establish:

"ARTICLE I

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

ARTICLE II In this Convention, genocide means any of the following acts, perpetrated with the intention of destroying, in whole or in part, a national, ethnic, racial or religious group, as such:

- a) Killing of group members;
- b) Serious injury to the physical or mental integrity of the members of the group;
- c) Intentional subjection of the members of the group to conditions of existence that will lead to their physical destruction, total or partial;
- d) Measures aimed at preventing births within the group;
- e) Forced transfer of children from the group to another group.

ARTICLE III The following acts will be punished:

- a) Genocide;
- b) The association to commit genocide;
- c) Direct and public incitement to commit genocide;
- d) The attempted genocide;
- e) Complicity in genocide.... ARTICLE V The Contracting Parties undertake to adopt, in accordance with their respective constitutions, the legislative measures necessary to ensure the application of the provisions of this Convention, and especially to

establish effective criminal sanctions to punish persons guilty of genocide or any other of the acts listed in Article III.

38

MINISTRY OF JUSTICE ARTICLE VI

Persons accused of genocide or of any of the acts enumerated in Article III shall be tried by a competent court of the State in whose territory the act was committed, or before the international criminal court that is competent with respect to those of the Contracting Parties that have recognized their jurisdiction.

... ARTICLE IX Disputes between the Contracting Parties relating to the interpretation, application or execution of this Convention, including those relating to the responsibility of a State in matters of genocide or in matters of any of the other acts enumerated in Article III , will be submitted to the International Court of Justice at the request of one of the parties to the controversy." 53.

Article 6 of the Statute of the International Military Tribunal, annexed to the Agreement to Prosecute and Punish Major War Criminals of the European Axis ("the London Agreement") of August 8, 1945 (82 UNTS 279) refers to crimes against peace, war crimes and crimes against humanity.

In the relevant part, it states:

"Any of the following acts are crimes that are subject to the jurisdiction of the Court and for which there will be personal responsibility:

... (c) Crimes against humanity: namely, murder, extermination, enslavement, deportation and other inhuman acts committed against any civilian population, before or during war, or persecution on political, racial or religious grounds in execution of, or in relation to, any crime subject to the jurisdiction of the Court, whether or not it is a violation of national law in the country where it is committed." 54.

The Rome Statute of the International Criminal Court ("the Rome Statute" and the "ICC") (2187 UNTS 3) was adopted on July 17, 1998, Switzerland ratified it on October 12, 2001 (2187 UNTS 6) .Entered into force on July 1, 2002.In its relevant provisions it establishes:

"Article 5.Crimes under the jurisdiction of the Court 1.

The jurisdiction of the Court will be limited to the most serious crimes of significance for the international community as a whole. The Court will have

39

MINISTRY OF JUSTICE jurisdiction, in accordance with this Statute, with respect to the following crimes:

- (a) The crime of genocide;
- (b) Crimes against humanity;
- (c) War crimes;
- (d) The crime of aggression; ...Article 6.

Genocide. For the purposes of this Statute, "genocide" means any of the acts mentioned below, perpetrated with the intention of destroying, in whole or in part, a national, ethnic, racial or religious group as such:

- (a) Killing of group members;
- (b) Serious injury to the physical or mental integrity of the members of the group;
- (c) Intentional subjection of the group to conditions of existence that will lead to its physical destruction, total or partial;
- (d) Measures intended to prevent births within the group;
- (e) Forcible transfer of children from the group to another group.

Article 7.Crimes against humanity

1. For the purposes of this Statute, "crime against humanity" shall mean any of the following acts when committed as part of a widespread or systematic attack against a civilian population and with knowledge of such attack:

- (a) Murder;
- (b) Extermination;
- (c) Slavery;
- (d) Deportation or forced transfer of the population;
- (e) Imprisonment or serious deprivation of physical liberty in violation of fundamental norms of international law;
- (f) Torture;
- (g) Rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization or any other form of sexual violence of comparable severity;
- (h) Persecution of a group or community with its own identity based on political, racial, national, ethnic, cultural, religious,

40

MINISTRY OF JUSTICE gender as defined in paragraph 3, or other grounds universally recognized as unacceptable under international law, in connection with any act mentioned in this paragraph or with any crime within the jurisdiction of the Court;

- (i) Forced disappearance of people;
- (j) The crime of apartheid;
- (k) Other inhuman acts of a similar nature that intentionally cause great suffering or seriously threaten physical integrity or mental or physical health.

..."

55. In its judgment dated September 2, 1998, in The Prosecutor v. Akayesu (no.ICTR-96-4-T), Trial Chamber I of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Violations serious violations of international humanitarian law committed in the territory of Rwanda and of Rwandan citizens responsible for genocide and other violations of that nature committed in the territory of neighboring States between January 1 and December 31, 1994 (the "TIR") highlighted the defining characteristic of the crime of genocide:

"498.

Genocide is distinguished from other crimes in that it embodies a special intention or dolusspecialis. The special intention of a crime is the specific intention, necessary as a constitutive element of the crime, which requires that the perpetrator clearly seek to carry out the

act of which he is accused.

Thus, the special intention of the crime of genocide resides in “the intention to destroy, in whole or in part, a national, ethnic, racial or religious group as such.”⁵⁶ The Court also elaborated on the crime of genocide in relation to others. crimes established by its Statute (cumulative charges):

“469.

Taking into consideration the Statute, the Chamber considers that the crimes contemplated therein – genocide, crimes against humanity and violations of Article 3 common to the Geneva Conventions and Additional Protocol II – have different elements and even seek to protect different interests... Therefore, it is legitimate to make accusations for these crimes regarding the same facts.

It may additionally be necessary, as the case may be, to sentence for more than one of these crimes to reflect which crimes a defendant committed. If, for example, a general ordered that all prisoners of war of a particular ethnic group be murdered, with the intention of eliminating said group, this would constitute both genocide and a violation of common article 3, although it does not necessarily constitute a crime against humanity.

Convictions for genocide and violations of Common Article 3 would adequately reflect that general's conduct.⁴¹

MINISTRY OF JUSTICE 470. On the contrary, the Chamber does not consider that the crimes of genocide, crimes against humanity or violations of Article 3 common to the Geneva Conventions and Additional Protocol II are each a less serious form of crime than the other. commission of the same crime.

The TIR Statute does not establish a normative hierarchy, but rather presents the three crimes as being of equal magnitude. While genocide could be considered the most serious crime, the Statute does not provide any justification for understanding that crimes against humanity or violations to common article 3 and Additional Protocol II are always alternative charges to genocide and, therefore, less serious crimes.

As has been said, and it is a related point, these crimes have different constitutive elements. Again, this consideration makes it permissible for multiple sentences to be handed down for these crimes related to the same facts.”

57.The Court held the following regarding the crime of public and direct incitement to genocide (without footnotes):

“557.

The “direct” characteristic of the crime of incitement implies that it takes a direct form and that it specifically provokes another to become involved in the commission of a crime and that more than mere vague or indirect suggestions is required for direct incitement to exist. civil law systems, “provocation,” which is the equivalent of incitement, is considered direct when its purpose is to cause the commission of a particular crime.

The prosecution must prove definitive causality between the act classified as incitement, or provocation, and a particular crime. However, the Chamber is of the opinion that the requirement that the incitement be "direct" must be analyzed in light of its cultural and linguistic content. In fact, a certain speech may be perceived as "direct" in one country, but not in another, depending on the audience.

For completeness, the Chamber recalls that incitement can be direct and, even so, implicit. Thus, during the drafting of the Genocide Convention, the Polish leader pointed out that it was enough to skillfully manipulate the psychology of the masses by raising suspicions about certain groups, insinuating that they are responsible for certain economic or other difficulties, to create an atmosphere favorable to the commission of the crime.

558.The Chamber will therefore consider on a casuist basis whether, given the culture of Rwanda and the specific circumstances of this case, the acts of incitement can be classified as direct or not, focusing primarily on the question of whether the persons to whom the message was addressed they immediately grasped the implications.

559.In view of the above, it can be noted in the final analysis that in any legal system, direct and public incitement must be defined... as direct provocation, whether through speeches, shouts or threats made in public places or meetings, or at through the sale, distribution, offer or display of written or printed material in

42

MINISTRY OF JUSTICE public places or meetings or through the public display of posters, or through any other means of audiovisual communication." 58.

In its judgment dated 28 November 2007, in Nahimana et al v. the Indictment (no.ICTR-99-52-A), the ICTR Court of Appeal stated the following with respect to the crime of incitement to commit genocide (without footnotes):

"692.The Court of Appeal considers that there is a difference between hate speech in general (or incitement to discrimination or violence) and direct and public incitement to commit genocide.

Direct incitement to commit genocide implies that the speech is a direct call to commit an act (of genocide); must be more than a vague or indirect suggestion.In most cases, public and direct incitement to genocide may be preceded or accompanied by hate speech, but only public and direct incitement to genocide (such as public incitement) is prohibited. and direct to commit the crime of genocide).

The Preparatory Works of the Genocide Convention confirm this conclusion. 693.The Court of Appeals, therefore, concludes that when an accused is indicted (for public and direct incitement to genocide), he cannot be held responsible for hate speech that has not directly called for the commission of genocide.

The Court of Appeal is also of the opinion that, to the extent that not all hate speech constitutes direct incitement to genocide, the jurisprudence on

"incitement to hatred, discrimination or violence is not directly applicable to determine what constitutes direct incitement to genocide..."

59.

In its judgment dated February 26, 2007 (Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, Reports of the ICJ 2007, p.43), the International Court of Justice (the "ICJ") noted the following: "(8) The question of the intention to commit genocide.

186. The Court notes that genocide, as defined in Article II of the Convention, comprises "acts" and "intentions". It is well established that the acts (a) Murder of members of the group;

- (b) Causing serious harm, physical or mental, to members of the group;
- (c) Deliberately impose on the group living conditions designed to cause its total or partial destruction;
- (d) Impose measures to prevent births within the group; (and)
- (e) Forcibly moving children from one group to another group

43

MINISTRY OF JUSTICE They include mental elements.

The murder must be intentional, as must causing serious physical or mental harm. The mental elements are explicitly evidenced in paragraphs (c) and (d) of Article II through the use of the words "impose" and "cause harm." ; Forced displacement also requires deliberate and intentional acts.

The acts, in the words of the ILC, are by their very nature conscious, intentional or volitional (Commentary on Article 17 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind, ILC Report 1996, Yearbook of the International Law Commission, 1996, Vol .II, PartTwo, p.44, para.

5).187.In addition to these mental elements, Article II requires an additional mental element. It requires that the "intention to destroy, in whole or in part... the (protected) group, as such, be demonstrated." It is not enough to demonstrate, for example, in the terms of subsection (a), that murders of members of the group have occurred.

Specific intent must also be demonstrated, and is defined very concretely. It is frequently referred to as special or specific intent or dolusspecialis; in this Judgment it will often be called "specific intention (dolusspecialis). 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 intention.

Something more is needed.The acts mentioned in Article II must be committed with the intention of destroying the group as such, in whole or in part.The words "as such" emphasize the intention to eliminate the protected group.188.The specificity of the intention and its particular requirements are highlighted when genocide is put in the context of other related crimes, particularly crimes against humanity and persecution, as the Chamber of the

International Criminal Tribunal for the former Yugoslavia (hereinafter "ICT" or "the Tribunal") in the Kupreškić et al case:

"The mensrea requirement necessary for indictment is higher than for ordinary crimes against humanity, but lower than for genocide.

In this context, the Chamber wishes to emphasize that persecution, as a crime against humanity, is a crime of the same kind as genocide. Both persecution and genocide are crimes committed against persons who belong to a particular group and to whom it is attacked precisely because of that belonging.

In both categories, what matters is the discriminatory intention: attacking people because of their ethnic, racial or religious characteristics (as well as, in the case of persecution, because of their political affiliation). While in the case of persecution discriminatory intent can manifest itself in multiple inhuman ways and in a variety of acts, including murder, in the case of genocide that intent must be

44

MINISTRY OF JUSTICE accompanied by the intention to destroy, in whole or in part, the group to which the victims of genocide belong.

Thus, it can be said, from the perspective of mens rea, that genocide is the most extreme and inhumane form of persecution. To put it another way, when persecution escalates to the extreme form of voluntary and deliberate acts planned to destroy a group or part of a group, the persecution can be said to constitute genocide." (IT-95-16-T, Judgment, January 14, 2000, para.

636.)" 60.In the same ruling, the ICJ founded the findings of fact that led it to conclude that the Srebrenica massacre had constituted a genocide, mainly in those (sic) of the International Tribunal for the Prosecution of Presumed Responsible for Grave violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 ("the ICTY"), despite the abundance of other materials that had been presented to it (paragraphs 212-24 and 278-97 of the judgment).

61.In the judgment dated February 3, 2015 (Application of the Convention to Prevent and Punish the Crime of Genocide (Croatia v. Serbia) (<http://icj-cij.org/docket/files/118/18422.pdf> last consulted on June 5, 2015), the ICJ, having examined numerous oral and written evidence presented by the parties, and taking particularly into consideration the factual findings of the ICTY, determined that a "pattern of conduct" had been presented " by the Yugoslav People's Army and Serbian forces in their actions against the Croats (paragraphs 407-16 of the judgment).

However, taking into consideration the context and the opportunity that these forces had to commit acts of violence, the court was not persuaded that the only reasonable conclusion that could be drawn from this pattern of conduct was the intention to destroy, in whole or in part. party, to the Croatian group, and that the acts constituting the crime of genocide as defined in article II (a) and (b) of the Genocide Convention (see paragraph 52 above) had been committed by the Yugoslav National Army and Serbian forces with the specific intent that would be necessary to characterize those acts as genocide.

On this basis, the court concluded that Croatia had not proven its claim that genocide had been committed (paragraphs 417-41 of the judgment). The court reached the same conclusion regarding Serbia's counterclaim that the acts committed by Croatia against the Serbian population of Krajina would have constituted genocide: it was not found proven that there had been a specific genocidal intention (*dolusspecialis*) (paragraphs 500-15 of the judgment).

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

Four. Five

MINISTRY OF JUSTICE 62.The International Convention on the Elimination of All Forms of Racial Discrimination (the "CEDR") (660 UNTS 195) was adopted by the United Nations General Assembly on December 21, 1965 and opened for signature on March 7, 1966.

It entered into force on January 4, 1969. Switzerland acceded to it on November 29, 1994, with effect from December 29, 1994 (1841 UNTS 337). In its relevant provisions it establishes:

"Article 1 1. In this Convention the expression "racial discrimination" shall denote any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin that has the purpose or result of nullifying or impairing the recognition , enjoyment or exercise, under conditions of equality, of human rights and fundamental freedoms in the political, economic, social, cultural or any other sphere of public life.

... Article 2 1.The States Parties condemn racial discrimination and undertake to pursue, by all appropriate means and without delay, a policy aimed at eliminating racial discrimination in all its forms and promoting understanding between all races, and with such object: ... d) Each State Party shall prohibit and cease by all appropriate means, including, if circumstances so require, legislative measures, racial discrimination practiced by individuals, groups or organizations; ... Article 4 The States Parties condemn all propaganda and all organizations that are inspired by ideas or theories based on the superiority of a race or a group of people of a certain color or ethnic origin, or that seek to justify or promote hatred racial discrimination and racial discrimination, whatever its form, and undertake to take immediate and positive measures aimed at eliminating any incitement to or acts of such discrimination, and, to that end, taking due account of the principles embodied in the Universal Declaration of Human Rights, as well as the rights expressly stated in Article 5 of this Convention, will take, among others, the following measures:

46

MINISTRY OF JUSTICE a) They will declare as an act punishable by law any dissemination of ideas based on racial superiority or hatred, any incitement to racial discrimination, as well as any act of violence or any incitement to commit such acts against any race. or group of people of another color or ethnic origin, and any assistance to racist activities, including their financing; b) Declare illegal and prohibit organizations, as well as organized propaganda activities and all other propaganda activities, that promote and incite racial discrimination, and recognize that participation in such organizations or activities constitutes a crime punishable by the law; ... Article 5 In accordance with the

fundamental obligations stipulated in article 2 of this Convention, States Parties undertake to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone to equality before the law, without distinction as to race, color and origin national or ethnic, particularly in the enjoyment of the following rights: ... d) Other civil rights, in particular: ... viii) The right to freedom of opinion and expression; Article 6 The States Parties shall ensure all persons under their jurisdiction effective protection and remedies, before the competent national courts and other State institutions, against any act of racial discrimination that, in contravention of this Convention, violates their human rights. and fundamental freedoms, as well as the right to ask these courts for just and adequate satisfaction or reparation for any damage that they may be victims of as a result of such discrimination."

63.

Upon accession to the CEDR, Switzerland made the following reservation regarding article 4 (1841 UNTS 337):

"Switzerland reserves the right to take the legislative measures necessary for the implementation of Article 4, taking due account of the freedom of

47

MINISTRY OF JUSTICE expression and freedom of association recognized, among others, in the Universal Declaration of Human Rights."

64.

In its initial report on the CEDR (UN Doc.CEDR/270/Add.1), published on March 14, 1997, Switzerland stated, on page 71, that it considered that the public interest in the exercise of freedom of expression had to yield to the interest of victims of discrimination, who have the right to protection of their personality.

For this reason, article 261bis § 4 of the Swiss Penal Code (see paragraph 32 above) sanctioned such acts of discrimination, even though the CEDR does not expressly prohibit them. The same applied to the prohibition of denying or justifying crimes committed by the Nazi regime and the denial or minimization of genocide in general.

65.In its third periodic report on the CEDR (UN Doc.CERD/351/add.2), published on May 22, 2001, Switzerland stated, in paragraphs 102 and 109, that in its first ruling related to the article 261bis § 4 of the Swiss Penal Code (ATF 123 IV 202), the Swiss Federal Court had ruled that this provision protected not only public order but also individual dignity.

However, the essential thing was that the protection of public order occurred indirectly, as a consequence of the protection granted to human dignity.⁶⁶The United Nations Committee on the Elimination of Racial Discrimination – the body of independent experts that monitors the implementation of the CEDR – in a criticism of Germany and Belgium for not extending the scope of their Holocaust denial laws to all genocides (UN Doc.

General No 35 dated September 26, 2013 on combating racist discourse (UN Doc.CERD/C/GS/35) that:

"Public denial of genocide or a crime against humanity, or attempts to justify them, as defined by international law, should be classified as crimes punishable by law, provided that they clearly constitute incitement to violence or hatred." racial.

The Committee also emphasizes that "the expression of opinions on historical facts" should not be prohibited or punished. 15. While article 4 (of the CEDR) requires that certain behaviors be classified as crimes punishable by law, it does not provide a Detailed guide on the qualification of the forms of conduct that should be considered crimes.

Regarding the qualification of dissemination (sic) and incitement as crimes punishable by law, the Committee considers that the following factors must be taken into consideration:

- The content and form of the speech: whether the speech is provocative and direct, how it was constructed and disseminated, and the style in which it is communicated.
- The economic, social and political climate that prevails at the time the speech is made or disseminated, including the existence of patterns of discrimination against groups

48

MINISTRY OF JUSTICE ethnic or other types, including indigenous populations. Certain speeches that in one context may be harmless or neutral may have dangerous connotations in another: in its indicators on genocide the Committee emphasized the importance of local circumstances in the evaluation of the meaning and possible effects of racist speech.

- The social position of the person communicating the message and the audience to which it is directed. The Committee repeatedly draws attention to the role that politicians and other opinion leaders play in creating negative sentiment towards groups protected by the Convention, and has invited such individuals and bodies to adopt positive approaches aimed at promoting intercultural understanding and harmony.

The Committee is aware of the special importance of freedom of expression in political matters and also that its exercise entails special responsibilities. - The scope of the speech or message, including the nature of the audience and the means of transmission: whether the message is disseminated through mass media or the Internet, and the frequency and extent of communication, particularly when repetition suggests the existence of a deliberate strategy to generate hostility against ethnic or racial groups.

- The objectives of the speech: messages that protect or defend the human rights of individuals or groups should not be subject to criminal or other sanctions."

3.International Covenant on Civil and Political Rights

67.The International Covenant on Civil and Political Rights (the "ICCPR") (999 UNTS 171) was adopted on December 16, 1966 and opened for signature on December 19, 1966.

Its substantive provisions entered into force on March 23, 1976. Switzerland acceded to the Covenant on June 18, 1992, giving it effect from September 18, 1992 (1678 UNTS 394). In its relevant provisions the Covenant establishes:

"Article 19 1.No one may be disturbed because of their opinions.

2.Everyone has the right to freedom of expression; This right includes the freedom to seek, receive and disseminate information and ideas of all kinds, regardless of borders, whether orally, in writing or in printed or artistic form, or by any other method of your choice.

49

MINISTRY OF JUSTICE 3.The exercise of the right provided for in paragraph 2 of this article entails special duties and responsibilities. Consequently, it may be subject to certain restrictions, which must, however, be expressly established by law and be necessary to: a) Ensure respect for the rights or reputations of others; b) The protection of national security, public order or public health or morals.

Article 20 1.Any propaganda in favor of war shall be prohibited by law.2.Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law." 68.In relation to Switzerland's accession to the ICCPR in 1992, the Swiss Government stated that the Swiss Penal Code, in the terms in force at that time, only covered some aspects of article 20 § 2 of the Covenant, and that Switzerland would need to submit a reservation to that article.

However, he also noted that a new legal provision related to Switzerland's eminent accession to the CEDR was planned (see paragraph 62 above) and that, once article 261bis of the Swiss Penal Code came into force (see paragraph 32 above), the reservation would be withdrawn (FF 1991 I 1129-85, at pp.

1139-40).69.The reservation was as follows (1678 UNTS 395):

"Switzerland reserves the right to adopt a penal provision that will take into account the requirements of article 20, paragraph 2, on the occasion of its upcoming accession to the International Convention on the Elimination of All Forms of Racial Discrimination of 1996." 70.

The reservation was withdrawn with immediate effect on October 16, 1995 (1891 UNTS 393).71.In its 102nd session (2011), the United Nations Human Rights Committee – the body of independent experts that monitors the implementation of the ICCPR – adopted General Comment no.34 regarding article 19 of the Covenant (CCPR/C/GS/34).

The relevant parts (without footnotes) of this Commentary read as follows: "Freedom of opinion 9. Article 19, paragraph 1, requires that the right to hold opinions be protected from interference. This is a right with respect to which the Covenant does not allow any exceptions or restrictions.

Freedom of opinion encompasses the right to change one's opinion whenever and for any reason when a person so decides. No person should be impeded from any of the rights recognized by the Convention on the basis of their real, apparent or opinions. All forms of opinion are protected, including opinions on political, scientific, historical, moral or religious topics.

Harassment, intimidation or stigmatization of a person, including

fifty

MINISTRY OF JUSTICE Arrest, detention, subjection to trial or deprivation of liberty on the basis of a person's opinions constitutes a violation of article 19, paragraph 1.10. Any attempt to coerce the holding or not holding an opinion in individual is prohibited.

The freedom to express one's opinions necessarily includes the freedom not to express them. Freedom of expression 11. Paragraph 2 requires Member States to guarantee freedom of expression, including the right to seek, receive and impart information and ideas of all kinds without borders.

This right includes the expression and receipt of communication of any kind of idea or opinion that may be transmitted to others, subject to the provisions of article 19, paragraph 3, and article 20. This freedom includes political speech, comments on own and public affairs, exploration, political debate, exchanges on human rights, the practice of journalism, artistic and cultural expression, teaching and religious discourse.

It may also include commercial advertising. The scope of paragraph 2 includes even expressions that may be considered deeply offensive, although such expressions may be restricted in accordance with the provisions of article 19, paragraph 3, and article 20.... The application of article 19(3)

...28.

The first of the legitimate grounds for restriction identified in paragraph 3 is respect for the rights and reputations of others. The term "rights" includes human rights as recognized by the Convention and, more generally, the right international human rights.

For example, it may be legitimate to limit freedom of expression to protect the right to vote under Article 25, as well as the rights under Article 17 (see paragraph 37). Such restrictions must be carefully planned: while it may be While it is permissible to protect voters from forms of expression that may constitute intimidation or coercion, such restrictions should not impede political debate, including, for example, calling for a boycott of non-mandatory voting.

The term "others" refers to individually identified people or as members of a community. Thus, it can, for example, refer to individual members of a community

defined by their religious beliefs or their ethnicity.²⁹ The second legitimate reason for restriction is the protection of national security or public order (ordrepublic), public health or morals.

... 35. When a Member State invokes a legitimate reason to restrict freedom of expression, it must demonstrate in a specific and individualized manner the exact nature of

51

MINISTRY OF JUSTICE the threat and the necessity and proportionality of the specific action taken, especially establishing a direct and immediate connection between the expression and the threat.

36. The Committee reserves the right to determine whether, in a specific situation, there could have been reasons justifying a restriction on freedom of expression. In this regard, the Committee notes that the scope of this freedom should not be analyzed with reference to a "margin of appreciation" and that in order for the Committee to carry out its function, a Member State must prove, in any particular circumstance, specifically the exact nature of the threat to any of the grounds outlined in paragraph 3 that it has led to the restriction of freedom of expression.

... Limiting scope of restrictions on freedom of expression in certain specific areas ...
49. Laws that sanction the expression of opinions on historical facts are incompatible with the obligations imposed by the Convention on Member States in relation to respect for freedom of opinion and expression.

The Convention does not allow a general prohibition on expressing a mistaken opinion or an erroneous interpretation of past events. Freedom of opinion must never be restricted and, as regards freedom of expression, restrictions must never exceed what is permitted. in paragraph 3 or required by article 20.

The relationship between articles 19 and 20 ⁵⁰.Articles 19 and 20 are compatible and complementary.The acts contemplated by article 20 are all subject to restrictions in accordance with article 19, paragraph 3.Thus, a limitation that based on article 20 must comply with article 19, paragraph 3.

51.What distinguishes the acts referred to in article 20 from other acts that may be subject to restriction in accordance with article 19, paragraph 3, is that for the acts referred to in article 20 the Convention indicates the specific response that is required of the State: its prohibition by law.

It is only to this extent that Article 20 can be considered as lex specialis in relation to Article 19.⁵² Member States are only obliged to impose legal prohibitions on the forms of expression specifically indicated in Article 20. In any other case in the "For the State to restrict freedom of expression, it will be necessary to justify the prohibition in question and the provisions containing it must strictly adhere to article 19." ⁷².

In a report presented to the United Nations General Assembly on September 7, 2012 (Promotion and protection of the right to freedom of opinion and expression, UN Doc.52

MINISTRY OF JUSTICEAA/67/357), the United Nations Special Editor for the promotion and protection of the right to freedom of opinion and expression said, in paragraph 55, in the chapter titled "Domestic legislation that contravenes international norms and standards":

"Historical events must be open to debate and, as the Human Rights Committee has said, laws that sanction the expression of opinions about historical events or facts are incompatible with the obligations that the International Covenant on Civil and Political Rights imposes on Member States in relation to respect for freedom of opinion and expression.

By requiring writers, journalists and citizens in general to convey only the government-approved version of certain events, states are causing freedom of expression to be subjugated by the official version of events."

73.In a report presented to the United Nations Human Rights Council on July 1, 2013 (UN Doc.

A/HRC/24/38), the United Nations Independent Expert on the promotion of a democratic and equitable international order recommended, in paragraph 56(e) that States "repeal legislation incompatible with articles 18 and 19 (of the International Covenant on Civil and Political Rights); particularly, memory laws and any other law that makes open debate on political and historical issues difficult."

He made a similar recommendation in paragraph 69(j) of the version of the report he presented to the United Nations General Assembly on August 7, 2013 (UN Doc.A/ 68/284). B. Instruments and other relevant materials of the Council of Europe

1.Additional Protocol to the Convention on Cybercrime

74.

The Additional Protocol to the Convention on Cybercrime, in relation to the criminalization of acts of a racist and xenophobic nature committed through computer systems (European Treaty Series No.189, 2466 UNTS 205), was opened for signature on January 28, 2003 and came into force on March 1, 2006.

It has been signed by thirty-six of the forty-seven Member States of the Council of Europe (plus two other States: Canada and South Africa), but to date it has only been ratified by twenty-four, and three of them (Denmark, Finland and Norway) have, by introducing reservations, taken advantage of the possibility provided for in Article 6 § 2 to wholly or partially not to criminalize the acts mentioned in Article 6 § 1 (see paragraphs 75 and 76 below).

Switzerland signed the Protocol on October 9, 2003, but has not ratified it and is not, in accordance with Article 10 § in force with respect to Switzerland.75.Article 6 of the Protocol, entitled "Denial, serious minimization or justification of genocides or crimes against humanity", states:

MINISTRY OF JUSTICE "1.

Each Party shall adopt the necessary legislative measures to classify the following conduct as crimes within its national legal order, when committed intentionally and without law:

distribute or make available to the public, through a computer system, materials that deny, seriously minimize, approve or justify acts that constitute genocide or crimes against humanity, as defined by international law and recognized as such in final sentences and binding provisions of the International Military Tribunal established by the London Agreement of August 8, 1945, or any other international tribunal established through international instruments and whose jurisdiction is recognized by the Parties.

2.A Party may (a) require that the serious denial or minimization referred to in paragraph 1 of this article be committed with the aim of inciting hatred, discrimination or violence against an individual or group of individuals in because of your race, color, ancestry and national or ethnic origin, or your religion, if used as a pretext for any of these factors; O well

(b) reserve the right not to apply, in whole or in part, paragraph 1 of this article." 76.

The explanatory report of this Protocol reads, in the relevant parts (without footnote citations):
"39.In recent years national courts have dealt with several cases in which certain persons (in public, in the media, etc.) have expressed ideas or theories that have the objective of denying, seriously minimizing, condoning or justifying the serious crimes that occurred in particular during the Second World War (especially the Holocaust).

The motivation for such behaviors is usually presented under the pretext of scientific research, although in reality their objective is to support and promote the political motivation that gave rise to the Holocaust. Furthermore, these behaviors have also inspired or even stimulated and emboldened groups. racist or xenophobic in their actions, including through computer systems.

The expression of these ideas is an insult (to the memory of) those people who were victims of this evil, as well as their families. Finally, it is a threat against human dignity.
40.Article 6, which has a similar structure to Article 3, addresses this problem. The drafters agreed that it was important to criminalize expressions that deny, seriously minimize, approve or justify acts that constitute genocide or crimes against humanity. humanity, as defined by international law and have been recognized as such in final and binding rulings of the International Military Tribunal established by the London Agreement of August 8, 1945.

This is because the most important and proven behaviors that gave rise to genocide and crimes against humanity occurred during the period 1940-1945. However, the editors recognized that, since then, other cases of

Therefore, the drafters considered it necessary not to limit the scope of this provision only to crimes committed by the Nazi regime during the Second World War and established as such by the Nuremberg Tribunal, but also to cover genocides and crimes against humanity established by other tribunals formed since 1945 under instruments of international law (for example Resolutions of the United Nations Security Council, multilateral treaties, etc.).

Such tribunals may, for example, be the International Criminal Tribunals for the former Yugoslavia, for Rwanda, the Permanent International Criminal Court. This article allows reference to final and binding judgments of future international tribunals, to the extent that the jurisdiction of such tribunals is recognized by the signatory Party of this Protocol.

41. This article aims to make it clear that the facts whose historical veracity has been established cannot be denied, seriously minimized, approved or justified to spread these detestable theories and ideas. 42. The European Court of Human Rights has made it clear that the denial or revisionism of "clearly established historical facts – such as the Holocaust - ... would be deprived of the protection granted by Article 10 and Article 17 of the ECHR (see in this context the Lehideux and Isorni ruling of September 23, 1998).

43. Article 6, paragraph 2, allows a Party (i) to require, by declaration, that the serious denial or minimization referred to in Article 6, paragraph 1, be committed with the intention of inciting hatred, discrimination or violence against an individual or group of individuals based on their race, color, ancestry or national or ethnic origin, as well as their religion, if used as a pretext for these factors; or (ii) make use of a reservation, allowing the Party not to apply – totally or partially – this provision."

2.

Resolution (68) 30 of the Committee of Ministers

77. On October 31, 1968, the Committee of Ministers of the Council of Europe adopted the Resolution (68) 30, recommending that the governments of the Member States of the Council of Europe, among other things, (a) sign and ratify the CEDR if they had not already done so, and (b) once ratified "emphasize through interpretative declarations the importance that they conferred on it... with respect to the rights included in the (Convention)."

3.

Recommendation 97/20 of the Committee of Ministers on "hate speech" 78. On 30 October 1997, the Committee of Ministers of the Council of Europe adopted Recommendation 97/20 on "hate speech" which, in part relevant, points out:

"Whereas the purpose of the Council of Europe is to achieve greater unity among its members, particularly with the aim of safeguarding and realizing the ideas and principles that are their common heritage;

55

MINISTRY OF JUSTICE Recalling the Declaration of the Heads of State and Government of the Member States of the Council of Europe adopted in Vienna on October 9, 1993; Recalling that the Vienna Declaration highlighted serious concern about the resurgence of racism, nationalism and anti-Semitism and the development of a climate of intolerance, and included a commitment to combat all ideologies, policies and practices that constitute a

incitement to racial hatred, violence, discrimination, as well as against any action or speech with the potential to strengthen fears and tensions between groups of different racial, ethnic, national, religious or social backgrounds;

Reaffirming its deep connection with the freedom of expression and information enshrined in the Declaration on Freedom of Expression and Information of April 29, 1982; Condemning, in accordance with the Vienna Declaration and the Declaration on the Media in a Democratic Society adopted at the 4th European Ministerial Council on Mass Media Policy (Prague, December 7 and 8, 1994), all forms of expression that incite racial hatred, xenophobia, anti-Semitism and all forms of intolerance, since they undermine democratic security, cultural cohesion and pluralism; Taking into consideration that such forms of expression can cause a greater and more harmful impact when disseminated through the media;

Convinced that the need to combat such forms of expression is even more urgent in situations of tension or in times of war and other forms of armed conflict; Convinced that it is necessary to establish guidelines for Member State governments on how to address these forms of expression while recognizing that most media cannot be held responsible for these forms of expression; Bearing in mind Article 7, paragraph 1, of the European Convention on Cross-border Television and the jurisprudence of the bodies of the European Convention on Human Rights relating to Articles 10 and 7 of the latter;

Taking into consideration the United Nations Convention on the Elimination of All Forms of Racial Discrimination and Resolution (68) 30 of the Committee of Ministers on Measures to be Adopted against Incitement to Racial, National and Religious Hatred;

Bearing in mind that not all Member States have signed this Convention or implemented it through national laws;

56

MINISTRY OF JUSTICE Aware of the need to reconcile the fight against racism and intolerance with the need to protect freedom of expression to avoid putting democracy at risk under the pretext of defending it;

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

Recommends that the governments of the Member States:

- 1.Take appropriate measures to combat hate speech based on the principles explained in this recommendation;
- 2.ensure that these measures are part of a comprehensive management of the phenomenon that also seeks to resolve its social, economic, political, cultural and other causes; 3.sign, ratify and effectively implement, if they have not already done so, the United Nations Convention on the Elimination of All Forms of Racial Discrimination in accordance with Resolution (68) 30 of the Committee of Ministers on Measures to be Taken Against incitement to racial, national and religious hatred;
- 4.review your domestic legislation and practices to ensure that they comply with the principles set out in the annex to this recommendation.” 79.

An annex to that recommendation defined “hate speech” as “any form of expression that spreads, incites, promotes or justifies racial hatred, xenophobia, anti-Semitism or any other form of hatred based on intolerance, including intolerance expressed through an aggressive nationalism of ethnocentrism, discrimination and hostility towards minorities, migrants and people of immigrant origin.” He then proceeded to establish a series of principles applicable to hate speech.

The relevant ones for these purposes are:

"Principle 2 The government of the Member States shall establish or maintain a robust legal framework composed of civil, criminal and administrative law provisions on hate speech that allows judicial and administrative authorities to reconcile respect for freedom in each case of expression with respect for human dignity and the protection of the reputation and rights of others.

To this end, Member State governments should consider measures to:

- stimulate and coordinate research on the effectiveness of existing legislation and practice;
- review the current legal framework to ensure that it is appropriately applied to the various media and novel communication and network services;
- develop a coordinated prosecution policy based on national guidelines, respecting the principles included in this recommendation;

57

MINISTRY OF JUSTICE

- incorporate community service into possible criminal sanctions;
- improve the possibilities of combating hate speech through civil law, for example by allowing interested non-governmental organizations to bring civil law actions, taking measures to provide compensation to victims of hate speech and ensuring the possibility of orders judicial measures that give victims the right to reply or order retractions;
- provide media and communication professionals with information regarding the legal provisions applicable to hate speech.

Principle 3 The governments of the Member States should ensure that in the legal framework referred to in Principle 2, possible interference with freedom of expression is closely limited and applied legally and not arbitrarily on the basis of objective criteria.

Furthermore, in accordance with the fundamental requirement of the rule of law, any limitation or interference with freedom of expression must be subject to independent judicial review. This requirement is of particular importance in those cases where freedom of expression must be reconciled with the respect for human dignity and the protection of the reputation and rights of others.

Principle 4 National law and practice should allow courts to take into account that certain types of hate speech may be so offensive to certain individuals or groups that they do not deserve the level of protection conferred by Article 10 of the European Convention of Human Rights to other forms of expression.

This is the case when hate speech has as its objective the destruction of the rights and freedoms established in the Convention or a limitation greater than that established therein. Principle 5 National legislation and practice should allow competent prosecutors to grant special attention, within the framework of its discretion, to the cases

that include hate speech.

In this regard, these authorities must, in particular, carefully consider the suspect's right to freedom of expression given that the imposition of criminal sanctions generally constitutes a serious interference with such freedom. The competent courts must, when imposing sentences on convicted persons for hate speech crimes, ensure strict respect for the principle of proportionality." 4.

Work of the European Commission against Racism and Intolerance

58

MINISTRY OF JUSTICE 80.The European Commission against Racism and Intolerance (the "CERI"), the body of the Council of Europe entrusted with combating racism, racial discrimination, xenophobia, anti-Semitism and intolerance, said in paragraph 18(e) of its Policy Recommendation No.

7 on national legislation to combat racism and racial discrimination of December 13, 2002 (CRI(2003)8) that the law should penalize, if committed intentionally, "public denial, trivialization, justification or apology, for racist purposes, the crime of genocide, crimes against humanity and war crimes." In the explanatory memorandum of the recommendation, CERI said that paragraph 18(e) referred to "crimes of genocide, crimes against humanity and war crimes." The crime of genocide was to be "understood as defined in Article II of the Genocide Convention and Article 6 of the (Rome Statute)", and crimes against humanity and war crimes were to be "understood as They are defined by articles 7 and 8 of the Rome Statute."

81.In its report dated December 10, 2010 (CRI(2011)5), adopted during Turkey's fourth monitoring cycle process, the CERI highlighted, among other things (without footnotes): "83.It is It is difficult to determine the size of the various minority groups living in Turkey at this time, since the most recent official estimates that are publicly available are from the year 2000 and do not cover all groups... According to these estimates, the Armenian population in Turkey is between 50,000 and 93,500 people... ... 90.

In addition to problems relating to the restitution of foundation property, the Armenian minority reports difficulties in the field of education in minority languages due to the lack of textbooks in Armenian and teachers trained in Armenian. This situation has contributed to a gradual reduction in the number of parents who decide to send their children to Armenian schools; Some parents also reportedly report avoiding sending their children to Armenian schools for fear of receiving, or having their children receive, threats.

The CERI notes that in 2008 the National Ministry of Education distributed to all primary schools, along with a notice that it should be shown, a propaganda documentary titled "The Blonde Bride: The Truth Behind the Armenian Problem"; The documentary showed bloody images of massacres and the children were asked to write a composition about how they felt after watching it.

While it is true that the National Ministry of Education eventually discontinued the distribution

of the DVD after a large number of complaints from parents, the DVDs that had already been delivered were not removed from the schools and the decision whether to screen them or not was left to the individual educational authorities.

CERI is of the opinion that the distribution and display of such materials in schools is directly

59

MINISTRY OF JUSTICE contrary to the objective of building a more open and tolerant society and considers it especially regrettable that this material has been directed at children.

91.CERI notes that on July 23, 2009, the National Ministry of Education approved the appointment of Armenian language, religious culture and ethics teachers for Armenian schools. These teachers had to be Turkish nationals of Armenian origin and have the necessary necessary educational qualifications obtained from a faculty recognized by the Turkish Education Board.

These teachers can receive training during their work. CERI hopes that the improvement of relations between Turkey and Armenia will generate additional opportunities to solve some of the concrete problems mentioned above, such as the training of teachers and the availability of textbooks in Armenian for minority schools.

CERI notes that at this time, and although the situation is far from ideal, the only source from which an adequate variety of textbooks in Armenian can realistically be obtained is Armenia.... 137....In January 2007, The editor-in-chief of the weekly newspaper Agos, published in Armenian and Turkish, HrantDink, was murdered after receiving repeated death threats of which the authorities were reportedly informed... In addition to specific and high-profile acts of violence mentioned above, minority schools, merchants, and religious institutions report threats via email, letters, and phone calls.

... 142.... certain occasional statements made by well-known politicians, especially in relation to Armenian claims of genocide, have shown that mutual resentment and mistrust can grow if sufficient care is not taken when dealing with sensitive topics in political discourse .

... 151.... In late 2008 and early 2009... boycotts of Jewish businesses were organized, some businesses in Eskişehir displayed signs indicating that Jews, Armenians and dogs were not welcome. It was not until a newspaper published photographs of these posters in an article asking the Ministry of Justice what it was waiting for, that the latter did something about it."

C.

European Union law

60

MINISTRY OF JUSTICE

82. Framework Decision 2008/913/JHA of 28 November 2008 of the Council of the European Union on combating certain forms and expressions of racism and xenophobia through criminal law (OJ L 328/55, 6.12.2008, pp.55-58) proposes the approximation of the laws of the Member States of the European Union in crimes that involve racism and xenophobia.

83. The decision, which was first proposed by the European Commission in November 2001 (Proposal for a Council Framework Decision on combating racism and xenophobia, COM(2001) 664 final, OJ C 75 E, 26.3. 2002, pp.269-73), was adopted by the Council of the European Union on November 28, 2008.

It entered into force on December 6, 2008. According to its article 10 § 1, the Member States of the European Union had to take the necessary measures to comply with its provisions before November 28, 2010. 84. The declarations of the decision, In their corresponding part, they point out:

“... (6) The Member States recognize that the fight against racism and xenophobia requires several types of measures in a comprehensive framework and cannot be limited to criminal matters.

This Framework Decision is limited to combating, through criminal law, certain particularly serious manifestations of racism and xenophobia. While the legal and cultural traditions of the Member States are, to a certain extent, different, particularly in this area, a Full harmonization of criminal law is not possible at this time.

... (14) This Framework Decision respects fundamental rights and observes the principles recognized by Article 6 of the Treaty on European Union and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, particularly its Articles 10 and 11 , and reflects the Charter of Fundamental Rights of the European Union, especially Chapters II and VI.

(15) Several Member States have established procedural guarantees and special rules on the determination and limitation of liability in national legislation in consideration of freedom of association and expression, particularly freedom of the press and freedom of expression in other media.

...” 85. Article 1 of the Decision, entitled “Crimes related to racism and xenophobia”, establishes, in its corresponding part, that:

61

MINISTRY OF JUSTICE “1. Each Member State must adopt the necessary measures to ensure that the following intentional conduct is punished:

... (c) publicly condone, deny or seriously trivialize crimes of genocide, crimes against humanity and war crimes, as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court, directed against a group of persons or a member of such a group defined on the basis of race, color, religion, ancestry or ethnic or national origin, when the conduct is carried out in a manner that incites violence and hatred against that group or a member of that group .

(d) Publicly condone, deny or seriously trivialize the crimes defined in Article 6 of the Charter of the International Military Tribunal created by the London Agreement of August 8, 1945, directed against a group of persons or a member of said group defined on the basis of race, color, religion, ancestry or ethnic or national origin, when the conduct is carried out in a manner that incites violence or hatred against said group or member of the group.

2. For the purposes of paragraph 1, Member States may choose to punish only that conduct that is carried out in such a way that it may affect public order or that is threatening, abusive or insulting. 3.... 4. Any Member State may, when adopting this Framework Decision or thereafter, make a declaration that it will make punishable the conduct of seriously denying or trivializing the crimes mentioned in paragraph 1(c) and/or (d) only if said crimes are recognized in a non-appealable ruling of a national court of that Member State and/or an international court, or by an unappealable decision of an international court only." 86.

Article 7 of the decision, entitled "Constitutional Rules and Fundamental Principles", states:

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

2. This Framework Decision shall not have the effect of obliging Member States to take measures that contravene the fundamental principles related to freedom of association and freedom of expression, in particular freedom of the press and freedom of expression through other means, as they emerge from their constitutional traditions or from the rules establishing the rights and responsibilities and

62

"MINISTRY OF JUSTICE procedural guarantees for the press and other media, when said rules are related to the determination or limitation of liability."

87.

In its report on the implementation of the decision, published on January 27, 2014 (COM (2014) 27 final), the Commission noted that, among the Member States that had specifically criminalized the conduct established in Article 1 § 1 (c) of the decision (see paragraph 85 above), France, Italy, Latvia, Luxembourg and Romania did not make it a condition that the conduct be carried out in such a way as to incite violence and hatred, while Bulgaria, Portugal, Slovenia and Spain required more than a mere probability of incitement.

The Commission later noted that thirteen Member States – Austria, Belgium, the Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Hungary, Ireland, the Netherlands, Sweden and the United Kingdom – did not have criminal provisions applicable to such conduct. Germany and The Netherlands had stated that the national jurisprudence applicable to the denial or trivialization of the Holocaust would also apply to the conduct described by said article.

88. Some Member States had used the possibility provided by Article 1 § 2 of the decision (see paragraph 85 above) to punish hate speech only if it was carried out

in a manner likely to disturb public order or was threatening, abusive or insulting. Cyprus and Slovenia had opted for both options.

Germany had made the punishability of such conduct subject to the potential to disturb the public peace. Similarly, Hungarian jurisprudence indicated that the punishability of the conduct depended on the probability of disturbing the public peace. In Malta and Lithuania, the crime of condoning , denying or trivializing depended on either option.

89.Cyprus, France, Lithuania, Luxembourg, Malta, Romania and Slovakia had used the possibility contemplated in Article 1 § 4 of the decision to sanction the serious denial or trivialization of the crimes established by the Rome Statute only if such crimes were had been established by an international court (see paragraph 85 above).

90.The Commission concluded that several Member States had not fully or correctly transposed the provisions of the decision. It noted that in the course of 2014 it would engage in dialogue with these States with a view to ensuring the correct transposition of the decision, taking into account freedom of expression..

IV. COMPARATIVE LAW

91.During the proceedings before the Chamber, the Swiss Government presented a comparative law study (opinion 06-184) published on December 19, 2006 by the Swiss Institute of Comparative Law. This study analyzed the legislation of 14 European countries (Austria , Belgium, Denmark, Finland, France, Germany, Ireland, Italy, Luxembourg, Holland, Norway, Spain, Sweden and the United Kingdom), the United States and Canada on the crime of

63

MINISTRY OF JUSTICE denial of crimes against humanity, particularly genocide.

The study summary states:

"The analysis of the denial of crimes against humanity and genocide in the different countries evaluated reveals considerable variations. Spain, France and Luxembourg have adopted an expansive position on the prohibition of the denial of these crimes. Spanish legislation refers to generic way to the denial of acts with the proven purpose of totally or partially eliminating an ethnic, racial or religious group.

The perpetrator faces a sentence of one to two years in prison. In France and Luxembourg the legislation refers to the denial of crimes against humanity as defined in Article 6 of the Charter of the International Military Tribunal annexed to the London Agreement of 8 December. August 1945... This limitation of the substantive scope of the crime of denial of crimes against humanity is understood in Luxembourg by the fact that there is a special provision for the denial of crimes of genocide.

The denial of said crimes is punishable by the same sentence (prison from eight days to six months and/or fine of between 251 and 25,000 euros) as the denial of crimes against humanity, but the definition of the crime of genocide used for this purpose is that of the Law of August 8, 1985 of Luxembourg, which is general and abstract, it is not limited to acts committed

during world war II.

The limited scope of the corresponding provisions in France has been criticized and attention should be drawn in this sense that the National Assembly approved in first reading an initiative aimed at criminalizing the denial of the existence of the Armenian genocide on October 12, 2006.

Thus, it seems that only Luxembourg and Spain criminalize the denial of crimes of genocide in a generic way and without restricting it to specific episodes of history in their legislation. Additionally, the denial of crimes against humanity in general is not currently a crime in no country.

In this regard, in a group of countries – including France, as can be seen from the analysis of their laws – only the denial of acts committed during the Second World War is a crime. In Germany, for example, anyone who, publicly or in a meeting, denies or trivializes the acts committed during the National Socialist regime with the aim of totally or partially eliminating a national, religious or ethnic group, will be punished with up to 5 years in prison and a fine.

In Austria, anyone who denies or seriously trivializes the genocide or other crimes against humanity committed by the National Socialist regime, in such a way that their opinion is known to a large number of people, will be punished with up to ten years in prison. Continuing Along the same lines, the law in Belgium punishes with imprisonment of between eight days and one year anyone who denies, seriously trivializes, tries to justify or approves the genocide committed by the German National Socialist regime.

64

MINISTRY OF JUSTICE In other countries, in the absence of special legislation establishing crimes, the courts have intervened to ensure that denialism is punished. In particular, the Supreme Court of the Netherlands has held that provisions of the Penal Code prohibiting discriminatory acts must applied to punish the denial of crimes against humanity.

Additionally, an initiative to criminalize denialism is currently pending consideration. The Canadian Human Rights Tribunal has referred to the crime of exposing others to hatred or contempt, as outlined in the Canadian Human Rights Act, as the basis to sanction the content of a denialist website.

The position of judges in the United States is less established given that the country extremely strictly protects freedom of expression, for historical and cultural reasons. However, it can be mentioned that, in general, victims of offensive speech have been successful , to date, by demanding reparations when they may have felt that their physical integrity was actually at risk.

Additionally, there are a range of countries in which denial of crimes against

humanity is not directly covered by the law. For some of these countries it is possible to interpret that this could be included in the definition of other more general crimes. For example, according to Italian law, it is a crime to condone the crimes of genocide, However, the line between condoning, trivializing and denying is very thin.

Norwegian law punishes anyone who makes an official statement that is discriminatory or hateful. This definition could reasonably be applied to denialism. The Supreme Court has not yet ruled on this point. In other countries, such as Denmark and Sweden, courts have already taken a position, having agreed to review whether the criminal law provisions related to discriminatory or hate statements could be applied to cases of denialism, despite the fact that they have not found them applicable in the specific cases that have been presented to them.

In Finland, the political authority has taken the view that these provisions do not apply to denialism. Finally, neither the United Kingdom nor Ireland have legislation that covers denialism."

92.The Chamber proceeded to point out that after the publication of this study in 2006, significant progress had been made in France and Spain.

93.In France, a law had been approved on January 29, 2001 (Law No.2001-70) in a single section that read:

"France publicly recognizes the Armenian genocide of 1915."

94.Later, on January 23, 2012, the French Parliament approved a law whose first section criminalized the condonation, denial or serious trivialization of genocide, crimes against humanity and war crimes, as they are "enunciatively defined." in articles 6, 7 and 8 of the Rome Statute, articles 211-1 and 212-1 of the French Penal Code and

65

MINISTRY OF JUSTICE article 6 of the Statute of the International Military Tribunal, "and as recognized in law, in any international treaty signed and ratified by France or to which France has acceded, in a judgment of any court of the European Union or international , or as characterized by a French court, if said judgment is enforceable in France." Section 2 of the Act expanded the list of associations that could act as civil parties in such proceedings.

95.In a ruling of February 28, 2012 (Décision no.2012-647 DC du 28 février 2012) the French Constitutional Council declared said law unconstitutional in the following terms:

"... 3. In the petitioners' brief, the aforementioned law infringes the freedom of expression and communication enshrined in article 11 of the Declaration of the Rights of Man and the Citizen of 1789, as well as the principle that crimes must be defined in the law, as established in article 8 of the Declaration.

To the extent that they apply, first, only to genocides recognized by French law and, secondly, only to genocides, excluding other crimes against humanity, these provisions also violate the principle of equality. The requesting parliamentarians They also point out that Parliament has exceeded its own authority and violated the principle of separation of powers enshrined in article 16 of the Declaration of 1789; Likewise, they allege a violation of the principle of necessity of the sanction established in article

8 of the Declaration of 1789, freedom of investigation and the principle that political parties are free to carry out their activities, enshrined in article 4 of the Constitution.

4.Firstly, article 6 of the Declaration of the Rights of Man and the Citizen of 1789 states that "The law is the expression of the general will..." It follows from said article and from all other provisions of constitutional rank. related to the purpose of the law that, without prejudice to the special provisions contemplated by the Constitution, the law is intended to establish rules and must, therefore, have a normative aspect.

5.Secondly, according to article 11 of the Declaration of 1789: "The free communication of ideas and opinions is one of the most precious rights of man. Every citizen can, consequently, speak, write and print freely , but will be responsible for the abuse of said freedom as established by law." Article 34 of the Constitution states: 'The law must establish the rules for... civil rights and the fundamental guarantees recognized to citizens for the exercise of their civil liberties.' On this basis, Parliament is free to adopt rules regulating the exercise of the right to free communication, freedom of expression, freedom of written expression and freedom of the press; It is also free to establish, on that basis, crimes that punish notices in the exercise of freedom of expression and communication that affect public order and the rights of third parties.

Without

66

MINISTRY OF JUSTICE However, freedom of expression and communication is all the more precious since its exercise is a precondition for democracy and one of the guarantees of other rights and freedoms. Any restriction imposed on the exercise of this freedom must be necessary, appropriate and proportional to the goal pursued.

6.A legislative provision whose purpose is to recognize a crime of genocide cannot, in themselves, have the normative aspect inherent to the law. However, section 1 of the reference law criminalizes the denial or trivialization of the existence of one or more crimes of genocide "recognized as such by French law."

By criminalizing the denial of the existence and the legal characterization of crimes that it has itself recognized and characterized as such, Parliament has unconstitutionally interfered with the exercise of freedom of expression and communication. Consequently, there is no need to examine the rest of the allegations, section 1 of the reference law must be declared unconstitutional and section 2, which is inextricably linked to the previous one, must also be declared unconstitutional.

DECIDE:

Article 1.- The Law that criminalizes the denial of the existence of genocides recognized by law is unconstitutional..." 96.The Chamber then referred to a ruling of November 7, 2007 (no.235/2007; BOE-T-2007-21161) of the Spanish Constitutional Court had declared unconstitutional the crime of denial of genocide established in article 607 § 2 of the Spanish Penal Code.

As drafted before said ruling, that provision sanctioned the propagation, by any means, of "ideas or doctrines that deny or justify" genocide. As a result of the ruling, the words "denying" were deleted.⁹⁷In said ruling, the Spanish Constitutional Court noted that Spain did not have a "militant democracy" and that the Constitution, which lacked an article equivalent to article 17 of the Convention, did not prohibit speech contrary to its essence unless it could effectively affect rights. constitutional.

The court went on to note that incitement to genocide or racial or ethnic hatred was penalized by other provisions of the Penal Code, in accordance with Spain's international law obligations. Other countries, which had been particularly affected by the genocide committed by the The National Socialist regime had also criminalized Holocaust denial.

When studying whether article 607 § 2 of the Penal Code was compatible with the constitutional right to freedom of expression, the court sought to determine the exact way in which this article should be interpreted. It noted that it criminalized both the denial and justification of genocide. In the court's opinion, denial should be understood as maintaining that certain events had not happened or had not been carried out in such a way that they could be classified as genocide, while justification did not entail outright denying the existence of a genocide but relativizing or relativizing it. denying that it had been illegal, identifying to a certain extent with its perpetrators.

The most important question

67

MINISTRY OF JUSTICE prominent issue was whether these two forms of expression constituted "hate speech," as it had been defined in the court's jurisprudence. Mere denial was not, since by itself it does not have the capacity to create a climate of hostility. towards a group that had been victims of genocide whose existence was denied.

Therefore, denial could only be prohibited if it resulted, in fact, in an attitude of hostility towards said group, all the more so since mere conclusions about the existence or not of certain acts that were not accompanied by value judgments about said acts or their legality also fell within the spectrum of academic freedom, deserving of an even higher level of protection.

However, article 607 § 2 did not include this limiting requirement. Therefore, it prohibited conduct that did not even constitute a potential danger and that could not, therefore, be constitutionally criminalized. Justification, on the other hand, implies a value judgment and can, therefore, in some cases, be considered a means of indirectly inciting genocide.

If genocide were presented as good and therefore hatred was incited against a specific group, a climate of hostility and violence could be created, so that disrespectful or degrading behavior towards a group could be validly prohibited. 98.Finally, the Chamber took note of the relevant provisions of the criminal law of

Luxembourg.

99.In addition to the above materials, the Grand Chamber had at its disposal various treatises and articles (M.Whine, Expanding Holocaust Denial and Legislation Against It, in I.Hare and J.Weinstein (eds.), Extreme Speech and Democracy, OUP, Oxford, 2009, pp.538-56; C.Tomuschat, Prosecuting Denials of Past Alleged Genocides, in The UN Genocide Convention, A Commentary, P.

Gaeta (ed.), OUP, Oxford, 2009, pp.513-30; M.Imbleau, Denial of the Holocaust, Genocide and Crimes Against Humanity: A Comparative Overview of Ad Hoc Statutes, in L.Hennebel and T.Hochmann (eds.), Genocide Denials and the Law, OUP, Oxford, 2011, pp. 235-77; N.Droin, État des lieux de la repression du négationnisme en France et en droit comparé, RTDH 2014, no.

98, oo- 363-93; and P.Lobba, A European Halt to Laws Against Genocide Denial?, European Criminal Law Review, Volume 4, Number 1 (April 2014), pp- 59- 77) that shed light on the most recent advances in this field of law. A review of such materials, together with the aforementioned developments and the most recent information available to the Grand Chamber, demonstrates that between the High Contracting Parties there are now four types of regime in this regard, as regards the scope of the crime of denial of genocide: (a) States, such as Austria, Belgium, France, Germany, the Netherlands, and Romania, that only criminalize Holocaust denial or, more generally, Nazi crimes (Romania additionally criminalizes Nazi extermination of the Roma population , and Greece, in addition to the Holocaust and Nazi crimes, criminalizes the denial of genocides recognized by international courts or its own Parliament); (b) States, such as the Czech Republic and Poland, that criminalize denial of Nazi and Communist crimes; (c) States, such as Andorra, Cyprus, Hungary, Latvia, Liechtenstein, Lithuania, Luxembourg, the former Yugoslav Republic of Macedonia, Malta, Slovakia, Slovenia and Switzerland, which criminalize the denial of

68

MINISTRY OF JUSTICE any genocide (Lithuania, furthermore, specifically criminalizes the denial of Nazi and Soviet crimes against Lithuanians, while Cyprus only criminalizes the denial of genocides recognized by a competent court); and (d) States, such as Finland, Italy, Spain (after the 2007 ruling of their Constitutional Court, cited in paragraph 96 above), the United Kingdom and the Scandinavian countries, which do not have special provisions criminalizing such conduct.

THE RIGHT

I. SCOPE OF THE CASE

100.The Court considers it important to clarify from the outset the scope of its jurisdiction in this case, which arose from an individual claim against Switzerland under Article 34 of the Convention (see paragraph 1 above).101.In accordance with Article 19 of the Convention, the task of the Court is limited to "ensuring observance of the commitments assumed by the High Contracting Parties in the Convention and its Protocols" and, according to article 32 § 1, its jurisdiction extends only to "matters related to the interpretation and application of the Convention and its Protocols."

Unlike the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal or the International Court of Justice, it has no criminal or other jurisdiction.

on the Genocide Convention or other instrument of international law related to those issues.

102. It follows that, in the present case, the Court not only has no obligation, as established by the Chamber in paragraph 111 of its judgment, to decide whether the massacres and mass deportations suffered by the Armenians at the hands of the Ottoman Empire since 1915 can be characterized as genocide under international law, but it does not have the authority to make binding pronouncements, one way or another, in this regard.

II.APPLICATION OF ARTICLE 17 OF THE CONVENTION

103. The first point to decide is whether the claim should be rejected in application of Article 17 of the Convention, which states:

"None of the provisions of this Convention may be interpreted in the sense of implying for a State, group or individual, any right to engage in an activity or carry out an act tending to the destruction of the rights or freedoms recognized in the Convention."

69

MINISTRY OF JUSTICE this Convention or to broader limitations on rights or freedoms than those provided for in it."

TO.

The Court's criteria

104. The Chamber considered by its own decision whether to reject the application in application of Article 17 of the Convention. Having reached the conclusion that the applicant's assertions did not constitute incitement to hatred against the Armenian people, that he did not express contempt towards the victims of the events of 1915 and the following years and that he has not been prosecuted for attempting to justify genocide, the Chamber concluded that the applicant had not exercised his freedom of expression for purposes contrary to those established by the letter and spirit of the Convention.

Therefore, there is no reason to reject the application in application of article 17.B. Writings presented to the Grand Chamber

1.The parts

105. Neither the plaintiff nor the Swiss Government addressed this point specifically in their pleadings.

2.Third Parties

106. The Turkish Government argued that, unlike Holocaust denial, the applicant's assertions that the events of 1915 and the following years had not constituted genocide did not amount to the denial of a clearly historically established fact.

The plaintiff had not questioned the reality of the massacres or mass deportations, but simply their legal characterization, on which there is no international consensus. They are still the subject of heated debate. This was demonstrated by a statement made by the Government of the Kingdom United approximately six months before the plaintiff's statements, and by a report presented to members of the United Kingdom Parliament in 2012.

No mention of these events was made in chapters on genocide in public international law or international criminal law textbooks, and none of the commentaries on the Genocide Convention referred to these events as "genocide" or mentioned them as examples of genocide.

In this context, any attempt to make a comparison with the Holocaust turns out to be unconvincing. The element that makes the characterization of the events of 1915 and the following years so controversial is, precisely, the presence or absence of a specific intention of destroy that is necessary for a mass murder to legally qualify as genocide.

Said intention has not been established by any national or international court, unlike the case of the Holocaust, in which the International Military Court did find said intention, despite not having used the term "genocide".⁷⁰

MINISTRY OF JUSTICE 107.The Turkish Government further maintained that the plaintiff had simply expressed his opinion on this issue.

Opinions cannot be interfered with simply because public authorities consider them unfounded, emotional, worthless or dangerous. The plaintiff had not attempted to deny the mass murder of Armenians, nor to cast doubt on the suffering of the victims or to express contempt for them. , exonerate the guilty or approve their actions, nor justify a pro-genocide policy.

108.The French Government alleged that genocide denial, in itself, amounts to incitement to hatred and racism because, in effect, it instigates such conduct under the pretext of questioning historical facts.To enjoy the protection of article 10 of the Convention, the historical debate must seek to find the truth, not serve as a vehicle for ideological purposes.

This is not the case of opinions that show a lack of self-criticism and manifestly ignore the testimony of people who participated in the events, therefore they are not consistent with the historical method; its authors were not motivated by interest in debate and the search for historical truth.

Such statements, in relation to a genocide, offend the memory and honor of the victims and fall within the scope of Article 17 of the Convention.¹⁰⁹The Swiss-Armenian Association argued that it was clear that following the jurisprudence of the Court, the claim could be rejected in application of Article 17 of the Convention.

110.The Federation of Turkish Associations of Francophone Switzerland argued that it would be difficult to justify the application of Article 17 of the Convention in respect of statements denying the characterization of the events of 1915 and subsequent years since, unlike Holocaust denial, These statements had not been motivated by a racist or anti-democratic interest.

111.The International Federation for Human Rights (FIDH) argued that, in view of the

radical effects and the risk of subjective assessments, Article 17 of the Convention had to be applied with the greatest caution. The Court's jurisprudence regarding whether certain statements were covered by this provision was inconsistent and the subject of intense debate.

Therefore, it was better to deal with such issues under Article 10 § 2 of the Convention and the proportionality test.¹¹² The International League against Racism and Anti-Semitism (LICRA) alleged that the trivialization or denial of a genocide were affronts against human dignity and the values of the Convention.

This could be deduced from the wording of article 261 bis § 4 of the Penal Code. They invariably had the purpose of inciting hatred or, at the very least, violating human dignity. C. The Court's evaluation

¹¹³In Ždanoka v. Latvia ([GS], no.58278/00, § 99, ECHR 2006-IV), having reviewed the preparatory work for the Convention, the Court stated that the reason why it had been included

71

MINISTRY OF JUSTICE article 17 was that it could not be ruled out that a person or group of persons attempted to use the rights enshrined in the Convention to derive a right to carry out activities aimed at destroying those rights.

¹¹⁴However, Article 17 is only applicable, as recently confirmed by the Court, in an exceptional manner and in extreme cases (see Pakas v. Lithuania [GS], no.34932/04, § 87 in fine, of 6 January 2011). Its effect is to deny the exercise of the Conventional right that the plaintiff seeks to vindicate in the proceedings before the Court.

In cases involving Article 10 of the Convention, it should only be resorted to if it is immediately evident that the disputed statements seek to divert this article from its true objective by using the right to freedom of expression for purposes clearly contrary to the values of the Convention. (see, for recent examples, Hizb ut-Tahrir et al.

v. Germany (dec.), no.31098/08, §§ 73-74 and 78, June 12, 2012, and Kasymakhunov and Saybatalov v. Russia, nos.26261/05 and 26377/06, §§ 106 -12, of March 14, 2013).¹¹⁵ While the decisive factor in Article 17 – whether the plaintiff's statements sought to provoke hatred or violence, and if, by making them, he sought to rely on the Convention to carry out activities or acts aimed at the destruction of the rights and freedoms it establishes – is not immediately clear and is linked to the question of whether the interference with the plaintiff's right to freedom of expression was "necessary in a democratic society", the Court finds that the question of whether Article 17 should apply must be added to the applicant's substantive claim under Article 10 of the Convention (see, mutatis mutandis, UnitedCommunist Party of Tureky and others v.

Turkey, January 30, 1998, § 32, Reportsofjudgments and Decisions 1998-I; RefahPartisi (theWelfare Party) and others v. Turkey [GS], nos.41340/98 and 3 others, § 96, ECtHR 2003-II; Soulard and others v. France, no.15948/03, § 23, July 10, 2008; Féret v. Belgium, no.15615/07, § 52, July 16, 2009; Varela Geis v.

Spain, no.61005/09, § 31, dated March 5, 2013; and Vona v. Hungary, no.35943/10, §38, EHCR

2013). III. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION 116. The plaintiff complains that his criminal conviction and the sanction for having publicly stated that the Armenian genocide had not occurred had been a violation of his right to freedom of expression.

He invoked article 10 of the Convention which establishes, in its relevant part:

"1. Everyone has the right to freedom of expression. This right includes freedom of opinion and the freedom to receive or communicate information or ideas without interference from public authorities and without regard to borders.

This article does not prevent States from subjecting broadcasting, film or television companies to a prior authorization regime.⁷²

MINISTRY OF JUSTICE 2.The exercise of these freedoms, which entail duties and responsibilities, may be subject to certain formalities, conditions, restrictions or sanctions, provided for by law, which constitute necessary measures, in a democratic society, for national security, territorial integrity or public security, the defense of order and the prevention of crime, the protection of health or morals, the protection of the reputation or rights of others, to prevent the disclosure of confidential information or to guarantee the authority and impartiality of the judiciary."¹¹⁷

It is indisputable that the conviction and sanction imposed on the plaintiff, together with the order to pay damages to the Swiss-Armenian Association, constituted an interference with the exercise of his right to freedom of expression. Such interference would be in violation of article 10 of the Convention if it does not satisfy the requirements of the second paragraph.

The Court, however, will first study whether Article 16 is applicable to the present case.A.Article 16 of the Convention

118.The first question to be decided is whether, as the Swiss Government suggests, the interference could be justified by Article 16 of the Convention, taking into account that the claimant was a foreigner.

119.Article 16 of the Convention establishes:

"None of the provisions of articles 10, 11 and 14 may be interpreted as prohibiting the High Contracting Parties from imposing restrictions on the political activity of foreigners"¹²⁰. The only case in which the Court has considered this article It was Piermont v.

France (27 April 1995, § 64, Series A no 314), in which the applicant, a German member of the European Parliament, had been expelled from French Polynesia as a result of a speech he had given there. The Court declared that, as Ms Piermont was a citizen of another Member State of the European Union and a member of the European Parliament and therefore not a foreigner, Article 16 could not apply to her.

121.This is not the case here. However, the Court does not find that Article 16 can present a justification for interference in the present case. In its report in Piermont, the previous Commission highlighted that this article reflected an outdated understanding of the international law (see Piermont v.

France, nos.15773/89 and 15774/89, Commission report of January 20, 1994, § 58, unreported). In point 10(c) of its Recommendation 799(1977) on political rights and their position on foreigners, the Parliamentary Assembly of the Council of Europe called for its revocation. It has never been applied by the old Commission or the

73

MINISTRY OF JUSTICE Court, and its unrestricted use to limit the possibilities for foreigners to exercise their right to freedom of expression would be contrary to the rulings of the Court in cases in which it has been decided that foreigners can exercise their right without any reference that it could be restricted by reference to article 16 (see WomennonWaves and others v.

Portugal, no.31276/05, §§ 28-44, of February 3, 2009 and Cox v. Turkey, no.2933/03, §§ 27-45, of May 20, 2010).In fact, in In this last ruling (§31) the Court specifically noted that, while the right to freedom of expression was guaranteed by Article 10 § 1 of the Convention “regardless of frontiers”, no distinction could be made between its exercise by nationals and foreigners.

122. Bearing in mind that clauses allowing interference with the rights enshrined in the Convention must be interpreted restrictively (see, among others, Vogt v. Germany, September 26, 1995, § 52, Series A no.323 ; Rekvényi v. Hungary [GS], no.25390/94, § 42, ECHR 1999-III; and Stoll v.

Switzerland [GS], no.69698/01, § 61, ECHR 2007-V), the Court finds that article 16 must be interpreted as only authorizing restrictions on “activities” that directly affect the political process. As this is not the case , cannot be invoked by the Swiss Government.123.In conclusion, Article 16 of the Convention does not authorize the Swiss authorities to restrict the defendant's right to freedom of expression in this case.

B.Justification according to article 10 § 2 of the Convention

124.To be justified by Article 10 § 2 of the Convention, an interference with the right to freedom of expression must have been “provided for by law”, with the intention of achieving one or more legitimate purposes set out in that paragraph and “necessary in a democratic society” to achieve its objective(s).

The Court will examine these points below.1.Legality of interference (a) The Chamber's analysis

125.The Chamber, taking into consideration the way in which the Swiss Federal Court has interpreted article 264 bis § 4 of the Penal Code in the case under study, finds that the precision of the term “a genocide” in this article may raise doubts .

However, he went on to point out that the applicant, being a lawyer and a well-informed politician, could have suspected that his statements could lead to criminal liability because the Swiss National Council had recognized the Armenian genocide and because the applicant had later admitted that, by making his statements, he was aware that public denial of the genocide was punishable in Switzerland.

The plaintiff could not, therefore, have "not been aware that by describing the Armenian genocide as an "international lie" he was exposing himself to a criminal sanction within Swiss territory" (see paragraph 71 of the Chamber's analysis).⁷⁴

MINISTRY OF JUSTICE Interference with your right to freedom of expression may, therefore, be considered "provided for by law."

(b) Arguments before the Grand Chamber

(i) The parties

126.The applicant did not make any submission on this point under Article 10 of the Convention, he made his argument by referring to Article 7 (see paragraph 286 below).¹²⁷The Swiss Government referred to the events leading up to the adoption of article 261 bis § 4 of the Penal Code in its current form.

According to him, these events showed that, when drafting this provision, the Swiss legislator had had a clearly defined intention. The previous case in which it had been applied to statements related to the events of 1915 and subsequent years – which resulted in the ruling of the Berne-Laupen District Court of September 14, 2001 – had left unresolved the question of whether the massacres and atrocities against the Armenian people should be characterized as genocide.

The Swiss Government also noted that article 261 bis § 4 criminalized the denial of both genocide and crimes against humanity, adding that there could be no further debate about the fact that atrocities against Armenians constituted the latter type of crime. On this basis, the Swiss Government concluded that the article was formulated with sufficient precision.

(ii) Third parties involved

128.The Turkish Government argued that Article 261 bis § 4 of the Penal Code did not achieve the degree of foreseeability necessary for criminal law rules that can result in severe sanctions and that the applicant could not have expected to be sentenced based on that provision. due to his statements.

129.The Turkish Government further alleged that, while recognizing that "genocide" is a well-defined legal concept, Swiss courts have sought to determine whether the events of 1915 and subsequent years constituted genocide by referring to the existing consensus in this regard. point in Swiss society.

The relevant point for these courts has not been, then, whether these events were in fact a genocide, but rather Swiss society believes that they were. This could, perhaps, be explained by the practical impossibility, revealed by the doctrine, for national courts to decide in those cases whether certain historical events qualified as genocide for the purposes of international and domestic law.

However, the problem with defining this point with reference to social consensus, which is fickle, is that there are no legal criteria to guide in this regard. Such vagueness is

incompatible with legal certainty. The fact that the Swiss Government and many other governments have not referred to the events of 1915 and subsequent years as "genocide", and that a number of historians have taken the position that they did not constitute it , could have led the plaintiff to conclude that the

75

MINISTRY OF JUSTICE issue was not settled in Switzerland.

Being a doctor of law, the plaintiff understood "genocide" as a strictly defined legal term and could not have foreseen that it would be determined by mere reference to social consensus. The difference between a strict legal concept and the more colloquial use of the word "genocide" outside the legal sphere has been highlighted in the doctrine with reference to the atrocities that happened in Cambodia, Bosnia and Darfur.

Relying on social consensus on this matter may allow politically active interest groups to expand the scope of application of article 261 bis § 4 of the Penal Code, advocating for parliamentary recognition of certain events as "genocide" without taking into consideration the legal definition. of the word.

The position of the Swiss Court means, then, that the interference with the plaintiff's right to freedom of expression has not been "foreseen by law" but "by public opinion." (c) The Court's analysis

130. It is undisputed that the interference with the applicant's right to freedom of expression had a legal basis in Swiss law – article 261 bis § 4 of the Penal Code (see paragraph 32 above) – and that the relevant legislation was accessible .

The arguments of the parties and the intervening third parties boil down to the point of whether the law was sufficiently foreseeable for the purposes of Article 10 § 2 of the Convention. (i) General Principles 131. In the first case in which it had to determine the meaning of the phrase "provided by law" in Article 10 § 2 of the Convention, *The Sunday Times v.*

the United Kingdom ((no.1), April 26, 1979, §§ 48-49, Series A no.30), the Court held that, among other things, this included a requirement of foreseeability. A rule cannot be considered "law" unless it has been formulated with sufficient precision to enable the affected person to regulate his or her conduct; The person must be able – with appropriate advice, if necessary – to foresee, reasonably under the circumstances, the consequences that a certain act could entail.

However, the Court later stated that these consequences did not have to be foreseeable with absolute certainty, which experience has shown to be impossible. 132. In its subsequent jurisprudence relating to Article 10 § 2 of the Convention, the Court has, with minor variations in the drafting, consistently held this position (see, among others, the Rekvényi case, cited above, § 34; *Öztürk v.*

Turkey [GS], no.22479/93, § 54, ECHR 1999-IV, and *Lindon, Otchakovsky-Lauren and July v. France* [GS], nos.21279/02 and 36448/02, § 41, ECHR 2007- IV). 133. Even in cases in which the interference with the plaintiff's right to freedom of expression has taken the form of

a criminal “sanction”, the Court has recognized the impossibility of achieving absolute precision in the determination of laws, especially in fields in which the situation changes according to the opinions that prevail in society, and has accepted that the need to avoid rigidity and keep pace with circumstances

76

Changing MINISTRY OF JUSTICE means that many laws may be drafted in somewhat vague terms and whose interpretation and application are practical matters (see, among others, Müller and others v.

Switzerland, May 24, 1988, § 29, Series A no.133; Tammer v. Estonia, no.41205/98, § 37, ECtHR 2001-I; and Chauvy and others v. France, no.64915/01, § 43, ECHR 2004-VI). 134.Naturally, when it speaks of “law”, Article 10 § 2 uses the same concept that the Convention refers to when it uses the same term elsewhere, for example – and of particular importance for the purposes of this case – in Article 7 (see Grigoriades v.

Greece, November 25, 1997, § 50, Reports 1997-VII; Başkaya and Okçuoğlu v. Turkey [GS], nos.23536/94 and 24408/94, § 49, ECHR 1999-IV; yErdoğdu e İnce v.Turkey [GS], nos. 25067/94 and 25068/94, § 59, ECtHR 1999-IV). In the context of Article 7, the Court has consistently ruled that the requirement that crimes be clearly defined in law is satisfied when a person can know, from the wording of the relevant provision – with the help of the courts' interpretation of it, if necessary – which acts or omissions will cause him to be criminally liable (see, generally, as recent examples, Kononov v.

Latvia [GS], no.36376/04, § 185, ECHR 2010; Del Río Prada v. Spain [GS], no.42750/09, § 79, ECHR 2013; Rohlena v. Czech Republic [GS], no.59552/08, § 50, ECtHR 2015; and, in the context of a case relating to both Article 7 and Article 10 of the Convention, Radio France and Others v. France, no.

53984/00, § 20, ECtHR 2004-II). Article 7 does not prohibit the gradual clarification of the rules of criminal responsibility through judicial interpretation on a case-by-case basis, if the resulting development is consistent with the essence of the crime and reasonably foreseeable (see Kononov, §185; Del Río Prada, §93; and Rohlena, §50, all cited above).

135.The Court has also established, by reference to Articles 9, 10 and 11 of the Convention, that the mere fact that a legal provision is susceptible to more than one interpretation does not mean that it does not comply with the requirement of foreseeability (see LeylaŞahin v. Turkey [GS], no. 44774/98, § 91, ECtHR 2005-XI, with regard to article 9; Vogt, cited above, § 48 in fine, with regard to article 10; and Gorzelik et al. v.

Poland [GS], no.44158/98, § 65, ECHR 2004-I, with regard to article 11).IN the context of articles 7 and 10, the Court has noted that whenever new legislation is created There will be an element of uncertainty about its meaning until it is interpreted and applied by criminal courts (see Jobe v.

United Kingdom (dec.), no.48278/09, June 14, 2011).136.In addressing these points in the

In this case, the Court is aware that, according to its own well-established jurisprudence, in proceedings originating from an individual application filed under Article 34 of the Convention, its task is not to review national legislation in the abstract but to determine whether the way in which it was applied to the plaintiff caused a breach of the Convention (see, among others, *Golder v.*

United Kingdom, February 21, 1975, §39 in fine, Series A no.18; *Minelli v. Switzerland*, March 25, 1983,

77

MINISTRY OF JUSTICE § 35, Series A no.62; and *Von Hannover v. Germany* (no.2) [GS], nos. 40660/08 and 60641/08, § 116, ECHR 2012).(ii) Application of these principles to the present case 137.

It follows from the above principles that the main question in this case is not whether article 261 bis § 4 of the Penal Code is, in principle, sufficiently foreseeable in its application, in particular with regard to the use of the term "genocide", but whether in making the statements for which he was sentenced the plaintiff knew or should have known – after receiving appropriate legal advice, if necessary – that these statements could subject him to criminal liability in accordance with this provision.

138.The Police Court and the Federal Court decided, based on the record of the plaintiff's interviews with prosecutors, that he knew that the Swiss National Council had recognized the events of 1915 and subsequent years as genocide, and had acted motivated by the desire to "help rectify the error" (see paragraphs 22 and 26 above).

In view of the above, and the wording of article 261 bis § 4 of the Criminal Code – seen, in particular, in the light of its legislative history (see paragraphs 33-38 above and, mutatis mutandis, *Olsson v. Sweden* (no.1) of March 24, 1988, § 62, Series A no.130) – the Court finds that, despite his complaints to the contrary, the plaintiff could reasonably have foreseen that his statements in relation to these events could result in criminal liability under that provision.

The fact that a previous accusation for similar statements had resulted in an acquittal does not change anything, especially considering that the Berne-Laupen District Court decided to acquit by finding that the accused had not acted with racist motivation – a factor which can change in each case depending on the person involved and the exact content of their statements – while leaving open the question of whether the events of 1915 and the following years could be considered "genocide" for the purposes of article 261 bis § 4 (see paragraph 44 above).

The plaintiff could have found this out by obtaining legal advice. It is true that, in the absence of further jurisprudence on this point, it was not entirely clear how the Swiss courts would proceed to determine whether these events had qualified as "genocide" for the purposes of article 261 bis. § 4 in later cases.

However, these courts cannot be blamed for this state of affairs, caused, according to

it seems, due to the infrequency with which they had had to confront acts such as those committed by the plaintiff (see, mutatis mutandis, Soros v. France, no.50425/06, § 58, of October 6, 2011).

Its position in the plaintiff's case could have reasonably been expected, especially in view of the adoption by the Swiss National Council of the motion recognizing the events of 1915 and subsequent years as genocide (see paragraphs 48-50 above). This position was not equivalent to a sudden and unforeseeable change in jurisprudence (see, mutatis mutandis, Jorgic v.

Germany, no.74613/01, §§ 109-13, ECtHR 2007-III; contrast Pessino v. France, no.40403/02, §§ 34-36, October 10, 2006), and could not be considered an expansion of the scope of application of a

78

MINISTRY OF JUSTICE criminal law by analogy (contrast Karademirci and others v. Turkey, nos.

37096/97 and 37101/97, § 42, ECHR 2005-I).139.The question whether the position of the Swiss courts on the question of what constitutes "a genocide" for the purposes of article 261 bis § 4 of the Criminal Code was acceptable in terms of the Convention relates to the relevance and sufficiency of the arguments they used to support the conviction of the defendant, and will be examined later under the heading of "necessity" (see, mutatis mutandis, Lindon, Ortchakovsky- Laurens and July, cited above, §42 in fine).

140.The interference with the plaintiff's right to freedom of expression was, therefore, sufficiently foreseeable and, therefore, "provided for by law" in the terms provided by Article 10 § 2 of the Convention.2.Legitimate Objective

(a) The Court's analysis

141.The Chamber accepted that the interference with the applicant's right to freedom of expression had been intended to protect "the rights of third parties", in particular, the honor of the relatives of the victims of the atrocities committed by the Ottoman Empire against the Armenian people after 1915.

However, it found that the Swiss Government's claim that the plaintiff's comments had also created a serious risk to public order was unfounded.(b) Pleadings before the Grand Chamber

(i) The parties

142.The plaintiff did not address this point in depth in his pleadings.143.The Swiss Government alleged that the interference with the plaintiff's right to freedom of expression had been intended to protect the rights of third parties: the victims of the events of 1915 and subsequent years and their descendants.

The plaintiff's views were a threat to the identity of the Armenian community. The interference was also aimed at protecting public order. On July 24, 2004, the plaintiff had addressed a demonstration in Lausanne to commemorate the signing of the Treaty of Lausanne, which had been attended by nearly 2,000 people, from Switzerland and abroad, and which had presented a certain risk because it had coincided with another

manifestation.

The Swiss Government also pointed out that article 261 bis was in a chapter of the Penal Code that dealt with "crimes against public peace" and that, according to the jurisprudence of the Swiss Federal Court, the purpose of said article was not only to protect members of a particular ethnic or religious group but also maintaining public order.

This also resulted from Switzerland's obligations under article 4(b) of the Convention for the Elimination of All

79

MINISTRY OF JUSTICE the forms of racial discrimination (CEDR) of 1965, 600 UNTS 195 and article 20 § 2 of the International Covenant on Civil and Political Rights (ICCPR), 999 UNTS 171, as interpreted by the Human Rights Committee of The United Nations.

(ii) The intervening third parties 144. The Turkish Government stated that no link had been established between the arrest of the applicant and the maintenance of public security, nor had any reference been made to any specific threat to public security. The Turkish Government called attention to the difference between the wording of Article 10 § 2 of the Convention, which spoke of the "prevention of disorder" and that of Article 19 § 3 (b) of the ICCPR, which uses the terminology "the protection... of public order" , and noted that there was no indication that the plaintiff's statements could have caused disorder or had, in fact, caused disorder.

Others made similar statements, before and after the statements that are the subject of this case, without any disorder being reported. (c) The Court's assessment

145.The Swiss Government argued that the interference with the applicant's right to freedom of expression had been intended to achieve two of the legitimate objectives set out in Article 10 § 2 of the Convention: "the prevention of disorder" and "the protection of ...the rights of third parties."

The Court will analyze each of these defenses below. (i) The "prevention of disorder"

146.In setting out the various legitimate objectives that may justify interference with the rights enshrined in the Convention and its Protocols, the English version of the various articles of the Convention and its Protocols uses various formulations.

Article 10 § 2 of the Convention, as well as articles 8 § 2 and 11 § 2, contain the term "prevention of disorder", while article 6 § 1 of the Convention and article 1 § 2 of Protocol No.7 speak of "public order interests", Article 9 § 2 of the Convention uses the formula "protection of public order", Article 2 § 3 of Protocol No.

4 refers to "maintenance of public order". While, as stated in paragraph 134 above, when the same term is used within the Convention and its Protocols, it should normally be presumed to refer to the same concept, the use of Different terms should normally be interpreted as a variation in meaning.

Seen in this context, the formulas in the second group seem to have a broader meaning, based on the notion of public order (ordrepublic) in the broad sense used in continental countries (see paragraph 16 of the explanatory report of Protocol No. 4) – where it is commonly understood to refer to a body of political, economic and moral principles essential for the maintenance of the social structure, and which in some jurisdictions even encompasses human dignity – while the formulas in the

80

MINISTRY OF JUSTICE first group seem to convey a more limited meaning, essentially understood in cases of this type such as brawls or other forms of public disorder.

147.On the other hand, the French text of Article 10 § 2 of the Convention, as well as Articles 8 § 2 and 11 § 2, speak of "la defense de l'ordre", an expression that may give the impression of having a broader content than the term "disorder prevention" used in the English version.

However, also in the French version there is a difference in formulation, since article 6 § 1 of the Convention, as well as articles 2 § 3 of Protocol No. 4 and 1 § 2 of Protocol No. 7 refer to the "ordrepublic".148.In fact, the Court recently highlighted the difference between the term "prevention of disorder" ("défense de l'ordre") in Article 8 § 2 of the Convention and the term "public order" ("ordrepublic").(see SAS

v.France [CG], no.43835/11, § 117, ECHR 2014).149.According to article 31 § 1 of the 1969 Vienna Convention on the Law of Treaties, treaties must be interpreted "in good faith, according to the ordinary meaning attributed to the words in the treaty, in its context and in light of the objectives and purposes pursued."

According to article 33 § 3 of the same Convention, which deals with the interpretation of treaties that, like the Convention, have authentic versions in two or more languages, the terms of the treaty "are presumed to have the same meaning in each authentic version "Article 33 § 4 of the Convention states that when the comparison of the authentic versions reveals a difference in meaning that cannot be resolved by the application of other rules of interpretation, the meaning that must be adopted will be the one that "best reconciles the versions.", taking into consideration the objective and purpose of the treaty."

These rules must be considered elements of the general rule of interpretation established in article 31 § 1 of said Convention (see Golder, cited above, § 30, and Witold Litwa v. Poland, no.26629/95, § 58, ECHR 2000- III).150.The Court has already had occasion to point out that these rules – which reflect generally accepted principles of international law (see Golder, cited above, § 29) which have acquired the character of customary law (see LaGrand (Germany v.

United States of America), Judgment, Reports 2001, pp.501-02, §§ 99 and 101) – oblige him to interpret the texts in question in order to reconcile them as much as possible and in the most conducive way for compliance. the objective and purpose of the Convention (see Wemhoff v. Germany, June 27, 1968, p.

23, § 8, Series A no.7; The Sunday Times, cited above, § 48; Brogan et al v. United Kingdom, 29 November 1988, § 59, Series A no.145-B, and Stoll, cited above, §§ 59-60). 151.Taking into account that the context in which the terms in question were used is a treaty for the effective protection of individual human rights (see Saadi v.

United Kingdom [CG], no.13229/03, § 62, ECHR, 2008) clauses, such as Article 10 § 2, that allow interference with Convention rights must be interpreted restrictively (see,

81

MINISTRY OF JUSTICE among others, Vogt, § 52; Rekvényi, § 42; and, especially, Stoll, § 61, all cited above), and that, more generally, exceptions to a general rule cannot be interpreted broadly (see Witold Litwa, cited above, § 59), the Court finds that , while the words used in the English text seem to only be able to be interpreted restrictively, the expressions “the prevention of disorder” and “la defense de l’ordre”, in the English and French versions of Article 10 § 2 can be reconciled in the best way by reading them in their most limited meaning.

152.The Swiss Government's arguments relating to the placement of article 261 bis within the Penal Code and the legal interests it seeks to protect within the Swiss legal system relate to the broader meaning and are therefore of limited relevance. in this context.

What must be shown, rather, is that the plaintiff's statements could or did cause disorder – for example, public disturbances – and that in taking action to sanction him, the Swiss authorities had that consideration in mind.153 However, , the only argument presented by the Swiss Government in support of its assertion that this was the case is the reference to two contrary demonstrations that occurred in Lausanne on July 24, 2004 – approximately one year before the events regarding which the plaintiff was convicted – and the plaintiff's participation as a speaker at one of said demonstrations.

The Swiss Government did not provide any details in this regard and there is no evidence that confrontations actually took place during those demonstrations (compare, mutatis mutandis, Plattform “Ärztefür das Leben” v. Austria, June 21, 1988, §§ 12 -13, 19 and 37-38, Series A no.139, and Chorherr v.

Austria, August 25, 1993, §§ 7-8 and 28, Series A no.266-B). Furthermore, none of these cases were mentioned by the Swiss courts in their rulings in the criminal proceedings against the plaintiff, which was established following a complaint filed by the Swiss-Armenian Association and not ex officio by the authorities (see paragraph 17 above).

Finally, there is no evidence that at the time of the public events during which the plaintiff made his statements, the Swiss authorities perceived those events as potentially causing public disturbances and attempted to regulate them on that basis. Nor is there evidence that, Despite the presence of both Armenian and Turkish communities in Switzerland,

This type of statement generates a risk of serious tensions or confrontations (contrast Castells v.

Spain, April 23, 1992, § 39, Series A no.236).¹⁵⁴The Court, therefore, does not find that the interference with the plaintiff's right to freedom of expression has sought the "prevention of disorder "(ii) The "protection of... the rights of third parties" ¹⁵⁵. With respect to this legitimate objective, it is necessary to make a distinction between, on the one hand, the dignity of the deceased and the surviving victims of the events of 1915 and the years

82

MINISTRY OF JUSTICE following and, on the other, the dignity, including the identity, of today's Armenians, as their descendants.

156.As the Swiss Federal Court noted in point 5.2 of its ruling, many of the descendants of the victims of the events of 1915 and subsequent years – especially those from the Armenian diaspora – build their identity on the perception that their community was a victim of genocide (see paragraph 26 above).

In view of this, the Court accepts that the interference with the plaintiff's statements, through which he denied that the Armenians had suffered a genocide, was aimed at protecting that identity and, therefore, the dignity of today's Armenians. At the same time, it cannot be said that by challenging the legal classification of the events the plaintiff has presented the victims in a negative light, deprived them of their dignity or minimized their humanity.

Nor does it appear that the plaintiff had directed his accusation that the Armenian genocide had been "an international lie" against those people or their descendants; The general tenor of his statements shows that the accusation is rather directed at the "imperialists" of "England, France and Tsarist Russia" and "the United States of America and the European Union" (see paragraph 13 above).

On the other hand, one cannot ignore the fact that in the statements he made in Köniz, the plaintiff referred to the Armenians involved in the events as "instruments" of the "imperialist powers" and accused them of "carrying out massacres." of Turks and Muslims" (see paragraph 16 above).

In these circumstances, the Court may also agree that the interference was intended to protect the dignity of those persons and, therefore, that of their descendants.¹⁵⁷Interference with the plaintiff's right to freedom of expression may , therefore, be considered aimed at the "protection of... the rights of third parties."

It remains to analyze whether a criminal sanction was "necessary in a democratic society" for that purpose. 3.Need for interference in a democratic society

(a) The Court's decision

158.The Chamber, having examined the applicant's statements in the context in which they were made, and taking into consideration the applicant's position, found that said statements had been "of a historical, legal and political nature" and related to a debate of public interest, and on this basis concluded that the margin of appreciation of the

Swiss authorities regarding them was small.

The Chamber finds it problematic that the Swiss courts have referred to the concept of "general consensus" for the characterization of the events of 1915 and the following years in order to justify the conviction of the applicant. Furthermore, the Chamber stated that there was no indication that the plaintiff's statements could stir hatred or violence, and he made a distinction between these statements and those denying the Holocaust on the basis that they did not have the same implications and could not have had the same repercussions.

The Chamber also took into account

83

MINISTRY OF JUSTICE considered recent developments in comparative law and the position of the UN Human Rights Committee. On this basis, it expressed doubts that the applicant's conviction would have been necessary for any pressing social reason. It also took into account the severity of the sentence imposed on the plaintiff and concluded that the criminal sanction and sentence had not been "necessary in a democratic society" for the purposes of protecting the honor and feelings of the descendants of the victims of the events of 1915 and the later years.

(b) Arguments before the Grand Chamber

(i) The parties

(a) The plaintiff

159.The applicant argued that his statements deserved special protection under Article 10 of the Convention because they had sparked debates not only about the events of 1915 and subsequent years but also about the appropriateness of criminalizing dissenting opinions regarding controversial historical events; both topics of public interest.

The imposition of a criminal sanction as a result of these statements was intended to hinder debate and prevent different interpretations of historical events from being presented to the public, and had the effect of creating an official historiography of the suffering of Armenians at the hands of the Empire. Ottoman.

This was the antithesis of open debate and freedom of inquiry, which are essential in a democratic society. The plaintiff had not denied the events as such, but simply their characterization as genocide according to the meaning attributed to that term in international law, in particular in view of the lack of evidence of a specific intention of the Ottoman government to destroy the Armenians as a group.

His assertions found additional support in the lack of retroactive application of the Genocide Convention and the fact that the events in question had not been recognized as genocide by any competent court. This marked a distinction between his statements and statements denying the Holocaust, which are related to specific historical events, not to their characterization.

Furthermore, the existence of the Holocaust had been clearly established by an international tribunal on the basis of clear legal rules, such that the primary facts and

their legal characterization are now inseparable. This Court had only tolerated the criminalization of Holocaust denial due to the anti-Semitic and anti-democratic intention of those who engage in it.

In view of the social climate in modern Europe, such denial is a unique phenomenon capable of rationalizing a similar crime and presenting it as a symbol of racial hatred. On the other hand, there is no history of persecution of Armenians in Europe. In this regard, The plaintiff highlighted several aspects that, in his opinion, distinguished the Holocaust from the events of 1915 and the years that followed, and stated that it was one thing to recognize an event as genocide and quite another to prohibit the expression of different opinions on the subject.

84

MINISTRY OF JUSTICE 160.The plaintiff also alleged that historical research into the events of 1915 and the following years was ongoing and there was no consensus among academics regarding them. The assertion of the Swiss authorities in this regard was denied by many historians and distinguished politicians.

Furthermore, in 2009, after a mediation process led by the Swiss government, the Armenian and Turkish governments had agreed to establish a joint commission to investigate historical records and make recommendations, however, the commission had not been formed as a result. of the lack of ratification of the agreement by the parliaments of the respective countries.

It also had to be taken into account that the term "genocide", as defined by international law, did not fully conform to the notion put forward by Raphael Lemkin, whose statements on the subject demonstrated that in inventing the term he had been inspired by a wide range of historical events.

161.The plaintiff later argued that his statements did not represent an extreme opinion and did not seriously undermine the identity of the Armenians. He had not expressed himself in a way that invited hatred or promoted racial discrimination. Therefore, there had been no need to penalize their declarations under article 4 of the CEDR.

His refusal to change his mind even when confronted with the conclusions of a neutral committee did not change that; Being a lawyer by profession, he could not agree that such a committee could replace a competent court under Article IV of the Genocide Convention.

His statements had not been motivated by racial considerations but rather by legal and historical ones. Being a lawyer, he insisted on the need to adhere to legal principles in the definition of genocide and to disapprove of the political use of the term by interest groups. His convictions as a socialist politician had led to accusing what he considered the imperialist powers, and not the Armenians, of spreading an "international lie."

Therefore, he had not accused the victims of having falsified the story, but simply

highlighted that the “Armenian question” in the Ottoman Empire continued to constitute an important part of the hegemonic discourse. His work as a historian had led him to see that there was no consensus among historians on this issue.

Contrary to what the Swiss authorities had determined, the mere fact that he had mentioned TalaatPasha did not mean that he supported his every act and speech.
162.According to the plaintiff, to the extent that his statements could have referred to a subject the mention of which was prohibited under Swiss law, they related to a Swiss domestic dispute.

Article 261 bis § 4 of the Penal Code was very controversial there, having even deserved criticism from the previous Minister of Justice. For its part, the debates throughout Europe regarding the legal characterization of the events of 1915 and the following years demonstrated that this was a matter of public interest not only in Turkey but also internationally, including in Switzerland, particularly given the concerns of the Turkish community on the matter.

163.The complainant further alleged that he was an anti-racism activist and that he had been invited to speak on these issues at LICRA and the European Parliament. He had also passed

85

MINISTRY OF JUSTICE thirteen years in prison in Turkey as punishment for his fight for equality for all citizens, including marginalized groups such as Alevis, Kurds and Christian minorities; The Court had already decided twice that her rights had been violated as a result of the above.

It was, therefore, absurd to call him racist.164.Finally, the plaintiff pointed out that in a case where two people denied the Srebrenica genocide – which had happened much more recently and had been recognized as such by the International Court of Justice – the Swiss authorities had decided not to press charges, finding that these people had not acted with racist motivations.

This demonstrated that article 261 bis § 4 of the Penal Code was being applied unequally and politically.(β) The Swiss Government

165.The Swiss Government argued that, to the extent that the Swiss Federal Court had decided, in paragraph 7 of its judgment, that the massacres and mass deportations of Armenians in 1915 and subsequent years had constituted crimes against humanity , the justification of which also fell within the scope of article 261 bis § 4 of the Penal Code, the legal characterization of said events was of limited importance.

Later, they expressed their disagreement with the Chamber regarding the fact that the plaintiff had only been convicted for denying the legal classification of said events. They alluded in this regard to the fact that the plaintiff had alleged that the Armenians had been the aggressors of the Turkish people and that the use of the term “genocide” to describe the atrocities committed against them was an “international lie”; He had also expressed being a follower of TalaatPasha, one of the protagonists of these events.

By describing the Armenians as aggressors, he had intended to justify the acts committed against them, thus violating the dignity of the victims and their families. In fact, according to the Swiss Federal Court, the plaintiff's statements had been a serious threat to the identity of the members of the Armenian community, who identified themselves particularly through their history, marked by the events of 1915 and the following years.

By focusing only on the applicant's trial for genocide denial, the Chamber had failed to take into consideration that context and the firmness with which the applicant had stated that he would never change his mind about these events.¹⁶⁶ The Swiss Government disagreed, with the Chamber's description that the applicant's statements had been "of a historical, legal and political nature", and with its consequent decision that the margin of appreciation of the national authorities was limited.

In his opinion, freedom of historical debate only protected those statements that sought historical truth and whose authors sought to debate openly and dispassionately, rather than stir up gratuitous controversies. The plaintiff had repeated several times that he would never change his mind and that he had never sought a real debate.

The tenor of his statements showed that he had not followed the basic rules of the historical method. In these circumstances, the authorities should be granted a wide margin of appreciation.⁸⁶

MINISTRY OF JUSTICE ¹⁶⁷ The applicant's statements could not be granted the protection normally accorded to political speech because they did not relate to Swiss domestic politics or a debate within Swiss society.

The applicant had not sought to challenge article 261 bis of the Penal Code or to debate any other aspect of Swiss political life, but had expressed himself on an issue related to the policies of his country of origin. He could not be put on the same level than a person who was expressing himself within a domestic political debate because this would imply not taking sufficient account of the purpose of freedom of expression.

This fucking also derived from Article 16 of the Convention, under which the High Contracting Parties could impose restrictions on the political activity of foreigners. By holding that the plaintiff's statements qualified as political speech, the Chamber had prevented Switzerland from reacting to a political dispute over which it had no influence, even though the Swiss authorities could have a legitimate interest in ensuring the application of the principle that the exercise of the right to freedom of expression entails duties and responsibilities.

¹⁶⁸ The Swiss Federal Court had determined that the cantonal authorities had not acted arbitrarily to establish the existence of a general consensus on the legal classification of the atrocities committed by the Ottoman Empire against the Armenian people. By rejecting the plaintiff's arguments, the court had clarified that consensus did not mean unanimity.

The Swiss courts had not simply accepted political statements on this point, but had taken into consideration whether the position of the authorities that had given rise to

These statements had been based on the advice of qualified or knowledgeable experts and documented reports, and had reviewed the literature on international criminal law and genocide.

In confirming that the rulings of the lower courts had not been arbitrary on this point, the Swiss Federal Court chose not to rule on historical issues. Since the Chamber has found that the Swiss courts had erred in accepting the existence of such a general consensus, it must be noted, first, that according to the Chamber, the plaintiff had expressed disagreement with the legal characterization of the facts, but not with their historical veracity and, secondly, that the events would be covered by article 261 bis § 4 even if they were classified as crimes against humanity and not genocide.

A High Contracting Party must be able to criminalize its denial even if this were the only point on which there was general agreement, regardless of the number of countries adopting the same position.¹⁶⁹ It had to be taken into account that Article 261 bis § 4 The Penal Code does not prohibit the mere denial, trivialization or justification of genocide or crimes against humanity; It also required that these acts be carried out for racial, ethnic or religious reasons, in a way that violates human dignity.

In the case of the plaintiff, the Swiss courts had sufficient grounds to find that his statements had been motivated by racism. He had sought to vindicate the acts committed against the Armenians and accuse them of those acts and their descendants of falsifying history.

One cannot, therefore, blame the

87

MINISTRY OF JUSTICE Swiss courts for determining that the plaintiff's statements were not intended to contribute to the historical debate. By deciding that the plaintiff had not expressed contempt for the victims of the events of 1915 and subsequent years, the Chamber has departed from the findings of fact by the local courts, acting as a court of fourth instance, and has evaluated the statements in isolation, without putting them in the correct context.

The applicant's obstinacy demonstrated that his ideas were not the result of historical research and that they threatened the values that underpin the fight against racism and intolerance, infringed the rights of the descendants of the victims and were incompatible with the values of the Convention.

These considerations were important not only in the context of Article 17, but also in that of Article 10 § 2, and required that national courts and authorities be granted a wide margin of appreciation.¹⁷⁰ The fight against racism was an important aspect of the protection of human rights.

This is demonstrated in the work of the European Commission against Racism and Intolerance (CERI), whose latest report on Switzerland recommends that civil and administrative legislation be strengthened to combat racial discrimination, and by Recommendation No.R(97) 20 of the Committee

of Ministers on "hate speech", which condemns all forms of expression that incite racial hatred, xenophobia, anti-Semitism and intolerance.

The Swiss Government also referred to recent developments in comparative law in this regard, and stated that the European trend, as exemplified in the CERI General Policy Recommendation No.7 of December 13, 2012 on national legislation for combating racism and racial discrimination (CRI(2003)8) and Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia through criminal law, OJ L 328, pp.

55-58 ("EU Framework Decision 2008/913/JHA"), which also points in this direction. The lack of absolute consensus on this point meant that the High Contracting Parties were granted a wide margin of appreciation. The decision contrary of the Chamber was not convincing. Furthermore, while there have been several attempts to obtain the revocation of article 261 bis § 4 of the Penal Code, none of them have been successful, which means that this provision has acquired democratic legitimacy. strong and continued in Switzerland.

171. While it is not intended to discuss the unique nature of the Holocaust, the Swiss Government considers that the High Contracting Parties had to be granted the necessary latitude for their efforts in combating the denial of other genocides and crimes against humanity. In any case In this case, accusing the victims of falsifying history was one of the most serious forms of racial defamation.

172. Finally, the Swiss Government argued that the sanction imposed on the applicant had not been unreasonably harsh since it had not prevented him from expressing his views in public and since he had not contributed to the discussion of problems affecting the lives of the community.⁸⁸

MINISTRY OF JUSTICE (ii) The third parties involved (a) The Turkish Government 173.

The Turkish Government argued that the plaintiff's statements qualified as political speech and that this concept, which encompasses speech on any topic of public interest, was not limited to statements referring only to domestic or dominant issues. These statements had been intended to influence the debate in Switzerland on the recognition of the events of 1915 and the following years as genocide and on the criminalization of its denial, and were intended to have an impact on Swiss domestic politics.

The fact that the issue was also a domestic dispute in Switzerland is demonstrated by the fact that two Swiss associations – the Swiss-Armenian Association and the Turkish Federation of Associations of Francophone Switzerland – had intervened as third parties in this case. The authorities Swiss authorities, therefore, had a limited margin of appreciation in deciding to act against the plaintiff, that margin should have been further limited by the fact that the plaintiff had criticized the Swiss legislator.

174. The plaintiff's intention was not to racially discriminate against Armenians but to criticize and cast doubt on the decision of the Swiss National Council to recognize the events of 1915 and the

later years as genocide. This was clear from the content of his statements, from the statements he had made in the course of the criminal proceedings against him, and from the reasons expressed by the Swiss courts.

The plaintiff was not seeking to start a gratuitous controversy but rather to contribute to an ongoing debate. This was demonstrated by the opposing views of the historians called by the plaintiff and those called by the Swiss-Armenian Association in the national procedure. The plaintiff had not put into question doubts the existence of massacres and deportations, but had simply opposed their classification as genocide.

His case is therefore different from those relating to Holocaust denial, where deniers deny the reality of historical facts. The plaintiff is not alone in his position, which was once shared by the UK government.¹⁷⁵ It is true that the plaintiff had had a provocative attitude regarding an issue that was a source of great suffering for the Armenian people.

However, he had not done so to denigrate the victims of the events of 1915 and the years that followed or the Armenians in Switzerland, but to spark public debate. Freedom of expression encompasses a certain degree of provocation. It protects ideas that clash and they already offend the way they communicate, even when their style is virulent.

The fact that the plaintiff has expressed support for TalaatPasha's ideas, has stated that he would never change his way of thinking, and has equated the United States of America and the European Union with Hitler is not relevant, as he has been sentenced for racial discrimination for denying "a genocide," not for having made other claims.

The plaintiff's statements cannot be equated with statements inciting violence, hostility or racial hatred against Armenians. Reject qualification

89

MINISTRY OF JUSTICE legal of the events of 1915 and subsequent years is not an implicit attack on the dignity of the group and a continuation of the discriminatory treatment meted out to it at that time.

The Swiss Government had not adequately demonstrated that this rejection had promoted racial discrimination against the Armenian community in Switzerland, and there is no basis to automatically infer from it racist or nationalist motives or the intention to discriminate. The main difference in this regard between these statements and those that refer to the Holocaust, whose denial is today one of the main mechanisms of anti-Semitism, is the lack of connection between present hatred and past hatred.

¹⁷⁶In terms of context, in no other Member State of the Council of Europe has there been a condemnation for denying the characterization as genocide of the events of 1915 and the following years. This suggests that democratic societies have not seen the need for it. The example of France, in particular, demonstrates that there is a difference between the official recognition of certain events as genocide and the criminalization of its denial.

The German government has also taken the position that a criminalization of this speech would not be appropriate. The position of the competent United Nations agencies is the same. It should also be taken into account that statements similar to those of the plaintiff could legally be made in other countries. countries and can be easily found on the Internet and in historical and legal treatises regarding cases related to the Holocaust in Germany and Austria, it cannot be said that the events of 1915 and the following years were part of the Swiss historical experience.

The mere presence of a community of approximately 5,000 Armenians on Swiss territory was not in itself sufficient in this sense, especially considering that these events occurred approximately one hundred years ago. It was also significant that the Swiss authorities had not attempted to prevent the plaintiff gave his statements; It was difficult to see how there could be a pressing social need to penalize them, but not to prevent them from occurring.

It had been disproportionate and unnecessary, under the international law obligations assumed by Switzerland, to impose criminal sanctions in relation to these statements.(β) The Armenian Government

177.The Armenian Government argued that article 261 bis of the Penal Code, which was based on article 20 of the ICCPR and article 4 of the CEDR, was compatible with the Convention because it only prohibited statements made with the intention of inciting negative racial sentiments. or that could have dangerous social consequences.

According to the Court's jurisprudence, cases against hate speech had to take into account whether the challenged statements were truly in the public interest, which was not the case with the plaintiff. The plaintiff was an incorrigible genocide denier who had provided no reasoning or academic validation in support of their rude and gratuitously offensive statements.

The Chamber's conclusion that these statements – which had been nothing more than a racially motivated insult to the Armenians and an invitation for the Turks to consider them

90

MINISTRY OF JUSTICE liars – had been of a historical, legal and political nature was extremely dry.

The Swiss courts had had the normal margin of appreciation to decide whether the statements could harm social harmony by infringing on the dignity of Armenians. The statements had not been part of a proper historical debate and the Chamber's apparent suggestion that they cannot Having objective truth in historical research is nonsense, since the atrocities committed against the Armenians were absolutely real.

Distinguishing the Armenian genocide from the Holocaust on the basis that the statements made by Holocaust deniers sometimes refer to very precise facts, or that the classification of Nazi crimes had had a well-defined legal basis, and that the existence of the Holocaust had been established by an international tribunal, it was odious, as well as an attempt to establish the Holocaust as the only modern genocide that can be clearly proven.

Contrary to what the Chamber suggested, genocidal intent was not difficult to prove when it was obviously inferred from the evidence or had been admitted by the perpetrators. The mass massacres and deportations of Armenians in 1915 and the following years clearly constituted genocide. By describing these events as a mere "tragedy," the Chamber had insulted the Armenians.

In the same way that Holocaust denial is the main driver of anti-Semitism, the denial of the Armenian genocide was the main driver of anti-Armenianism, this is how genocide denialism works. The Chamber had erred in seeking support from the position of Spain and France and the position of the United Nations Human Rights Committee, because these presented serious differences with respect to article 261 bis of the Penal Code.

178.The true error of judgment of the Chamber was that it had been considered by genocide deniers as an authoritative argument in support of the idea that there are doubts about the authenticity of the Armenian genocide. For a human rights court to send that message is deeply hurtful and unfair.

It had been based on erroneous or misleading evidence provided by the plaintiff on this point, about which there can be no doubt. There was broad academic consensus in this regard, and those who denied it were mainly historians without legal credentials and with a poor understanding of how genocidal intent is proven in international law, many of them were also on the payroll of the Turkish government.

In this regard, the Armenian Government referred to the number of investigations, analyses, reports, acts of official recognition and other evidence.(y) The French Government

179.The French Government maintained that States should be able to resort to criminal sanctions to respond to racism and denialism in a sufficiently dissuasive manner.

When the right to freedom of expression was exercised in a way that threatened the basic foundations of a democratic society, the legislator should be able to react by establishing criminal sanctions. This was confirmed by the positions adopted by ECRI and article 1 § 1 (c) of Framework Decision 2008/913/JHA.

Genocide denial was a

91

MINISTRY OF JUSTICE counterfeiting program aimed at promoting intolerance. In view of the threat that this implied, the laws that made it a criminal offense were consistent with Article 10 of the Convention. These laws do not seek to put restrictions on debate or investigation historical facts but to combat denialist statements that have negative consequences.

Its application in appropriate cases was within the margin of appreciation of national courts. The purpose of that margin of appreciation is to allow the High Contracting Parties

combat such behavior even in the absence of a general consensus on this issue.(δ) The Swiss-Armenian Association 180.

The Swiss-Armenian Association argued that the case concerned not only the plaintiff's right to freedom of expression but also the honor, reputation and memory of the victims of the atrocities committed by the Ottoman Empire in 1915 and the years following and their descendants, who are entitled to the protection granted by Article 8 of the Convention.

The Court had recently recognized that ethnic identity was covered by that article. The case therefore raised a conflict between two rights that deserved equal protection. The High Contracting Parties had a wide margin of appreciation to balance these rights. The rulings of the Swiss courts in the plaintiff's case therefore deserved considerable deference, especially with regard to their findings on the "general consensus" regarding the legal classification of the events of 1915 and subsequent years.

It was not for the Court to rule on these issues.¹⁸¹ The plaintiff had made his statements deliberately, having gone to Switzerland for that particular purpose. These statements had not been limited to the legal classification of the events of 1915 and the following years, but, in reality, they had denied its existence.

The applicant's criminal conviction was not, therefore, incompatible with the Convention. The Chamber's attempt to distinguish this conviction from those related to Holocaust denial was disturbing since it implied unequal treatment of victims of genocide. In any case , the plaintiff had also tried to justify the massacres that, without a doubt, had constituted crimes against humanity.

There was no reason to pay more attention to the constitutional courts of Spain and France than to the Swiss Federal Court. Finally, the sentence imposed on the plaintiff had been highly symbolic, given the seriousness of his acts.(ε) The Federation of Turkish Associations of Francophone Switzerland

182.

The Federation of Turkish Associations of Francophone Switzerland alleged that only a minority of democratic states had decided to criminalize genocide denial, especially before the adoption of EU Framework Decision 2008/913/JHA. They referred to the position of the United States of America and noted that Germany and France had only banned Holocaust denial.

No other historical event had, up to that time, been included in the category of "clearly established historical facts" whose denial could not be

92

MINISTRY OF JUSTICE deserved, according to the Court's jurisprudence, the protection of Article 10 of the Convention. Such extension, which implies an official interpretation of the past supported by criminal sanctions, could not be reconciled with freedom of expression, particularly in view of the reasons raised by the constitutional courts of Spain

and France on that point.

Expression on such topics could only be penalized if it was clearly motivated by racism or undemocratic considerations or gave rise to an imminent threat to public order. The High Contracting Parties had a wide margin of appreciation in this regard only in relation to those events that had happened in their territory.

183.The Federation drew attention to the provisions of EU Framework Decision 2008/913/JHA, especially its limitation clauses and the emphasis on the need to punish denial only when it could incite violence or hatred .He concluded that, properly interpreted, European Union law did not require the criminalization of the denial that the events of 1915 and subsequent years had constituted genocide if it was not accompanied by the denial or condonation of the underlying facts.

He also drew attention to the recent report on the implementation of EU Framework Decision 2008/913/JHA, noting that a lack of consensus on the need for criminal law measures in this area continued to be identified. The third party intervenor alleged that the Applicable international law did not have a requirement in that sense either.

Finally, he argued that freedom of expression on this point was important for the 130,000 Turks residing in Switzerland, who wanted to be able to debate controversial issues in a spirit of openness. (ζ) The Coordinating Council of Armenian Organizations in France (CCOAF) 184. The CCOAF claimed that it was acting on behalf of a community of 600,000 Armenians in France, the third largest Armenian community in the diaspora.

They were well aware that they belonged to a people who had suffered extermination, and that time had not erased those memories. The CCOAF illustrated this point by describing in detail the various public and private ways in which Armenians in France commemorated the victims. He went on to say that under international law, genocide was recognized as an attack on human dignity, which French courts recognized as an element of the ordrepublic.

Its denial also infringed said dignity, affecting not only history but also memory, which was an essential aspect of the right to dignity. Prohibiting denial was the only way to protect that right. Furthermore, denial affected public order, by less in countries that, like France, had large Armenian communities.

This was demonstrated by the number of acts of vandalism and desecration, as well as the insults and threats to which Armenians were victims, especially in locations where people of Turkish origin also lived, as well as online. Organized public demonstrations by genocide deniers, both inside and outside France, which could easily degenerate into confrontations, were a source of particular anxiety on that issue.

MINISTRY OF JUSTICE 185.The COOAF also alleged that, if the Chamber's ruling was confirmed, the Grand Chamber would make it practically impossible to outlaw the denial of the Armenian genocide and other genocides and would harden Turkey's position on the issue. However, If the Grand Chamber reversed the Chamber's decision, its ruling would allow the High Contracting Parties to combat denialism through criminal measures and discourage potential future denialists, offering Armenians in the diaspora some kind of moral reparation, and even, perhaps, motivating Turkey to abandon its policy of denial.

(η) The Turkish Human Rights Association, the Truth Justice Memory Center and the International Institute for the Study of Genocide and Human Rights

186.The Turkish Human Rights Association, the Truth Justice Memory Center and the International Institute for the Study of Genocide and Human Rights, which had filed joint allegations, alleged that the conduct for which the applicant had been convicted had been a incitement to discrimination, not a simple denial of genocide.

They also rejected the Chamber's conclusion that the plaintiff had only denied the legal characterization of the events of 1915 and subsequent years, noting that the Lausanne District Court had concluded that he had attempted to justify the massacres and described the Armenians as "aggressors" and "traitors", that the Chamber had itself noted that he recognized himself as a follower of TalaatPasha.

They also mentioned that the plaintiff had deliberately chosen the places in which he made his statements. However, the most revealing factor of the plaintiff's racist motivation was his leadership of the TalaatPasha Committee, condemned by the European Parliament as "xenophobic and racist." All of this It had to be looked at primarily in the context of Turkey, not Switzerland, and its effects on the Armenian minority there.

The plaintiff had been sentenced in Turkey, in so-called Ergenekon proceedings which, among other things, related to his activities in the TalaatPasha Committee whose purpose, the Istanbul Court of Appeal had found, was "to refute allegations of Armenian genocide." and that it was part of a "nationalist" and "chauvinist" organization that exalted hatred and enmity between peoples.

In fact, the spread that it was a lie that the events of 1915 and the following years had been a genocide could be associated with the murder of the Turkish-Armenian journalist HrantDink in January 2007, instigated by Turkish ultranationalist groups.¹⁸⁷In this regard, these The intervening third parties referred to an open letter – of which they did not present a copy – that the plaintiff had issued immediately after said murder addressed to the Armenian Patriarch in Istanbul, and to several anonymous letters addressed to Armenian schools in Turkey in May 2007.

Instead, references were made to the online versions of two articles published in Turkish newspapers (see paragraph 28 above). They also referred to the ruling of the Istanbul Court of Appeal in the so-called Ergenekon trial and to other documents in the file of that process.

MINISTRY OF JUSTICE 188.Finally, they alleged that in Turkey the xenophobic and racist propaganda regarding the events of 1915 and the following years was a single and constant narrative. The plaintiff's statements regarding the characterization of those events could be directly related to the climate of hostility against Armenians in Turkey, as had been documented by, among others, ECRI.

(θ) The FIDH

189.The FIDH argued that this case highlighted the conflict between the need to ensure freedom of expression and debate, particularly on historical issues, and the importance of combating hate speech, especially when it took the form of denialism. Both things were equally important in the terms of the Convention.

The Court's recent jurisprudence in this area had been to some extent inconsistent and still needed clarification by the Grand Chamber, which had to determine clear principles and find the balance between these competing values. In doing so, the Grand Chamber needed to clarify three points.

First, that neither of these two values is superior to the other. Second, that freedom of expression is the rule and its restriction the exception. Third, that in this field there is little room to grant a margin of appreciation to the High Contracting Parties. 190.The FIDH criticized the Chamber for accepting without question that statements denying the character of genocide to the events of 1915 and the following years do not have the potential, as such, to generate hatred or violence towards Armenians.

In his opinion, this much more nuanced point could only be decided on the basis of a careful analysis of the context in which the statements had been made. In Turkey, such denial could, in view of the prevailing atmosphere, lead to hatred and opposition. violence, which had been demonstrated in several cases before this Court.

While the context that mattered most was that of the country in which the statements were made, in view of the new media and their capacity to give global impact to the statements, the Court should not omit to take into account a more context. broad.191.The FIDH expressed its disagreement with the distinction made by the Chamber between statements related to the legal classification of the events of 1915 and the following years and statements denying the Holocaust, on the basis that the latter, to Unlike the first, it has been clearly declared by an international court.

This perspective does not provide, in the opinion of the FIDH, an appropriate reference parameter because it was somewhat confusing to dissociate the historical reality of the events from their legal characterization. Furthermore, it carried the risk of creating a "hierarchy of genocides," as Judicial recognition depends on many historical factors.

On the other hand, judicial recognition cannot preclude talk of genocide. A better way to deal with this issue – which would avoid treating the Holocaust as a special case and produce more predictable results – would be to focus on whether the statements in question were intended to invite hatred or discrimination and determine that its criminalization would be justified not simply

MINISTRY OF JUSTICE because they constituted the denial of a historical fact but because they were motivated by said intention, which normally lies at the base of the denialist cause.

This had been demonstrated in jurisprudence relating to Holocaust denial, where such an intention was almost incontrovertibly presumed and was the actual basis for denying such statements the protection of the Convention. It was very likely that a similar intention underlay the denial of the Holocaust. Armenian genocide, usually provoked by the desire to rehabilitate the Ottoman regime of that period or to justify the acts committed.

But that had to be determined by the Court on a case-by-case basis.(l) The LICRA

192.The LICRA argued that making genocide denial illegal was not only compatible with freedom of expression but also mandatory in accordance with the European system of protection of human rights. It referred, in this regard, in particular to Article 6 § 1 of the Additional Protocol to the Convention on Cybercrimes.

(k) The International Center for the Protection

The International Center for Protection argued that declarations related to national identity required granting national authorities a broader margin of appreciation. It had to be kept in mind, in this regard, that the Armenian diaspora had arisen mainly as a result of the events of 1915 and subsequent years.

The most appropriate test was whether the statements contributed to public debate or were instead gratuitously offensive, which could be determined on the basis of a comprehensive analysis of the statements and their context. A statement could only be considered legal or historical whether it really contributed to the underlying debate and was not hiding behind the mask of political expression if it actually constituted hate speech.

A contextualized analysis was also possible to determine whether a statement had destructive purposes and therefore required the application of Article 17 of the Convention. The use of the word "lie" was of special importance in this regard because it violated the integrity of the victims and their families. descendants and sought to redefine the events they had experienced as something much less serious and convert them from victims to perpetrators causing their own destiny.

194.The existence of a pressing social need for interference had to be measured with reference to the conditions existing in the State in question, for example, the diversity of its population and the values and principles underpinning its society. The mere fact that others countries have made different decisions in this matter was not decisive.

Such pressing social need could also arise from a country's international law obligations: in this case, those arising from Article 4 of the CEDR and Article 20 of the ICCPR, as

MINISTRY OF JUSTICE had interpreted by the competent bodies of the United Nations.

Finally, States must be granted a wide margin of appreciation in classifying certain events as genocide with the purpose of prohibiting their denial and imposing sanctions proportional to such denial.(λ) The group of French and Belgian academics 195.The group of French and Belgian academics argued that hate speech was not limited to statements that openly called for violence, the denial of genocide or its justification also fell into the same category.

Factors to be taken into account in this regard included the nature of the statement, seen in its proper context, which was not limited to its literal meaning or the alleged profession of its author. What mattered, ultimately, was the meaning that a reasonable member of the public might give to the statement, taken as a whole.

This followed from the jurisprudence of the German courts in cases of this type and from the criteria established by the United Nations Committee on the Elimination of Racial Discrimination. A statement could only benefit from the protection granted to historical research if its author had acted in accordance with the methods of that area of research.

As for virulent political statements, according to the Court's jurisprudence, these seem to receive a higher level of protection only when they relate to domestic controversies. In any case, hate speech can never benefit from the protection granted to the political speech.

This is confirmed by the criminalization of hate speech in international and European law, who saw such criminalization as a necessity in the fight for peace and justice and against discrimination, racism and xenophobia. The applicable international instruments do not differentiate, in this regard, between genocide, crimes against humanity and war crimes, and leave States the freedom to determine how they should be established.

In particular, these instruments do not necessarily condition the possibility of outlawing the denial of these crimes with the official recognition of an international court, which is consistent with the principle of complementarity that underlies the work of the International Criminal Court, under which It was, in principle, up to national courts to punish certain crimes.

(c) The Court's evaluation

(i) General Principles

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

196.The general principles for assessing whether an interference with the exercise of the right to freedom of expression is "necessary in a democratic society" within the meaning of Article 10 § 2 of the Convention are well established in the Court's jurisprudence.

As the Chamber points out, they were recently reiterated in *Mouvementraëliensuisse v. Switzerland* ([GS], no.16354/06,

97

MINISTRY OF JUSTICE §48, ECtHR 2012) and in *Animal Defenders International v. United Kingdom* ([GS], no.48876/08, § 100, ECtHR 2013), and can be summarized as follows: (i) The freedom of Expression is one of the essential pillars of a democratic society and one of the basic conditions for its progress and for the fulfillment of each individual.

Subject to the provisions of Article 10 § 2, freedom of expression covers not only "information" or "ideas" favorably received, considered harmless or inconsequential, but also those that offend, negatively surprise or disturb. These are the requirements of plurality, tolerance and open-mindedness without which there is no "democratic society".

As stated in Article 10, this freedom is subject to exceptions, but the exceptions must be interpreted limitingly and the necessity of any restriction must be convincingly established. (ii) The adjective "necessary" in Article 10 § 2 implies the existence of a pressing social need.

The High Contracting Parties have margin of appreciation to assess whether such a need exists, but hand in hand with European supervision, taking into consideration both the law and the applicable rulings, including those issued by independent courts. The Court has, therefore, the power to make a final decision as to whether a "restriction" can be reconciled with freedom of expression.

(iii) The Court's task is not to take the place of the national competent authorities but to review the conclusions reached by them in the light of Article 10. This does not mean that the Court's supervision is limited to determining whether said authorities exercised their reasonable discretion and carefully and in good faith.

First, the Court must examine the interference in the light of the case as a whole and decide whether the interference was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it were relevant and sufficient. In doing so, the Court must satisfy themselves that these authorities used standards consistent with the principles enshrined in Article 10 and were based on an acceptable assessment of the relevant facts.

197.Another principle that has been repeatedly emphasized in the Court's jurisprudence is that there is little scope within Article 10 § 2 of the Convention to restrict political expression or debate on matters of public interest (see, among others, *Wingrove v. Kingdom United Kingdom*, November 25, 1996, § 58, Reports 1996-V; *Ceylan v.*

Turkey [GS], no.23556/94, § 34, ECHR 1999-IV, and *Animal Defenders International*, cited above, § 102).

(β) On the balance of articles 10 and 8 of Convention 198.The general principles applicable to cases in which the right to freedom of expression under Article 10 of the Convention must be balanced with the right to respect for private life under Article 8 of the Convention were established by the Grand Chamber in *Von Hannover*, cited

previously, §§ 104-07 and Axel Springer v.

Germany ([GS], no.39954/08, §§ 85-88, February 7, 2012). They can be summarized as follows:

98

MINISTRY OF JUSTICE (i) In such cases, the result should not vary depending on whether the complaint was filed under Article 8, by the person who was the subject of the declaration, or under Article 10, by the person who made the declaration. , because in principle the rights protected by these articles deserve equal respect.

(ii) The choice of means to ensure compliance with Article 8 in the field of relations between individuals is, in principle, a matter that falls within the margin of appreciation of the High Contracting Parties, whether the obligations related to it whether negative or positive.

There are different ways of ensuring respect for private life and the nature of the obligation will depend on the particular aspect of private life that is in question.(iii) Similarly, under Article 10 of the Convention, the High Contracting Parties have a margin of appreciation to assess whether – and, if so, to what extent – an interference with the right to freedom of expression is necessary.

(iv) The margin of appreciation, however, goes hand in hand with European supervision, adopting both the legislation and the decisions that apply it, even those issued by independent courts. In exercising this supervisory function, the Court does not have to put themselves in the place of the national courts but rather review, looking at the case as a whole, whether their rulings were compatible with the provisions of the Convention that were invoked.

(v) If the balancing exercise carried out by the national authorities is in accordance with the criteria established by the Court's jurisprudence, the Court will require compelling reasons to substitute its own opinions for the opinions of the national courts.¹⁹⁹More recently, in Aksu v.

Turkey ([GS], nos.4149/04 and 41029/04, § 67, ECHR 2012), the Grand Chamber went into more detail regarding this last requirement, deciding that if the balance reached by the national authorities was unsatisfactory, in Particularly if the importance or scope of one of the rights at stake was not properly considered, the margin of appreciation will be reduced.

(ii) Relevant jurisprudence of the Court

(a) Group identity and reputation of ancestors ²⁰⁰. In Aksu (cited above, §§ 58-61 and 81), the Court held, among other things, that stereotypes of an ethnic group could, at a certain level, have a negative impact on the group's sense of identity and on the self-esteem and self-confidence of its members.

It could, therefore, affect his "private life" in the sense used in Article 8 § 1 of the Convention. On this basis, the Court decided that certain procedures in which a person

of Roma origin had been offended by certain passages in a book and certain entries in a dictionary about the Roma in Turkey and had sought compensation had compromised that article.

99

MINISTRY OF JUSTICE 201.In Putistin v. Ukraine (no.16882/03, §§ 33 and 36-41, of November 21, 2013), the Court accepted that the reputation of an ancestor could, in certain circumstances, affect the “private life” and the identity of a person, and therefore fall within the scope of Article 8 § 1 of the Convention.

On that basis, the Court decided that a newspaper report about a famous football match in Kiev during World War II that could be interpreted to mean that Mr. Putintin's late father, a well-known footballer who had played in the match, had collaborated with the Gestapo had, indirectly and marginally, affected the rights of Mr.

Putistin under article 8 § 1.202. In Jelševar et al v. Slovenia ((dec.), no.47318/07, § 37, March 11, 2014), the Court similarly accepted that an attack on reputation of an ancestor presented as a work of literary fiction could affect a person's rights under article 8 § 1 of the Convention.

203.In Dzhugashvili v. Russia ((dec.), no.41123/10, §§ 26-35, December 9, 2014), the Court proceeded on the basis that two newspaper articles dealing with the historical role of the plaintiff's grandfather, Stalin, had affected his rights under Article 8 § 1 of the Convention.(β) Incitement to violence and “hate speech” 204.

The Court has been asked to consider the application of Article 10 of the Convention in a number of cases involving statements, verbal or non-verbal, that allegedly promoted or justified violence, hatred or intolerance. In determining whether interference with the exercise of freedom of expression of the authors, or sometimes publishers, of such statements was “necessary in a democratic society” in light of the general principles formulated in its jurisprudence (see paragraphs 196-97 above), the Court has taken into account consideration various factors.

205.One of these factors has been whether the statements were made in a context of political or social tension; The presence of that context has generally led the Court to accept that a certain degree of interference with such statements was justified. Some examples include the climate of tension existing in the armed conflicts between the PKK (Kurdistan Workers' Party, a illegal armed organization) and Turkish security forces in southeastern Turkey in the 1980s and 1990s (see Zana v.

Turkey, November 25, 1997, §§ 57-60, Reports 1997-VII; Sürek v. Turkey (no.1) [GS], no.26682/95, §§ 52 and 62, ECHR 1999-IV and Sürek v. Turkey (no.3) [GS], no.24735/94, § 40, July 8, 1999); the atmosphere generated by the deadly prison riots in Turkey in December 2000 (see Falakaoğlu and Saygılı v.

Turkey, nos.22147/02, and 24972/03, § 33, of January 23, 2007, and Saygılıt and Falakaoğlu v.Turkey (no.2), no.38991/02, § 28, of February 17, 2009); the problems related to the integration of non-Europeans and especially Muslim immigrants in France (see Soulas et al, cited above, §§ 38-39, and La Pen v.

France

100

MINISTRY OF JUSTICE (dec.) no.18788/09, April 20, 2010); and relations between national minorities in Lithuania shortly after the restoration of its independence in 1990 (see Balsytė-Lideikienė v.Lithuania, no.72596/01, § 78, dated 4 November 2008). 206.Another factor has been whether the statements, fairly interpreted and viewed in their immediate or broader context, could be considered an indirect invitation to violence or a justification of violence, hatred or intolerance (see, among others, Incal v .

Turkey, June 9, 1998, § 50, Reports 1998-IV, Sürek (no.1), cited above, § 62; ÖzgürGündem v. Turkey, no.23144/93, § 64, ECtHR 2000-III; Gündüz v. Turkey, no.35071/97, §§ 48 and 51, ECtHR 2003-XI; Soulas et al, cited above, §§ 39-41 and 43; and Balsytė-Lideikienė, cited above, §§ 79-80; Féret, cited above, §§ 69-73 and 78; Hizb ut-Tahrir et al, cited above, § 73; Kasymakhunov and Saybatalov, cited above, §§ 107-12, Fáber v.

Hungary, no.40721/08, §§ 52 and 56-58, July 24, 2012; and Vona, cited above, §§ 64-67).In evaluating this point, the Court has been particularly sensitive to generalized statements that attack or present in a negative light an entire ethnic, religious or other group (see Seurot v.

France (dec.), no.57383/00, May 18, 2004, Soulas at al, cited above, §§ 40 and 43, and Le Pen, cited above, all of which referred to generalized and negative statements about non-Europeans, particularly Muslim immigrants to France; Norwood v. United Kingdom (dec.) no.

23131/03, ECHR 2004-XI, relating to statements linking all Muslims in the United Kingdom to the terrorist acts committed on September 11, 2001 in the United States of America; WPet al v.Poland (dec.), no.42264/98, ECtHR 2004-VII, and Pavel Ivanov v.Russia (dec.), no.

35222/04, of February 20, 2007, both related to passionate anti-Semitic statements; Féret, cited above, § 71, relating to a statement presenting non-European immigrant communities in Belgium as prone to crime; Hizb ut-Tahrir et al, § 73, and Kasymakhunov and Saybatalov, § 107, both cited above, which concerned direct calls for violence against Jews, the State of Israel, and the West in general; and Vejdeland et al v.

Sweden, no.1813/07, § 54, of February 9, 2012, relating to allegations that homosexuals sought to minimize pedophilia and were responsible for the spread of HIV and AIDS).207.The Court has also placed particular attention to the way in which

made the statements and their potential to cause, directly or indirectly, harmful consequences.

Some examples include Karatas v. Turkey ([GS], no.23168/94, §§ 51-52, ECHR 1999-IV), where the fact that the statements had been made through poetry and not in the mass media led to the conclusion that the interference was not justified by the special security context that existed in the case in general; Féret (cited above, § 76), where the statements had been made in electoral pamphlets, which had increased the effect of the discriminatory and hateful message they communicated; Gündüz (cited above, §§ 43-44), where the statements had been made during a deliberately pluralistic televised debate, which had reduced their negative effect; Fáber (cited above, §§ 44-45),

101

MINISTRY OF JUSTICE where the statement had had limited effect, if any, in the course of that statement; Vona (cited above, §§ 64-69), where the declaration had consisted of military-style marches in villages with a significant Roma population which, given the historical context in Hungary, had had sinister connotations; and Vejdeland et al (cited above, § 56), where the statements had been made on pamphlets left in the lockers of high school students.

208.In all of the above cases, it was the interaction between the various factors, rather than any of them individually, that determined the outcome of the case. The Court's position in these types of cases can be described as highly context-dependent. (y) Holocaust denial and other statements related to Nazi crimes

209.

The previous Commission dealt with a number of cases under Article 10 of the Convention that related to Holocaust denial and other statements related to Nazi crimes. It declared all claims inadmissible (see XvGermany, no.9235/81, Commission decision of July 16, 1982, Decisions and Reports (DR) 29, p.

194; TvBélgica, no.9777/82, Commission decision of July 14, 1983, DR 34, p.166; H., W., Py KvAustria, no.12774/87, Commission decision of 12 October 1989, DR 62, p. 216; Ochensberger v.Austria, no.21318/93, Commission decision of September 2, 1994, unreported; Walendy v.

Germany, no.21128/93, Commission decision of January 11, 1995, DR 80-A, p.94; Remer v. Germany, no.25096/94, Commission decision of September 6, 1995; DR 82-A, p.117; Honsik v.Austria, no.25062/94, Commission decision of 19 October 1995, DR 83-A, p. 77; NationaldemokratischeParteiDeutschlandsBezirksverbandMünchen-Oberbayern v.

Germany, no.25992/94, Commission decision of November 29, 1995, DR 84-A, p.149; Rebhandl v.Austria, no.24398/94, Commission decision of January 16, 1996, unreported; Marais v.France, no.31159/96, Commission decision of June 24, 1996, DR 86-B, p.184; DIvGermany, no.

26551/95, Commission decision of June 26, 1996, unreported; and Nachtmann v. Austria,

no.36773/97, decision of the Commission of September 9, 1998, unreported). In all these cases the Commission confronted statements, almost always coming from people who professed Nazi-style ideas or related to movements inspired by the Nazis, that questioned the reality of the persecution and extermination of millions of Jews under the Nazi regime; who alleged that the Holocaust was an "unacceptable lie" and a "Zionist scam," disguised as a means of political extortion; that denied or justified the existence of concentration camps; or that they claimed that the gas chambers in those camps had never existed or that the number of people murdered in them was exaggerated and technically impossible.

The Commission, frequently referring to the historical experience of the affected States, described these statements as attacks on the Jewish community and intrinsically related to the Nazi ideology, which was undemocratic and inimical to human rights. It considered them as invitations to racial hatred, antisemitism and

102

MINISTRY OF JUSTICE xenophobia, and on that basis agreed that the criminal convictions they had caused were "necessary in a democratic society."

In some of these cases the Commission had used Article 17 as support in the interpretation of Article 10 § 2 of the Convention, and used it to strengthen its conclusion on the need for interference.²¹⁰ After November 1, 1998, the Court also dealt with several cases of the same type and also decided that the claims were in all cases inadmissible (see Witzsch v.

Germany (no.1) (dec.), no.41449/98, April 20, 1999; Schimanek v. Austria (dec.), no. 32307/96, of February 1, 2000; Garaudy v.France (dec.), no.65831/01, ECHR 2003-IX; Witzsch v. Germany (no.2) (dec.) no.7485/03 of December 12, 2005; and Gollnisch v.France (dec.), no.48135/08, June 7, 2011).

These cases also involved statements denying the existence of the gas chambers, describing them as a "scam" and the Holocaust as a "myth," calling the description of the Holocaust "the business of the Shoah," "mystifications for political" or "propaganda", or they questioned the number of deaths and ambiguously expressed the opinion that the gas chambers were a subject of study for historians.

In one of them, the statement had been limited to the assertion that it was false that Hitler and the National Socialist German Workers Party had planned, initiated and organized the mass slaughter of Jews (see Witzsch (no.2) cited above).²¹¹ In three cases, the Court decided that interference with the plaintiffs' right to freedom of expression had been "necessary in a democratic society" (see Schimanek; Witzsch (no.

1); and Gollnisch, all cited above).²¹² However, in the other two cases, the Court used Article 17 to declare that claims under Article 10 were rationmateriae incompatible with the provisions of the Convention. In Garaudy(cited above), found that, by questioning the reality, scope and severity of the Holocaust, which was not a matter of debate among historians but, on the contrary, a clearly established fact, Mr.

Garaudy sought to rehabilitate the Nazi regime and accuse the victims of falsifying history. Such actions were incompatible with democracy and human rights and amounted to using the right to freedom of expression for purposes contrary to the text and spirit of the Convention. Witzsch (no.

2) (cited above), the Court agreed with the German courts that Mr. Witzsch's statements demonstrated his contempt for the victims of the Holocaust.(8) Historical debates

213.The Court has faced several cases involving historical debates.214.In many of those cases the Court has expressly said that it is not its role to be the arbiter of such debates (see Chauvy et al, cited above, § 69; Monnat v.

Switzerland, no.73604/01, § 57, ECHR 2006-X; Fatullayev v.Azerbaijan, no.40984/07, § 87, April 22, 2010; and Giniewski v.France, no.64016/00, § 51 in fine, ECHR 2006-I).103

MINISTRY OF JUSTICE 215.In deciding whether interference with the exercise of the right to freedom of expression of the authors, and sometimes publishers, of statements referring to historical issues was "necessary in a democratic society", the Court has taken into consideration various factors.

216.One of these has been the way in which the impugned statements were drafted and the way in which they could be interpreted. Some examples include Lehideux and Isorni v. France (23 September 1998, § 53, Reports 1998-VII) , where the statements could not be read as a justification of pro-Nazi policies; Stankov and the United Macedonian Organization Ilinden v.

Bulgaria (nos.29221/95 and 29225/95, §§ 102 and 106, ECHR 2001-IX), where the statements, despite consisting of "strong anti-Bulgarian statements" could be considered an element of exaggeration designed exclusively to attract attention ; Radio France et al (cited above, § 38), where the statements, which contained serious defamatory allegations, were marked by their categorical tone; Orban et al v.

France (no.20985/05, §§ 46, 49 and 51, of January 15, 2009), where the statements were simply the testimony of a first-hand participant in the Algerian War, not a justification of torture or a glorification of its perpetrators.217.Another factor has been the specific interest or right affected by the statements.

For example, in Stankov and the United Macedonian Organization Ilinden (cited above, § 106), these had been the Bulgarian national symbols. In Radio France et al (cited above, §§ 31 and 34-39) and Chauvy et al (cited above, §§ 52 and 69), these had been the reputations of living persons, who had been affected by accusations of maleficence contained in the statements.

In Monnat (cited above, § 60), the statements had not been directed against the reputation or personality rights of the people who grieved them or against the Swiss population, but against the leaders of that country during the Second World War. .In Association of Citizens "Radko" and Paunkovsku v.

the former Yugoslav Republic of Macedonia (no.74651/01, §§ 69 and 74, ECHR 2009), the declarations had affected the national and ethnic identity of all Macedonians. In Orban et al (cited above, § 52) the declarations They had the ability to relive the painful memories of torture victims.

218.A related factor has been the impact of the statements. For example, in Stankov and the United Macedonian Organization Ilinden (cited above, §§ 102-03 and 110), the Court took into account that the group that had made the statements it had no real influence, not even local, and that its demonstrations were not likely to become a platform for the spread of violence or intolerance; the Court also made that clarification in the related case of the United Macedonian Organization Ilinden – PIRIN et al v.

Bulgaria (no.59489/00, § 61, of October 20, 2005). On the contrary, in Radio France et al (cited above, §§ 35 and 39), the Court noted that the statement, which had included allegations seriously defamatory against a living person, had been broadcast on national radio sixty-two times.

104

MINISTRY OF JUSTICE 219.Finally, the Court has taken note of the time that has elapsed since the historical event to which the statements refer: forty years in Lehideux and Isorni (cited above, § 55), fifty years in Monnat (cited above, § 64) and, again, forty years in Orban et al (cited above, § 52).

220.The above cases illustrate that, similar to its position on “hate speech”, the Court's assessment of interference with statements related to historical events has also been very case-specific and has depended on the interaction between the nature and possible effects of such statements in the context in which they were made.

(ε) Cases against Turkey related to statements regarding the events of 1915 and subsequent years

221.In Güçlü v Turkey (no.27690/03 of 10 February 2009), the plaintiff, a lawyer and politician, said during a press conference that for him personally, the events of 1915 and the following years genocide and that Turkey needed to accept this and engage in an open debate on the issue.

He was subsequently sentenced under a provision prohibiting propaganda contrary to the territorial integrity of Turkey and sentenced to one year in prison for this and other statements he made at the same press conference in relation to the Kurdish issue. He had spent a just over three months in prison when the provision was revoked.

As a result, his conviction was annulled and he was released. The Court found that Mr. Güçlü's statement had clearly referred to a debate on an issue of public interest. It then stated that the expression of such opinions, even if they did not coincide with those of public authorities and could offend or negatively surprise others, was protected by

Article 10 of the Convention and that debating consisted, precisely, of expressing divergent points of view.

The Court also noted that by making this statement Mr. Güclü sought to provoke a debate on historical and political issues. In view of the above, and the severity of the sentence imposed on him, the Court decided that there had been a violation of Article 10 (*ibid.*, §§ 33-42).²²²In Dink v. Turkey (nos.

2668/07 and 4 others, September 14, 2010), the plaintiff, a renowned Turkish-Armenian writer and journalist who would later be murdered, had been sentenced for denigrating “Turkishness” (*Türklük*), a crime contemplated in article 159 of the Turkish Penal Code in force at that time (replaced by Article 301 of the Turkish Penal Code of 2005).

When studying the sentence in the light of Article 10 of the Convention, the Court noted that an analysis of the articles in which Mr. Dink had made the impugned statements demonstrated that his use of the term “poison” referred to the “perception of the Turks” that the Armenians had and the “obsessive” nature of the Armenian diaspora’s campaign to achieve recognition of the events of 1915 and the following years as genocide.

Mr. Dink had, in fact, claimed that this obsession, which caused Armenians to continue to see themselves as “victims,” had poisoned the lives of members

105

MINISTRY OF JUSTICE of the Armenian diaspora, preventing them from developing their identity in a healthy way. These statements could not be considered “hate speech” (*ibid.*, § 128).

223.The Court also took into consideration the fact that Mr. Dink had written in his capacity as a journalist and editor of a Turkish-Armenian newspaper, commenting on issues of interest to the Armenian minority from the point of view of an actor in the Turkish political scene. Expressing his resentment towards attitudes that, in his opinion, amounted to denial of the incidents of 1915 and subsequent years, Mr.

Dink had communicated his opinions on a matter of undoubted public interest in a democratic society. It was essential in such societies that debates related to historical events of a particularly serious nature could occur freely. It was an integral part of freedom of expression to seek the historical truth and it was not the role of the Court to serve as an arbiter in a historical question about which there was an ongoing public debate.

Furthermore, Mr. Dink's articles had not been gratuitously offensive or insulting and had not promoted disrespect or hatred (*ibid.*, § 135). Therefore, there had been no pressing social need to condemn him for denigrating the “Turkishness”.²²⁴In Cox (cited above) a US citizen who had worked as a professor at two Turkish universities in the 1980s had been deported from Turkey in 1986, prohibited from re-entering the country, for having said in front of students and colleagues that “the Turks had assimilated the Kurds” and “expelled and massacred the Armenians.”

She had subsequently been reported on two more occasions. In 1996 she had initiated proceedings to overturn the re-entry ban but had been unsuccessful. The Court noted, in particular, that Ms Cox's statements had referred to Kurdish issues, and Armenia, which were still the subject of "heated debate, not only within Turkey but in the international arena, with all involved expressing their opinions and counter-opinions."

The Court recognized that "the opinions on these issues expressed by one side could, at times, offend the other" but emphasized that "a democratic society requires tolerance and open-mindedness in the face of controversial expressions" (*ibid.*, §§ 41-42). He concluded that the re-entry ban imposed on Ms.

Cox was intended to repress the exercise of his freedom of expression and hinder the dissemination of ideas. Interference with his right to freedom of expression had not, therefore, been "necessary in a democratic society" (*ibid.*, §§ 44-45).²²⁵ In *Altuğ Taner Akçam v Turkey* (no. 27520/07, dated 25 October 2011), the plaintiff, a history professor who had published extensively on the events of 1915 and subsequent years and had been the subject of several criminal investigations – all dismissed – related to newspaper articles in which he criticized the trial against Hrant Dink (see paragraph 222 above), complained about the existence of article 301 of the Turkish Penal Code which, according to him, allowed him to be prosecuted in any time for academic work related to the Armenian question.

Based on the criminal investigations against Mr. Akçam and the position of the Turkish courts on the Armenian question and the application of said article, as well

106

MINISTRY OF JUSTICE as a public campaign against Mr. Akçam related to the investigations, the Court found that there was a real risk that he would be prosecuted for his "unfavorable" opinions on this issue (*ibid.*, §§ 65-82).

The Court then noted that the terms used in that article, as interpreted by the Turkish authorities, were too broad and ambiguous, despite the safeguards established by the legislator. The number of investigations and proceedings initiated under that article of the Turkish Penal Code demonstrated that any opinion considered offensive, negatively surprising or disturbing could easily give rise to its use (*ibid.*, §§ 89-94).

Therefore, said article of the Turkish Penal Code did not meet the requirement of foreseeability.⁽ⁱⁱⁱ⁾
Application of the above principles to the specific case

226. In the present case, the Court is not required to determine whether the criminalization of the denial of genocides or other historical facts can, in principle, be justified.

Unlike the constitutional courts of France and Spain, which had the power, and indeed the obligation, to examine the legislative provisions in this regard in the abstract (see paragraphs 95 and 97 above), in a case originating in an individual claim, the Court is limited by the facts of the case (see T.

v. Belgium, cited above, on p.169). Therefore, it can only analyze whether the application of the

Article 261 bis § 4 of the Penal Code in the case of the defendant was “necessary in a democratic society” within the scope of Article 10 § 2 of the Convention (see National Union of Rail, Maritime and Transport Workers v.

United Kingdom, no.31045/10, § 98, ECHR 2014).227.The answer to the question of whether such a need exists depends on the need to protect the “rights of third parties” through criminal measures.As noted in paragraph 156 above, these were the rights of Armenians to have their dignity and that of their ancestors respected, including the right to have the identity they have built around the understanding that their community suffered a genocide respected.

In view of jurisprudence in which the Court has accepted that both ethnic identity and the reputation of ancestors may fall within the scope of Article 8 of the Convention in its “private life” section (see paragraphs 200-03 above) , the Court agrees that these rights were protected by that article.

228.The Court is then faced with the need to find a balance between two Convention rights: the right to freedom of expression under Article 10 of the Convention and the right to respect for private life under Article 8 of the Convention; Therefore, it will take into consideration the principles established in jurisprudence in relation to the balancing exercise (see paragraph 198 above).

The prominent question is what specific weight should be assigned to these two rights, which, in principle, must be respected in equal measure, in the specific circumstances of this case. This requires the Court to analyze the comparative importance of the specific aspects of the two rights that were at stake, the need to restrict or protect each of them, and the proportionality between the means used and the objective pursued.

The Court will carry out this exercise taking into consideration the nature of the statements of the

107

MINISTRY OF JUSTICE applicant, the context in which the interference occurred, the degree of impact it caused on the rights of the Armenians, the existence or not of consensus between the High Contracting Parties on the need to resort to criminal law sanctions in relation with such statements, the existence of any rule of international law bearing on the issue, the method used by the Swiss courts to justify the conviction, and the severity of the interference.

(a) Nature of the plaintiff's statements

229.To assess the weight of the plaintiff's interest in the exercise of his right to freedom of expression, the Court must first examine the nature of his statements. In doing so, the Court will not seek to establish whether they could properly be characterized as denial or justification. of genocide for the purposes of article 261 bis § 4 of the Penal Code, or if they were done “on the basis” of “race, ethnic origin or religion” under that article.

These points are within the scope of the application of Swiss law and it was up to the Swiss courts to determine them (see, among many others, Lehideux and Irsoni, cited above, § 50).

The relevant question is whether the statements correspond to a type of expression that deserves greater or lesser protection under Article 10 of the Convention, in which the Court is the final arbiter, taking into account the conclusions of the Swiss courts in this regard (see paragraph 196 (iii) above).

230.According to the Court's jurisprudence, expression on matters of public interest deserves, in principle, strong protection, while expression that promotes or justifies violence, hatred, xenophobia or any other form of intolerance cannot normally be , claim protection (see the cases cited in paragraphs 197 and 204-07 above).

Statements on historical issues, whether made in public statements or in media such as books, newspapers, radio or television programs, are normally considered to concern issues of public interest (see Stankov and the United Macedonian Organization Ilinden, §§ 79 , 85 and 97 (statements at demonstrations); Chauvy et al, §§ 68 and 71, and Orban et al, § 45 (books); Lehideux and Isorni, §§ 10-11 (periodicals); Radio France et al, §§ 34-35 (radio broadcasts) and Monnat, § 56 (television programs), all cited above).

231.The Chamber found that the plaintiff's statements had been of a historical, legal and political nature. The Swiss government and some of the intervening third parties disagreed, essentially on the basis that the plaintiff had not proceeded in an academic and dispassionate manner and with the spirit of openness characteristic of a proper historical debate.

The Grand Chamber cannot accept this argument. Although the plaintiff's statements referred tangentially to historical and legal issues, the context in which they were made – at public events where the plaintiff was addressing like-minded followers – demonstrates that he was speaking as a politician, not as a historian or jurist.

He was involved in a long-standing controversy which the Court, in several cases against Turkey, has already accepted as relating to a matter of public interest (see paragraphs 221 and

108

MINISTRY OF JUSTICE 223 above), and has described as a “heated debate, not only within Turkey but in the international arena” (see paragraph 224 above).

Indeed, the issue had been debated in the Swiss Parliament in 2002 and 2003, shortly before the plaintiff's statements (see paragraphs 48-50 above). The fact that they did not refer to a prominent issue in Swiss politics does not detract from them. its nature of public interest. Nor the fact that the plaintiff has expressed himself in vehement terms (see Morice v.

France [GS], o.29369/10, § 125 in fine, ECHR 2015). It is part of political discourse to be controversial and often virulent (compare Erbakan v. Turkey, no.59405/00, § 59, of July 6, 2006; FarukTemel v. Turkey, no.16853/05, §§ 8 and 60, of February 1, 2011; and Otegi Mondragón v.

Spain, no.2034/07, §§ 10 and 53-54, ECHR 2011). That does not diminish its public interest, as long as, of course, it does not cross the line and become a call to violence, hatred or intolerance, which is the point that the Court will examine next.²³²The Swiss courts concluded that the plaintiff had spoken with a racist motivation.

They reached that conclusion on the basis of their claim that the Armenians had been the aggressors of the Turks and their acknowledged affiliation with TalaatPasha, the Ottoman Minister of Internal Affairs at the time of the events of 1915 and the years that followed, but also on the basis of the mere, if foolish, denial that those events had constituted a genocide (see paragraphs 22, 24 and 26 above).

The Chamber disagreed, noting that the applicant had not been prosecuted for incitement to hatred, which was a separate crime under Swiss law, and that he had not expressed contempt for the victims (see paragraphs 51-53 and 119 of the judgment of the Chamber).²³³With full awareness of the heartfelt importance that the Armenian community attaches to the issue on which the plaintiff spoke, the Court, taking into consideration the general meaning of his statements, does not perceive them as a form of inciting hatred or intolerance.

The plaintiff did not express contempt and hatred for the victims of the events of 1915 and subsequent years, pointing out that the Turks and Armenians had lived in peace for centuries and suggesting – a theory that is not relevant in the present context – that both had been victims of “imperialist” machinations.

The plaintiff did not call the Armenians liars or use other abusive terms to refer to them or try to stereotype them (confront Seurot; Soulas et al, § 40; Balsyté-Lideikienė, § 79; Féret, §§ 12-16 and 69-71 ; and Le Pen, all cited above). Their vehement allegations were directed against the “imperialists” and their alleged insidious designs regarding the Ottoman Empire and Turkey (compare, mutantis mutandis, Giniewski, cited above, §§ 45-49, where the The Tribunal, departing from the conclusions of the local courts, concluded that in criticizing an encyclical and therefore the position of the Pope, a journalist did not intend to criticize Christianity as a whole, and Klein v.

Slovakia, no.72208/01, § 51, of October 31, 2006, in which the Court, also departing from the criteria of national courts, held that certain strong statements by a journalist regarding an Archbishop of the Roman Catholic Church in Slovakia could not be considered derogatory from the Catholics of that country).

109

MINISTRY OF JUSTICE ²³⁴.The next question is whether the statements could still be perceived as a form of incitement to hatred or intolerance towards Armenians in view of the position of the plaintiff and the broad context in which they were made.In the cases concerning statements about the Holocaust that have been aired before the former Commission and the Court, this has always been presumed for historical and contextual reasons (see paragraphs 209 and 211 above).

However, the Court does not consider that the same can be done in this case, where the plaintiff made his statements in Switzerland about events that occurred in the territory of the Ottoman Empire approximately ninety years ago. While it cannot be excluded that some statements about those events could, likewise, promote a racist and undemocratic agenda, and that they could do so through innuendo rather than directly, the context does not require this automatic presumption, and there is insufficient evidence that that was the case here.

The only element that could point towards such an agenda is the plaintiff's self-recognized affiliation with TalaatPasha. However, the Swiss courts did not elaborate on this point and there is no proof that the plaintiff's membership of the so-called Committee TalaatPasha was motivated by a desire to vilify Armenians and spread hatred against them and not by his desire to refute the idea that the events of 1915 and the following years constituted a genocide (see, mutatis mutandis, Lehideux and Isorni , cited above, § 53).

235. With the intention of demonstrating that this was the case, the Turkish Human Rights Association, the Truth, Justice and Memory Center and the International Institute for Genocide and Human Rights, all third parties involved, made reference to materials taken from the so-called Ergenekon process (see paragraphs 186-87 above).

However, they did not provide the original documents nor complete translations, but rather included selected quotes taken from them. Furthermore, the appeal in this process is still pending resolution in the Turkish Court of Cassation (see paragraph 27 above), and the process has given rise to numerous complaints regarding its justice, rejected as premature given its pending nature (see Özkan v.

Turkey (dec.) no.15869/09, December 13, 2011; Göktaş v.Turkey (dec.) no.59374/10, December 13, 2011; Kireçtepe et al v.Turkey (dec.), no.59194/10, February 7, 2012; Güder v. Turkey (dec.), no.24695/09, §§ 64-65, April 20, 2013; Karabulut v. Turkey (dec.), no.

32197/09, §§ 64-65 of September 17, 2013; Tekin, cited above, §§ 64-65; and Yıldırım v.Turkey (dec.), no.50693/10, §§ 43- 44, March 17, 2015). These materials, therefore, cannot be taken into consideration in the present case.236.Nor It can be deduced that the plaintiff has an anti-Armenian agenda from the newspaper articles to which said third parties referred (see paragraph 187 above).

The first, from the daily publication Vatan, points out that after the murder of HrantDink, in 2007, the plaintiff, condemning the murder, had invited the Armenian Patriarch of Istanbul to recognize that it had been the result of an insidious plot by the United States of America. The second, from the newspaper Milliyet, referred to anonymous threats

110

MINISTRY OF JUSTICE sent to Armenian schools in Istanbul and did not mention the plaintiff at all (see paragraph 28 above).

237.More generally, the Swiss government and some of the third parties involved attempted

present the plaintiff as an extremist given to exercising his right to freedom of expression in an irresponsible and dangerous manner. In the Court's opinion, this cannot be reconciled with the fact that interferences with the plaintiff's exercise of this right have caused rulings favorable to the defendant in two lawsuits filed by him against Turkey.

The first of these rulings, handed down on a lawsuit filed in 1992, was Socialist Party et al. v. Turkey (May 25, 1998, Reports 1998-III). In that ruling, the Court found that there had been a violation of Article 11 of the Convention in relation to the dissolution of a political party of which the applicant was then president.

The Court found that the plaintiff's statements that had given rise to the dissolution had included an invitation to people of Kurdish origin to unite and make certain political demands, but there were no exhortations to use violence, rebel or otherwise reject the democratic principles.

Therefore, they did not justify dissolution. The second ruling, handed down on a lawsuit filed in 1999, was in the case of Perinçek v. Turkey (no. 46669/99, June 21, 2005). In that case, the Court found that the criminal conviction of the applicant in Turkey related to similar statements that could not be characterized as hate speech had not been necessary in a democratic society and was therefore in violation of Article 10 of the Convention.

238.The fact that the plaintiff's statements referred to the Armenians as a collective cannot, in itself, serve as a basis for inferring that the plaintiff has a racist agenda, given that the definition of the term "genocide" in the international law (see paragraphs 52 and 54 above), any statement on whether or not it is appropriate to classify a historical event as genocide will necessarily refer to a particular national, ethnic, racial or religious group.

239.For the Court, the applicant's statements, read as a whole and taken in their immediate and broader context, cannot be seen as an incitement to hatred, violence or intolerance towards Armenians. It is true that they were virulent and that their position is uncompromising, but it must be recognized that they apparently had a degree of exaggeration since they sought to attract attention (see, mutatis mutandis, Stankov and the United Macedonian Ilinden Organization, cited above, § 102, which referred to "angry anti-Bulgarian statements" made by members and followers of an association during demonstrations organized by it).

240.The Chamber found that the applicant had not been prosecuted or convicted for attempting to justify a genocide, but simply for denying its existence. The Swiss government disagreed with this assessment, noting that the Swiss Federal Court had, in paragraph 7 of its ruling, determining that the massacres and mass deportations of Armenians in 1915 and

The Court notes that, as detailed in the Court's ruling in Varela Geis (cited above, §§ 45-53) – which, coincidentally, refers to a case that gave rise to the Spanish Constitutional Court's ruling cited in paragraph 96 above – the two positions can be very different.

However, as already noted, the prominent issue here is not how the Swiss courts have characterized the plaintiff's statements, but whether those statements could, read as a whole and in context, be considered incitements to violence, hatred or intolerance. The Court has already found that this is not the case.

I would only add here that, as the Spanish Constitutional Court explained, the justification of genocide does not consist in stating that a certain event did not constitute a genocide, but in expressing a value judgment regarding it, relativizing its seriousness or presenting it as good (see paragraph 97 above).

The Court does not consider that the applicant's statements could be understood in that way or could be considered as tending to justify some other crime against humanity.²⁴¹ It follows that the applicant's statements, which referred to a matter of public interest, deserved protection under Article 10 of the Convention, and that the Swiss authorities had a limited margin of appreciation to interfere with them.

(β) The context of interference

Geographic and historical factors

242. In analyzing whether there is a pressing social need to interfere with Convention rights, the Court has always taken into account the historical context of the High Contracting Party involved. For example, in Vogt (cited above, §§ 51 and 59) took into consideration "Germany's experience during the Weimar Republic and the bitter period that followed between the collapse of that regime and the adoption of the Basic Law in 1949," and its consequent desire to "avoid a repetition of these experiences by founding his new State on the idea that it must be a democracy "capable of defending itself."

The respective historical experience of the State has been a strong factor in the assessment of the existence of a pressing social need in many other cases (see Rekvény, cited above, §§ 41 and 47; RefahPartisi (the Welfare Party) et al, cited above, §§ 124-25; Jahn et al v.

Germany [GS], nos.46720/99 and 2 others, §116, ECtHR 2005-VI, LeylaŞahin, cited above, § 115; Ždanoka, cited above, § 119-21; Fáber, cited above, § 58; and Vona, cited above, § 66).²⁴³ This issue is particularly relevant with respect to the Holocaust. For the Court, the justification for criminalizing its denial is not so much that it is a clearly established historical fact but that, in view of the historical context of the affected States – the cases studied by the previous Commission and the Court have so far referred to Austria, Belgium, Germany and France (see paragraphs 209-10 above and contrast Varela Geis, cited above, § 59,

MINISTRY OF JUSTICE where the Court did not examine the complaint under Article 10 of the Convention) – its denial, even if disguised as impartial historical investigation, must always be seen as associated with an anti-democratic and anti-Semitic ideology.

Holocaust denial is therefore doubly dangerous, especially in states that experienced Nazi horrors and that can be assigned a special moral responsibility to distance themselves from the mass atrocities they committed and covered up by, among other things, the penalty for its denial.

244.In contrast, it has not been alleged that there is any direct link between Switzerland and the events that occurred in the Ottoman Empire in 1915 and subsequent years. The only link could come from the presence of an Armenian community on Swiss territory, but it is a tenuous link.This is confirmed by the statements of the Swiss government, which clearly convey the idea that the controversy initiated by the plaintiff was unrelated to Swiss political life and, to a certain extent, by the ruling of the Lausanne Police Court which, When deciding to suspend part of the plaintiff's sentence, it highlighted that he was a foreigner and would return to his country (see paragraph 22 above).

Furthermore, there is no evidence that at the time the plaintiff made his statements there was a tense atmosphere in Switzerland that could result in serious friction between the Turks and the Armenians there (contrast Zana, §§ 57-60, and Sürek(no.1), § 62, both cited above, which referred to the tense situation in southeastern Turkey in the 1980s and 1990s, as well as Falakaoğlu and Saygılı, § 33, and Saygılı and Falakaoğlu, § 28 in fine , both cited above, referring to the publication of harsh statements made at a time when clashes had occurred in several prisons in Turkey between security forces and detainees, which resulted in deaths and injuries on both sides).

In fact, the first case in which criminal proceedings were initiated under article 264 bis § 4 of the Penal Code in relation to such statements shows that, although the Armenian and Turkish communities in Switzerland had expressed their strong disagreement regarding the legal classification of the events of 1915 and subsequent years, this had not entailed any consequences apart from the legal proceedings (see paragraphs 41-46 above).

The failure of the Swiss authorities to prosecute the defendant could not realistically have been considered as a legitimization of his ideas by them (contrast, mutatis mutandis, Vona, cited above, § 71).245.The question is, then, whether the defendant's criminal conviction in Switzerland could be justified by the situation in Turkey, whose Armenian community is said to suffer hostilities and discrimination (see paragraphs 186 and 188 above).

For the Court, the answer must be negative. In condemning the defendant, the Swiss authorities made no reference to the Turkish context. Nor did the Swiss government in its observations. On the contrary, its attempt to justify the interference by referring to Article 16 of the Convention shows that its main concern was the domestic political context.

MINISTRY OF JUSTICE 246. It is true that today, especially with the use of electronic means of communication, no message can be considered purely local. It is also admirable, and consistent with the spirit of universal protection of human rights, that Switzerland seeks to vindicate the rights of the victims of mass atrocities, regardless of where they were committed.

However, the broader concept of proportionality inherent in the phrase "necessary in a democratic society" requires a rational connection between the measures taken by the authorities and the objective they pursued with the measures, in the sense that the measures could, reasonably, produce the desired effect (see, *mutatis mutandis*, *Weber v.*

Switzerland

Switzerland, May 22, 1990, § 51, Series A no.177, and *Observer and Guardian v. United Kingdom*, November 26, 1991, § 68, Series A no.216). It can hardly be argued that any hostility that could exist against the Armenian minority in Turkey could be a result of the plaintiff's statements in Switzerland (see, *mutatis mutandis*, *Incal*, cited above), or that the plaintiff's criminal conviction in Switzerland protects the rights of that minority in some real way or make her feel safer.

Furthermore, there is no evidence that the applicant's statements have, in themselves, provoked hatred towards Armenians in Turkey or that he has on other occasions attempted to generate hatred against Armenians there. As already noted, the two newspaper articles to which the intervening third parties, the Turkish Human Rights Association, the Truth Justice Memory Center and the International Institute for the Study of Genocide and Human Rights, referred, in support of their position that the plaintiff had incited to hate, they do not confirm their statements.

The other materials on which they sought support were taken from the so-called Ergenekon process and, as already explained, cannot be taken into account.²⁴⁷ While the hostility towards Armenians in some ultranationalist circles in Turkey cannot be denied, particularly in view of the murder of the Turkish-Armenian journalist and writer Hrant Dink in January 2007, probably as a consequence of his opinions on the events of 1915 and the following years (see Dink, cited above, § 66 in fine), this cannot be considered a consequence of the statements of the plaintiff in Switzerland.

248. There is no reason to take into account other domestic contexts, such as the French one, as suggested by the third party CCAF. It is true that the third largest Armenian community in the diaspora in terms of size resides in France, and that the events of 1915 and the later years have been frequent topics there for years (see paragraphs 93 and 94 above).

But there is no evidence that the plaintiff's statements had a direct effect in that country, or that the Swiss authorities had that context in mind when they took action against him. The temporal factor

249. In *Lehideux and Isorni* (cited above, § 55), the Court noted that, while controversial comments relating to traumatic historical events are always likely to reopen controversies and rekindle memories of past suffering, it was not appropriate to deal with those comments with the same severity forty years after

MINISTRY OF JUSTICE the events that ten or twenty years before.

The Court has adopted that position in other cases as well (see *Editions Plon v. France*, no. 58148/00, § 53, ECHR 2004-IV; *Monnat*, cited above, § 64; *Vajnai v. Hungary*, no. 33629/06, § 49, ECtHR 2008; *Orban et al*, cited above, § 52; and *Smolorz v. Poland*, no. 17446/07, § 38, October 16, 2012; and also, *mutatis mutandis*, *Hachette Filipacchi Associés v.*

France, no. 71111/01, § 47, of June 14, 2007).²⁵⁰ In the present case, the time elapsed between the plaintiff's statements and the tragic events to which he referred was considerably longer, almost ninety years, and at the time he made those statements there were surely few, if any, survivors of those events.

While in their pleadings some of the third parties emphasized that this was still a very live issue for many Armenians, especially those in the diaspora, the temporal factor cannot be ruled out. While more recent events may prove traumatic enough to warrant, for a time, an increase in regulation of statements in which they are referred to, the need for such regulation necessarily diminishes over time.

(y) The degree to which the plaintiff's statements affected the rights of members of the Armenian community.²⁵¹ Having accepted that the "third party rights" sought to be protected by interfering with the plaintiff's right to freedom of expression are rights that merit protection in accordance with Article 8 of the Convention (see paragraph 227 above), the Court must now, for the purposes of carrying out the balancing exercise, measure the degree to which the claimant's statements affected those rights.

252. The Court is aware of the immense importance for the Armenian community of the question of whether the tragic events of 1915 and the following years should be considered a genocide, and the acute sensitivity of this community to any statement relating to this issue.

However, it cannot accept that the plaintiff's statements in this case were so hurtful to the dignity of the Armenians who suffered and perished in these events and to the dignity and identity of their descendants as to merit criminal measures in Switzerland. As already It was pointed out, the sting of the plaintiff's statements was not directed at those people, but at the "imperialists" whom he considers responsible for these atrocities.

The parts of his statements that could, in any way, be considered offensive to Armenians are those in which he refers to them as "instruments" of the "imperialist powers" and accuses them of "carrying out massacres of Turks and Muslims." However, as can be seen from the general tenor of the plaintiff's comments, he did not conclude that they therefore deserved the atrocities to which they were subjected or the annihilation; He earlier accused the "imperialists" of increasing violence between Turks and Armenians (see paragraphs 13 and 16 above).

This, coupled with the amount of time that has passed since the events to which the plaintiff referred, leads the Court to the conclusion that no

115

MINISTRY OF JUSTICE can be attributed to their statements the significantly disruptive effect of which they are accused (see, *mutatis mutandis*, Vajnai, § 57; Orban et al, § 52; Putistin, § 38; and Jelševar et al, § 39, all cited above; as well as *John Anthony Mizzi v.*

Malta, no.17320/10, § 39, of 22 November 2011).253.The Court is also not convinced that the applicant's statements – in which he denied that the events of 1915 and the following years could be considered a genocide but he did not deny the reality of massacres and mass deportations – they could have a severe negative impact on the collective identity of Armenians.

The Court has already held, although in different circumstances, that statements that contradict, even in virulent terms, the relevance of historical events considered especially sensitive by a country and that touch its national identity cannot be considered, in themselves, as causing a severe impact on its recipients (see *Stankov and the United Macedonian Organization Ilinden*, cited above, § 104 and 107).

It has reached the same conclusion regarding statements that question the very identity of a national group (*Citizens' Association "Radko"* and *Paunkovski*, cited above §§ 70-75). The Court does not exclude that there are situations in which, in a particular context, some statements referring to traumatic historical events may cause significant damage to the dignity of the groups affected by those events; for example, if they are particularly virulent and impossible to ignore.

The Court notes, in this regard, that in *Vejdeland et al* (cited above, §§ 8 and 56-57), where virulently homophobic pamphlets had been left in students' lockers at a secondary school, when it determined that there had been no violation of Article 10 of the Convention, he attributed particular importance to the fact that the pamphlets had been "imposed" on people who were of an "impressionable and sensitive age" and who had not had the possibility of rejecting them.

But it cannot be said that those were the circumstances in this case. The only cases in which the previous Commission and the Court have accepted the contrary without specific evidence concerned Holocaust denial. But, as has already been said, this could be attributed to the particular context from which those cases arose, which led the former Commission and the Court to accept that Holocaust denial, even if disguised as impartial historical research, must invariably be seen as imbued with an ideology of anti-democratic and anti-Semitism (see paragraphs 234 and 243 above) and should therefore, at this point, be considered particularly disturbing for the persons affected.

254.Finally, the Court highlights that the plaintiff's statements were made at three public events. Their impact, therefore, was intended to be limited (see, *mutatis mutandis*, *Fáber*, cited above, §§ 44-45, and contrast *Féret*, cited above, § 76, in which the Court attached particular importance to the fact that the statements in question, consisting of stereotypical ways of vilifying a sector of society, had been made in

pamphlets distributed during an electoral campaign, thus reaching the entire population of the country).

116

MINISTRY OF JUSTICE (8) Agreement or disagreement between the High Contracting Parties 255.The comparative law information available to the Court demonstrates that in recent years there have been variations in this area in the legal systems of the High Contracting Parties. In some – France and Spain – these variations have been influenced by constitutional jurisprudence (see paragraphs 95-97 above).

In others, the impetus has come from EU Framework Decision 2008/913/JHA (see paragraphs 82-90 above).256.The information available reveals a spectrum of national positions.Some High Contracting Parties – such as Denmark, Finland, Spain (since the 2007 Constitutional Court ruling), Sweden and the United Kingdom – do not penalize the denial of historical events.

Others – such as Austria, Belgium, France, Germany, the Netherlands and Romania – only criminalize, by different methods, the denial of the Holocaust and Nazi crimes. A third group – such as the Czech Republic and Poland – criminalize the denial of Nazi crimes and communists. A fourth group – such as Andorra, Cyprus, Hungary, Latvia, Liechtenstein, Lithuania, Luxembourg, the Former Yugoslav Republic of Macedonia, Malta, Slovakia, Slovenia and Switzerland – criminalize the denial of any genocide (see paragraph 99 above).

Within the European Union, the applicable provisions are broad in scope but, at the same time, connect the requirement to criminalize genocide denial with the need for it to produce tangible negative consequences (see paragraph 85 above).257.The Swiss Government and other third parties expressed doubts about the importance of the comparative perspective, emphasizing the different national contexts and perceptions about the need to legislate in this area.

The Court recognizes this diversity. However, it is clear that, by criminalizing genocide denial, without requiring that it be carried out in a way that could incite violence or hatred, Switzerland is at the extreme end of the comparative spectrum. In these circumstances, and given that in the present case there are other factors that have a significant impact on the breadth of the margin of appreciation (see paragraphs 242-54 above and 274-78 below), the comparative law position cannot play a role. of weight in the Court's conclusions regarding this issue.

(ε) Could Switzerland's international law obligations be considered to have made the interference necessary?258.The next point to be determined is whether, as alleged by some third parties involved, the interference was justified by the international law obligations assumed for Switzerland (see, *mutatis mutandis*, Jersild v.

Denmark, September 23, 1994, §§ 28, 30 and 31 in fine, Series A no.298, in relation to alleged mandatory interference in light of Article 4 CEDR; Al-Adsani v. United Kingdom [GS], no.35763/97, §§ 56-57 and 60-66, ECHR 2001-XI; Cudak v. Lithuania [GS], no. 15869/02, §§ 57 and 63-67, ECHR 2010; and Jones et al v.

United Kingdom, nos.34356/06 and 40528/06, §§ 189, 196-98 7 201-15, ECHR 2014, regarding denial of access to a court required by international law

117

MINISTRY OF JUSTICE in relation to the immunities of third States; and BosphorusHavaYollarıTurizm ve TicaretAnonimŞirketi v.

Ireland [GS], no.45036/98, §§ 168-72, ECtHR 2005-VI, regarding the obligations that derive from the membership of a State to the European Union). The principles that govern the analysis of a conflict putative between the obligations of a High Contracting Party under the terms of the Convention and its other international obligations were detailed in Nada v.

Switzerland ([GS]), no.10593/08, §§168-72, ECHR 2012); there is no need to repeat them here, except to emphasize that apparent contradictions should, as far as possible, be avoided by interpreting simultaneously applicable provisions so as to coordinate their effects and avoid contradiction between them.

259.In this case, the Court, having established that the applicant's statements cannot be seen as a form of incitement to hatred or discrimination, must only determine whether Switzerland was obliged under international law to criminalize genocide denial as such. The Court is not convinced that this is the case.

260.In particular, it does not appear that this would have been necessary due to Switzerland's accession to the CEDR. It is true that article 261 bis of the Pernal Code was adopted in relation to that accession (see paragraphs 33-37 above and the explanations contained below). this regard in point 3.2 of the ruling of the Swiss Federal Court, cited in paragraph 26 above).

However, this article prohibits many acts other than genocide denial, and there is no indication that the second clause of its paragraph 4 – the one that refers to genocide denial and was the basis of the applicant's conviction – was specifically necessary to comply with the CEDR. Suffice it to say, in this regard, that the Cantonal Court of Vaud stated, in paragraph 2 (b) in fine of its judgment, that article 261 bis § 4 had gone beyond what was required by Switzerland's obligations under the CEDR (see paragraph 24 above).

The same opinion was expressed in the initial report on Switzerland of the United Nations Committee on the Elimination of Racial Discrimination (see paragraph 64 above).261.An analysis of the text of article 4 of the CEDR shows that this article does not establish directly nor does it give expression to a requirement to criminalize genocide denial as such.

It simply states that States Parties undertake to criminalize "all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to violence or incitement to any other act against a race or group of people of another color or ethnic origin", and this – as the Swiss government highlighted at the time when it was contemplating whether Switzerland should accede to the CEDR (see paragraph 34 above) – with "due regard to ...the rights expressly

recognized in Article 5 of (the CEDR)", which include "the right to freedom of thought and expression" (see paragraph 62 above).

Furthermore, in acceding to the CEDR, Switzerland, acting on the recommendation made in Resolution (68) 30 of the Committee of Ministers of the Council of Europe (see paragraph 77 above), reserved the right to take "due account of the freedom of "thought" when adopting the legislative measures necessary for the

118

MINISTRY OF JUSTICE implementation of article 4 (see paragraph 63 above).

The international body that monitors the implementation of the CEDR, the United Nations Committee on the Elimination of Racial Discrimination, recommended that "public denials or attempts to justify crimes of genocide or crimes against humanity... be declared punishable offenses." by law, provided that they clearly constituted an exhortation to racial violence or hatred," but at the same time emphasized that "the expression of opinions about historical facts should not be prohibited or sanctioned" (see paragraph 66 above).

262.The Court is not convinced that Switzerland was obliged by its international law commitments to criminalize genocide denial as such. 263.The only treaty provision that directly requires such criminalization is Article 6 § 1 of the Additional Protocol to the Cybercrime Convention, which Switzerland has signed but not ratified, and which is not binding on it (see paragraphs 74 and 75 above).

264.Article III (c) of the Genocide Convention obliges States Parties to criminalize "direct and public exhortation to commit genocide." However, ICTR jurisprudence on this point shows that, while the distinction may Depending on the context, not to be blunt, there is an important difference between exhortation to genocide and "hate speech" (see paragraphs 57 and 58 above).

Nor does it seem that the obligation established in Article 1 of the Genocide Convention has been interpreted in the sense that it covers, without any qualification, the criminalization of "hate speech." In any case, it had already been established that The applicant's statements could not be considered incitement to hatred or discrimination.

It cannot therefore be concluded that Switzerland had an obligation to criminalize itself in accordance with these provisions.265.Article 20 § 2 of the ICCPR, which has been in force for Switzerland since 1992, does not contain a clear obligation to criminalize genocide denial as such. What it requires is the prohibition of "any promotion of national, racial or religious hatred that constitutes an incitement to discrimination, hostility or violence" (see paragraph 67 above).

In 2011, the international organization that monitors the implementation of the ICCPR, the United Nations Human Rights Committee, expressed its position that "laws that criminalize the expression of opinions about historical facts are incompatible with the obligations that the Covenant imposes on Member States in relation to respect for freedom

of thought and expression”, and that the ICCPR “does not allow a general prohibition of expressing erroneous opinions or wrong interpretations of past events”, and that “restrictions should never be imposed on the right to freedom of thought and, with respect to freedom of expression, must not go beyond what is permitted by paragraph 3 (of Article 19) or required by Article 20”, and that “a limitation that is justified on the basis of Article 20 must also comply with Article 19 § 3” (see paragraph 71 above).

119

MINISTRY OF JUSTICE 266. There also does not appear to be a law of customary international law that requires Switzerland to criminalize genocide denial. State practice, as can be seen in paragraphs 87-97 above, is far from widespread and consistent (see, mutatis mutandis, North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, ICJ Reports 1969, p.

43, §74). Article 6 § 1 of the aforementioned Additional Protocol to the Cybercrime Convention is only applicable to the denial of genocide committed “by means of a computer system” and related to a genocide “recognized as such by a final decision and mandatory” from a competent “international tribunal” (see paragraph 75 above); The explanatory report on the Protocol notes that this refers to “other international tribunals established since 1945 by relevant international instruments”, such as the ICTY, the ICTR and the ICC (see paragraph 76 above).

Furthermore, the second paragraph of that article allows States Parties to the Protocol to reserve the right not to apply, in whole or in part, the first paragraph (see, mutatis mutandis, North Sea Continental Shelf Cases, cited above, paragraph 72). .The Protocol has so far only been ratified by twenty-four of the forty-seven Member States of the Council of Europe, and three of them have used the possibility of not applying Article 6 § 1 (see paragraph 74 above).

Therefore, this article can hardly be said to establish a rule that has achieved the status of customary international law (see, mutatis mutandis, North Sea Continental Shelf Cases, cited above, § 73, and contrast Van Anraat v.

Netherlands (dec.), no.65389/09, §§ 90-92, of July 6, 2010, where it was determined that the rule against the use of mustard gas as a weapon of war in international conflicts, established for the first time in a treaty of 1925, had achieved customary law status). The same can be said of the rules set out in the EU Framework Decision 2008/913/JHA, which to date has not been fully implemented by the Member States of the European Union (see paragraph 90 above).

267. It is also worth noting that the majority of international organizations that have addressed the issue – the United Nations Human Rights Committee, the United Nations Committee on the Elimination of Racial Discrimination, the United Nations Special Rapporteur on the promotion and protection of the right to freedom of thought and expression, and the United Nations Independent Expert on the promotion of a democratic and equitable international order – have made inconclusive pronouncements and recommendations in this regard (see paragraphs 66, 71, 72 and 73 above).

CERI appears to be the only such body to have unequivocally called for the criminalization of genocide denial: it recommended that the law criminalize, if committed intentionally, “public denial, trivialization, justification or condonation, with a racist purpose, of the crimes of genocide, crimes against humanity and war crimes” (see paragraph 80 above).

This was, as is clear from its title, a public policy recommendation that, notwithstanding its importance, is not binding international law.¹²⁰

MINISTRY OF JUSTICE 268.In summary, there are no international treaties binding on Switzerland that clearly and explicitly oblige it to impose criminal sanctions on the denial of genocide as such.

Nor does it appear to have been obliged to do so on the basis of customary international law. It cannot, therefore, be said that the interference with the applicant's right to freedom of expression was required, and could therefore be justified, by the obligations of international law assumed by Switzerland (see, mutatis mutandis, Al-Jedda v.

United Kingdom [GS], no.27021/08, §§ 100-06, ECHR 2011, and Capital Bank AD v.Bulgaria, no. 49429/99, § 110, of November 24, 2005; contrast Nothing, cited above, § 172).^(ζ)

Method used by the Swiss courts to justify the conviction of the plaintiff

269.The Court does not consider that it should review in detail the way in which the Swiss courts reached the conclusion that the events of 1915 and the following years had constituted a “genocide” for the purposes of article 261 bis § 4 of the Penal Code .

As already said, this point corresponds to the interpretation and application of Swiss law. 270.However, the Court has jurisdiction to review the effect that the decisions of the Swiss courts on this point had on the applicant's rights under the Convention. 271.The Court highlights, in this regard, that by concluding that the events of 1915 and the subsequent years had constituted a “genocide”, the Police Court did not analyze this point by reference to the rules of Swiss or international law that define said term, such as article 264 of the Penal Code, article II of the Genocide Convention, and article 6 of the Rome Statute (see paragraphs 47, 52 and 54 above).

It simply referred to a series of acts of official recognition by Swiss, foreign and international authorities, expert reports, legal treatises and textbooks (see paragraph 22 above). For its part, the Cantonal Court of Vaud cited the legal provisions that define genocide, but found, in points 2 (c) in fine and (d) of its judgment, that the position of the Swiss Parliament on whether the events of 1915 and the following years had constituted a genocide was conclusive (see paragraph 24 above).

The Swiss Federal Court reversed this decision in paragraph 3.4 of its judgment, endorsing, in paragraph 4, the position taken by the Police Court, and holding that the plaintiff's allegations relating to the propriety of classifying the events as a genocide for effects of article 264 of the Penal Code were irrelevant (see paragraph 26 above).

As a result, it was not clear whether the plaintiff was penalized for disagreeing with the legal classification given to the events of 1915 and subsequent years, or with the prevailing opinions in Swiss society on this issue. If the latter, the plaintiff's conviction must be considered in conflict with the possibility of expressing, in a "democratic society," opinions contrary to those of the authorities or any sector of the population.

(η) Severity of interference

121

MINISTRY OF JUSTICE 272.In two recent cases relating to Article 10 of the Convention, the Court confirmed the proportionality of interferences consisting of regulatory schemes that limited the technical means through which freedom of expression could be exercised in the public sphere (see Mouvementraëliensuisse , §§ 49-77; and Animal Defenders International, §§ 106-25, both cited above).

By contrast, the form of interference at issue in this case – a criminal conviction that could even result in a period of imprisonment – was much more serious in its consequences for the plaintiff, and requires greater scrutiny.²⁷³In Lehideux and Isorni (cited above, § 57), the Court noted, as it has done in many other cases relating to Article 10 of the Convention, that a criminal conviction is a severe sanction, taking into account that there are other means of intervention and contradiction, particularly through civil remedies.

The same applies here, what matters is not so much the severity of the sentence against the plaintiff but the mere fact that he was criminally convicted, which is one of the most severe forms of interference with the right to freedom of expression.^(θ) Balance between the plaintiff's right to freedom of expression and the right of Armenians to have their privacy respected

274.

Taking into consideration the above factors, the Court must now determine whether the Swiss authorities struck an appropriate balance between the plaintiff's right to freedom of expression and the right of Armenians to the protection of their dignity. As highlighted in paragraphs 198 and 199 above, the High Contracting Parties are entitled to a margin of appreciation in this regard, but only if their authorities have carried out the balancing exercise in accordance with the criteria established by the jurisprudence of the Court and have given due consideration to the importance and scope of the rights at stake.

275.In proposing the adoption of what would later become article 261 bis § 4 of the Penal Code, the Swiss government referred to the possible conflict between, on the one hand, the imposition of criminal sanctions for conduct prohibited by the proposed article and, on the other, the rights to freedom of thought and association guaranteed by the Swiss Constitution of 1874, then in force, explaining that both had to be balanced in individual situations so that only those cases truly worthy of sanction ended in convictions (see paragraph 34 former).

These concerns demonstrated that, in applying the provision to cases

individual, Swiss courts needed to weigh competing interests carefully. Indeed, an interference with the right to freedom of expression that takes the form of a criminal conviction will inevitably require a detailed judicial analysis of the specific conduct sought to be sanctioned.

In this type of case, it is usually not enough that the interference occurred because the issue fell within a particular category or within the scope of a generally formulated legal rule; what is required is that the sanction is necessary in the concrete circumstances (see, *mutatis mutandis*, *The Sunday Times*, cited above, § 65 in fine).

122

MINISTRY OF JUSTICE 276.However, an analysis of the reasons that motivated the rulings of the Swiss courts in the plaintiff's case does not show that they paid particular attention to this balance.²⁷⁷The Cantonal Court of Vaud did not even mention, much less went into any detail, the effect of the conviction on the applicant's rights under Article 10 of the Convention or its equivalent in national law, Articles 16 and 36 of the Constitution of the Swiss Confederation of 1999 (see paragraphs 30 and 31 above).

278.For its part, the Swiss Federal Court simply stated, in paragraph 5.1 of its judgment (cited in paragraph 26 above), that it was not bound by section 106(2) of the Federal Court Act 2005. (see paragraph 51 above) to consider whether the lower courts had violated the plaintiff's rights under the Swiss Constitution or the Convention, as the plaintiff had not made that allegation in sufficient detail.

It is difficult to reconcile the above with paragraph 6 of that judgment, in which the court found that the applicant had relied on his right to freedom of expression under Article 10 of the Convention, and proceeded to examine whether his sentence had been compatible with that article. However, when studying that point he only analyzed its predictability and the purpose of the sentence: to protect the rights of Armenians.

It made no reference to the need for conviction in a democratic society and did not enter into an analysis of any factors affecting this point.²⁷⁹In view of the above, the Court finds that it must carry out the balancing exercise itself. ²⁸⁰Taking into account all the elements analyzed above – that the plaintiff's statements referred to a matter of public interest and did not reach the level of incitement to hatred or intolerance, that the context in which the statements were made was not marked by exacerbated tensions or special historical connotations in Switzerland, that the statements cannot be considered to have affected the dignity of members of the Armenian community to the extent of requiring a criminal response in Switzerland, that there is no international law that binds Switzerland to criminalize such statements, that the Swiss courts appear to have censured the plaintiff for expressing an opinion different from the opinion established in Switzerland, and that the interference took the severe form of a criminal conviction – the Court concludes that it was not necessary, in a society democratic, subject the plaintiff to a criminal sanction to protect the rights of the Armenian community that were at stake in this case.

281.Therefore, Article 10 of the Convention has been violated.²⁸²It also follows that there are no elements to apply Article 17 of the Convention (see, *mutatis mutandis*, *United Communist*

Party of Turkey et al; § 60, Soulas et al, § 48; and Féret, § 82, all cited above).

IV. ALLEGED VIOLATION OF ARTICLE 7 OF THE AGREEMENT

123

MINISTRY OF JUSTICE 283.

The applicant stated that the wording of article 261 bis § 4 of the Swiss Penal Code was too ambiguous. To do so, he used article 7 § 1 of the Convention, which, in the relevant part, states:

"No one shall be convicted of a criminal offense as a consequence of an act or omission that did not constitute a criminal offense under national or international law at the time it was committed.

Nor shall a greater penalty be imposed than that applicable at the time the crime was committed..." 284. The Chamber found that the complaint under Article 7 of the Convention did not raise any issues other than those already examined in relation to the complaint. under Article 10. Therefore, there was no need to separately examine its admissibility or merits.

285.The applicant argued that this decision was wrong. While he benefited from the protection of Article 10 of the Convention, a separate finding under Article 7 that denial of genocide did not constitute a crime would be of great importance as a matter of principle.

286.With regard to the substance of his complaint, the plaintiff highlights a previous case related to similar statements that had resulted in an acquittal. Taking into account that the Swiss Council of States had not reached an agreement on whether the events of 1915 and the years following actions constituted genocide, and that there was no ruling of a competent court that would have qualified those events as such, the plaintiff, with his legal mind, could not have predicted that denying that this had been the case could constitute a crime under Swiss law and that he could be convicted of such acts.

187.The Swiss government agreed with the Chamber's decision on this point and referred to its arguments regarding the legality of the interference with the plaintiff's right to freedom of expression.288.None of the intervening third parties made allegations in this regard.289.The Court finds that the complaint under Article 7 of the Convention is a repetition of the complaint under Article 10 to the effect that the law used as a basis for the applicant's conviction was not sufficiently foreseeable, same which has already been sufficiently addressed (see paragraphs 137-40 above).

Therefore, it does not require a separate examination.V.APPLICATION OF ARTICLE 41 OF THE CONVENTION

290.Article 41 of the Convention establishes:

"If the Court finds that a violation of the Convention or its Protocols has occurred, and that the domestic law of the High Contracting Party concerned only allows partial relief, the Court shall, if necessary, grant compensation to the affected party. "

124

MINISTRY OF JUSTICE.

Damage

291.In the proceedings before the Chamber, the plaintiff claimed 20,000 euros (EUR) as pecuniary damages, without specifying the nature of the damage. He also claimed EUR 100,000 as non-pecuniary damages. The Swiss government alleged that the plaintiff had not proven that no pecuniary damage would have been caused to him, especially since he had not shown that he had paid the fine of 3,000 Swiss francs (CHF) or the sum of CHF 1,000 that he had been ordered to pay to the Swiss-Armenian Association.

As regards non-pecuniary damages, the Swiss government stated that a finding of violation of Article 10 would, in itself, provide sufficient satisfaction.292.The Chamber held that the claim for pecuniary damages had not been sufficiently proven and that the declaration of a violation of Article 10 of the Convention constituted a sufficient remedy for any non-pecuniary damage that the conviction may have caused to the plaintiff.

293.Before the Grand Chamber, the applicant reiterated the claims he had made during the proceedings before the Chamber.294.The Swiss government referred to the arguments it had presented before the Chamber and urged the Grand Chamber to confirm the decision of the Chamber on this point.295.The Grand Chamber fully agrees with the Chamber's analysis.

It therefore finds that the plaintiff's claim for pecuniary damages must be rejected in its entirety and that the declaration that a violation of Article 10 of the Convention has been committed constitutes sufficient reparation for any non-pecuniary damage suffered by the plaintiff.

B. Expenses and costs 296. In the proceedings before the Chamber, the plaintiff claimed reimbursement of EUR 20,000 allegedly used for travel expenses by him, his lawyer and his experts. The Swiss government argued that no reimbursement should be ordered since there was no the claim had been sufficiently proven.

Alternatively, it argued that an amount of CHF 9,000 would be sufficient to cover all the expenses and costs of the proceedings before the national courts and before the Tribunal.297.The Chamber, having taken into consideration the documents in its possession and the established jurisprudence of the Tribunal in this matter, found that the plaintiff's claim had not been sufficiently proven and dismissed it.

298.Before the Grand Chamber, the plaintiff reiterated his initial claim and claimed reimbursement of an additional EUR 15,000 for his lawyer's professional fees and transport and accommodation expenses allegedly incurred in connection with the hearing before the Grand Chamber.125

MINISTRY OF JUSTICE 299.

The Swiss government referred to the arguments presented during the proceedings before the Chamber and urged the Grand Chamber to confirm the Chamber's decision on this point. Furthermore, it noted that the plaintiff had not presented any document supporting his claim.

on expenses and costs for the proceedings before the Grand Chamber, and urged the Grand Chamber to reject it.

300.The Grand Chamber fully agrees with the decision of the Chamber regarding the claim for costs and expenses for the proceedings before the Chamber. Furthermore, it notes that the applicant has not provided an adequate breakdown of his claim for costs and expenses for the proceedings before the Chamber. the procedure before the Grand Chamber nor has it presented any document that supports its claim.

Having taken into account the terms of Rule 60 § 2 of the Rules of Court and paragraph 21 of the Practical Guidelines on the Fair Satisfaction of Claims, and bearing in mind that according to the jurisprudence of the Court the claimant is entitled to reimbursement of expenses and costs only to the extent that it has been shown that they were actually incurred and necessary (see, for recent precedent, Center for Legal Resources on Behalf of Valentine Campeanu v.

Romania [GS], no.47848/08, § 166, ECtHR 2014), the Grand Chamber rejects these claims in their entirety. FOR THE ABOVE REASONS, THE COURT

1.Joins, by fourteen votes to three, the question of whether Article 17 of the Convention should be applied to the substance of the claim under Article 10 of the Convention;
2.

Concludes, by ten votes to seven, that a violation of Article 10 of the Convention has been committed;

3.Concludes, by thirteen votes against four, that there is no basis for applying Article 17 of the Convention;

4.Concludes, by sixteen votes to one, that there is no need to separately examine the admissibility or merits of the claim under Article 7 of the Convention;
5.

Concludes, by twelve votes to five, that the declaration that a violation of Article 10 of the Convention has been committed constitutes, in itself, fair and sufficient compensation for any non-pecuniary damage suffered by the plaintiff;

6.Dismisses, unanimously, the rest of the plaintiff's claims for compensation.

Written in English and French, and communicated at a public hearing in the Human Rights Building, in Strasbourg, on October 15, 2015.Johan Callewaert

Dean Spielmann Deputy Secretary

President

126

MINISTRY OF JUSTICE

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

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

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

DSJPARTIALLY CONCURRING AND PARTLY DISSENTING OPINION OF JUDGE NUSSBERGER

Historical debates as part of freedom of expression

Analyzing, evaluating and commenting on historical facts are prerequisites for peaceful social coexistence, being aware of what has happened in the past and assuming responsibility when necessary.

There is no historical truth that can remain permanently immutable. On the contrary, new research and the discovery of new documents and evidence can provide a different perspective from what was considered an unquestioningly accepted opinion. Therefore, the debate and discussion about of history are essential elements of freedom of expression and should never, in principle, be restricted in a democratic society, especially, they should not be restricted by defining taboos on which events should be excluded from free analysis in public debate or by establishing "official positions" that cannot be questioned.

However, limits may need to be set if the debate about history degenerates into incitement to hatred against a specific group and is used exclusively to attack the dignity of others and violate their most intimate feelings. The best-known example is denial of the Holocaust, which has been criminalized in different jurisdictions (check, for example, the legislation in Germany, Austria and Belgium described in paragraph 91 of the judgment).

Such measures have been generally accepted by the Court's jurisprudence (see paragraphs 209-12 of this ruling).¹²⁷

MINISTRY OF JUSTICE In this context, the declaration of violation in the present case raises important questions about the consistency of the Court's jurisprudence.

Why would it be appropriate to declare that the criminalization of the denial of the "genocide" nature of the massacres of Armenians in Turkey in 1915 violates freedom of expression while it has been concluded that sanctioning the denial of the Holocaust is compatible with the Convention? disagreement with the majority position

I voted to declare a violation in this case.

But regarding the fundamental question of the distinction between the denial of the Holocaust and the denial of the genocide of the Armenian people in 1915, I cannot accept either the response of the majority of the Chamber (see paragraph 117 of the Chamber's ruling) nor that of the majority of the Grand Chamber (see paragraphs 242-43 of this ruling).

I do not agree that a substantive violation of freedom of expression has occurred in the present case. In my opinion, there has only been a procedural violation, a consequence of the lack of legal certainty and the absence of a balanced exercise of rights. involved

(compare, as examples of violations of Article 10 of the Convention, Association Erkin v.

France, no.39288/98, § 58, ECHR 2001-VIII, and Lombardi Vallauri v. Italy, no.39128/05, § 46, of October 20, 2009). The conflict between the plaintiff's freedom to doubt the veracity of what is considered the "historical truth" and the protection of the sense of historical identity of the Armenians and their feelings should have been resolved in a clear and predictable manner by Swiss legislation.

Article 264 bis § 4 of the Penal Code, however, did not. And the Swiss courts were not able to make up for this deficiency. Distinction between the Court's jurisprudence on Holocaust denial and the present case

The Chamber and the Grand Chamber relied on various arguments to differentiate the present case from cases related to Holocaust denial.

The Chamber questioned the existence of a "general consensus" regarding the characterization as "genocide" of the Armenian people of the events that occurred in 1915 and the following years. On this basis, it made a distinction between the criminal sanctions imposed as a consequence of the speeches of the plaintiff and cases related to the denial of crimes related to the Holocaust (see paragraph 117 of the Chamber's ruling).

Although the Chamber indicated that it was not its function to evaluate historical events (see paragraph 99 of the Chamber's ruling), its reasoning seems to be based on the presumption of a different degree of certainty with respect to what happened in Turkey in

128

MINISTRY OF JUSTICE 1915 and what happened in Germany during the Nazi regime.

This analysis can be misunderstood as a conclusion about the validity of knowledge about historical facts. The majority in the Grand Chamber distanced itself from this method and argued that "the justification for Holocaust denial being a crime is not so much that it is a clearly fact. established" (see paragraph 243 of this ruling).

Instead, they see the context as the relevant element, referring to geographical and historical factors (see paragraphs 242-48 of this ruling), as well as the temporal factor (see paragraphs 240-50 of this ruling). According to this position, the States where the prohibition of Holocaust denial has been considered compatible with the Convention are those that "experienced the Nazi horrors and to which a greater moral responsibility can be attributed to distance themselves from the mass atrocities that they perpetrated or instigated" (see paragraph 243 of this ruling).

The majority did not find that link of responsibility between Switzerland and the events that occurred in the Ottoman Empire (see paragraph 244 of this ruling). The majority also referred to the temporal element and argued that the time that has passed since the commission of the atrocities and the resurgence of controversy mitigates the effects of critical statements.

I cannot agree with this perspective. To me, it is not only “laudable and consistent with the spirit of universal protection of human rights,... to attempt to vindicate the rights of victims of mass atrocities regardless of where they occurred.” committed” (see paragraph 246 of this ruling), but that this is sufficient justification for laws of this type.

It is a “choice of society” (see SASvFrance [GS], no.43835/11, § 153, ECtHR 2014) that the Court must accept. Legislation that expresses solidarity with the victims of genocides and crimes against humanity must be possible everywhere, even when there are no direct links to the events or victims, even if a lot of time has passed, and even when the legislation is not directly aimed at preventing conflict.

Each society must be free to resolve the conflict between the free and unrestricted debate of historical events and the right to personhood of the victims and their descendants in accordance with its view of historical justice in the case of what is alleged to have been a genocide. Society's choice, however, must be based on a transparent and open social debate and must be reflected in the law in such a way that it is clearly foreseeable which statements are permitted and which are not only taboo, but also carry criminal liability. .

Uncertainty regarding criminal responsibility can stifle historical debate from the start, and may cause historians to fail to address certain issues. Holocaust denial legislation in Germany, Austria and Belgium, which the Court has analyzed so far (see paragraphs 209-12 of this ruling) is unequivocal in this context.

All the respective laws clearly refer to the “National Socialist regime” (see references to the corresponding provisions in paragraph 91 of this judgment). In France, the legislation refers to the denial of crimes against humanity, as defined by the article 6 of the Statute

129

MINISTRY OF JUSTICE of the International Military Tribunal, annexed to the London Agreement of August 8, 1945 (see paragraph 91 of the ruling), thus making clear what historical events it refers to.

Procedural violation of Article 10 of the Convention

Unlike the situations mentioned above, the legislative process in Switzerland was not focused on the “Armenian question”, but rather took place in the form of a general debate on the prohibition of the denial of genocides and crimes against humanity, of which this topic was only an example (compare the documents of the legislative process in paragraphs 37-38 of this judgment, as well as the explicit analysis of the legislative process by the Swiss courts in paragraphs 22-26 of this judgment).

The example of the Armenian genocide was also not included in the text of article 261 bis § 4 of the Penal Code. The penal provision of article 261 bis § 4 is worded in such a way that it is not clear whether the courts in charge of its application should decide for themselves on the characterization of a historical event as “genocide” and, if so, on what basis.

This insurmountable difficulty is amply illustrated by the decision of the Swiss courts. While international law and Swiss national law provide a clear definition of "genocide" (see paragraphs 47 and 52-54 of the judgment) in which the courts can be based, they have difficulty determining what methodology should be used to make a decision on the legal characterization of an event so distant in time (references to scientific literature, to political statements made by state organizations or international institutions, etc.

– see paragraphs 22-26 of this ruling). They are faced with the problem that there is no ruling from an international court nor is there unanimity in the debate at the national and international level, whether in academia or politics. Thus, the Swiss Federal Court cannot but refer to what it calls "a sufficient general consensus, especially among historians" (section 4.3 of the ruling of the Swiss Federal Court, cited in paragraph 26 of this ruling).

Can that be enough for a criminal conviction for an opinion that questions the characterization of "genocide"? In my opinion, this shows that the Swiss legislator has failed to strike a balance between the rights protected by Article 8 and those protected by Article 10 regarding the debate on the events of 1915 in Turkey.

In such a sensitive area, it cannot be enough to legislate on rights in conflict in the abstract, without reference to the concrete historical case. This is the difference that matters between the present case and the cases referring to the denial of the Holocaust, where the limits of the debate historical characterization are clearly defined on the basis of national legislation and where courts could therefore take the legal characterization of the Holocaust as "genocide" as a starting point for their analysis of possible criminal liability.

Leaving significant doubt in a debate of this importance puts freedom of expression at risk more than is necessary in a democratic society.¹³⁰

MINISTRY OF JUSTICE I have therefore voted in favor of declaring a (procedural) violation of Article 10 of the Convention and also in favor of carrying out a separate analysis of the case in light of Article 7 of the Convention.

JOINT DISSENTING OPINION OF JUDGES SPIELMANN, CASADEVALL, BERRO, DE GAETANO, SICILIANOS, SILVIS AND KŪRIS 1.We cannot agree with the conclusion that in the present case there has been a violation of Article 10 of the Convention. 2. First, we note the Court's decidedly timid approach in reiterating the Chamber's conclusion that it is not required to determine whether the massacres and deportations suffered by the Armenian people at the hands of the Ottoman Empire can be characterized as genocide in light of international law, but also that it has no authority to make legally binding pronouncements in any sense on this point (see paragraph 12 of this judgment).

That the massacres and deportations suffered by the Armenian people were a genocide is evident. The Armenian genocide is a clearly established historical fact.¹ To deny it is to deny the obvious. But that is not the issue here. This case is not about historical truth , or about the

characterization of the events of 1915.

The real question here is whether it is possible for a State, without exceeding its margin of appreciation, to criminalize insulting the memory of a people who have suffered a genocide. In our opinion, this is possible. 3. That being so, we cannot follow the position of the majority regarding the analysis of the plaintiff's statements (I).

The same applies regarding the impact of geographical and historical factors (II), the implications of the temporal factor (III) and the lack of consensus (IV), the lack of obligation to criminalize said statements (V), and the analysis of the exercise balancing of rights carried out by national authorities (VI).

I.Analysis of the plaintiff's statements

4. Our disagreement refers mainly to the majority's understanding of the plaintiff's statements (see paragraphs 229-41 of this ruling). His particularly pernicious speech and its consequences have been minimized throughout the ruling.

While it is true that the statements in question do not necessarily fall within the scope of Article 17 of the Convention – although some of us are of the opinion that they do –

1 For a detailed analysis of both the existence of the crimes and the intention of those who perpetrated them, see HL

Kieser and D.Bloxham, "Genocide" in J.Winter (ed.), The Cambridge History of the First World War, Cambridge, Cambridge University Press, 2014, vol.1, Global War, pp.585-614.131

MINISTRY OF JUSTICE These statements, as we understand them, amount to a distortion of historical facts that far exceeds the denial of the legal characterization of the Armenian genocide.

The statements in question carry the intention (*animus*) of insulting an entire people. They are a gross misrepresentation, directed at the Armenians as a group, which seeks to justify the actions of the Ottoman authorities by presenting them almost as an act of self-defense and accompanying them with a racist tone that denigrates the memory of the victims, as properly determined by the Federal Court.

To the extent that they sought to discredit the "obvious", the statements in question – as the plaintiff unequivocally confirmed at the hearing – can be considered, if not an incitement to hatred and violence, at least as an incitement to intolerance. against the Armenians. Far from being historical, legal and political, the plaintiff's statements presented the Armenians as the aggressors of the Turkish people and described as an "international lie" the use of the term "genocide" to refer to the atrocities committed against the Armenians. Armenians.

Furthermore, the plaintiff declares to be a follower of Talaat Pasha, one of the protagonists of these events, who was described at the hearing as "the best friend of the Armenians" (sic). These statements, in our opinion, exceed the limits of what acceptable in light of article 10 of the

Agreement.5.

Thus, this case is simply about the limits of freedom of expression. By successively applying the various requirements of Article 10 of the Convention, we easily find that there was interference and that it was lawful. In its decision of March 9, 2007, the Lausanne Police Court found that the plaintiff had denied the Armenian genocide by justifying the massacres.

The Federal Court, in its judgment of 12 December 2007, extensively examined the question of mens rea of the offense (grounds of racial discrimination – paragraphs 5.1 and 5.2) and concluded that the factual findings “provided sufficient evidence on the existence of grounds that, beyond nationalism, could only be seen as racial or ethnic discrimination.”

The plaintiff was prosecuted under article 261 bis § 4 of the Penal Code, a provision that, in itself, does not raise any question either for its content or for its legitimacy in relation to the values protected by the Convention. The courts examined the facts and evaluated the plaintiff's statements.

The plaintiff was aware that making the offensive statements could lead to criminal liability under article 261 bis § 4 of the Code. This article, in addition, seeks the legitimate goal of protecting the rights of third parties and avoiding disorder. II. Impact of the factors geographical and historical 6. Beyond this aspect, we believe that the methodology used by the majority is problematic in some areas.

This is especially true with respect to the “geographical and historical factors” addressed in detail in paragraphs 242-48 of the judgment. Minimizing the meaning of the plaintiff's statements by attempting to limit their geographical scope is tantamount to seriously diluting the universal and *erga omnes* scope of human rights – the factor that essentially defines them today.

As the Institute of International Law has emphatically stated, the

132

MINISTRY OF JUSTICE The obligation of States to ensure the observance of human rights is an *erga omnes* obligation; “it is up to each State in relation to the international community as a whole, and each State has a legal interest in the protection of human rights” (“The Protection of Human Rights and the Principle of Non-Intervention in Internal Affairs of States”, Resolution of September 13 of 1989, Yearbook of the Institute of International Law, 1989, vol.

63-II, p.341, article 1). Along the same lines, the Declaration and Program of Action adopted by the International Conference on Human Rights in Vienna establishes that “the promotion and protection of all human rights is a legitimate concern of the international community” (1993, UN Doc.

A/CONF.157/23, § 4). Clearly, this universal vision contrasts with that adopted by the

majority in this ruling. Drawing all the logical conclusions that derive from the geographically restricted view apparently adopted by the majority, one could conclude that the denial, in Europe, of genocides perpetrated on other continents, such as the genocide in Rwanda or the one carried out carried out by the Khmer Rouge regime in Cambodia, would be protected by freedom of expression without any limits or almost without limits.

We do not believe that this vision reflects the universal values enshrined in the Convention.III.Impact of the temporal factor

8.The emphasis on the temporal factor (see paragraphs 249-54 of this ruling) presents a similar problem, in our opinion. Should we conclude that in twenty or thirty years denying the Holocaust may be acceptable in terms of freedom of expression? expression?

How can this factor be consistent with the principle that war crimes and crimes against humanity do not have a statute of limitations? IV. Lack of consensus 9. The lack of consensus on which the majority based its conclusions in paragraphs 255 to 257 could , at most, be considered as a factor that expands the margin of appreciation of the Swiss authorities.

At the risk of being repetitive, we consider that the legislator is perfectly empowered to criminalize statements such as those made by the plaintiff. The question of consensus, as a limit to the margin of appreciation of the authorities, would only arise if there was consensus on the fact that criminalizing That conduct was expressly prohibited.

That is not, however, the case.V.Lack of obligation to criminalize those statements 10.With regard to the conclusion that Switzerland was not obliged to criminalize the plaintiff's statements (see paragraphs 258-68), we confess to having serious doubts about the relevance of this reasoning. Could it not be argued that, on the contrary, a (regional) custom is emerging, through the practice of the States, the European Union (Framework Decision 2008/913/JHA) or the European Commission against Racism and Intolerance (Recommendation of

133

MINISTRY OF JUSTICE Public Policy No.

7)?We would also point out that, beyond Europe, the United Nations Committee on the Elimination of Racial Discrimination has repeatedly recommended criminalizing denialist speech. Can these advances be discarded at a stroke when examining the case in terms of an alleged conflict of obligations?

11.In addition to these advances, which point in the opposite direction to that of the majority, it should be noted that the Court of Cassation of the Canton of Vaud emphasized in its ruling of June 13, 2007 that the particularity of the anti- Swiss racism was that Parliament had decided, in the case of genocide or other crimes against humanity in particular, the law should go beyond the minimum standards set out in the International Convention on the Elimination of All Forms of Racial Discrimination of 1965 .

In our opinion, the legislator is perfectly entitled to criminalize statements such as those of the plaintiff. The Swiss National Parliament, after long debates, adopted the position that statements such as those made by the plaintiff deserved sanctions

penalties. We consider that the need to penalize such conduct in a democratic society is an issue that is within the margin of appreciation of the State in the present case.

VI.Balance exercise of the rights in question 12.Finally, with regard to the balance between the various rights in question (see paragraphs 274-80), we consider that the Federal Court did an excellent job, issuing a measured ruling , detailed and reasoned. The ruling dedicated section 6 to freedom of expression, as established in Article 10 of the Convention, concluding the following:

"...the appellant is, in essence, seeking, through provocation, to have his statements confirmed by the Swiss judicial authorities, to the detriment of the members of the Armenian community, for whom this issue is of central importance to their identity .

The appellant's conviction therefore seeks to protect the human dignity of the members of the Armenian community, who identify themselves through the memory of the 1915 genocide. The criminalization of genocide denial is, ultimately, a means to prevent genocides, for the purposes of article I of the Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature in New York on December 9, 1948 and approved by the Federal Assembly on March 9, 2000..." 13.

There was, therefore, an appropriate balancing exercise in the present case. Therefore, the conclusion contained in paragraph 280 of this judgment is not justified in any way. 14. In summary, we are convinced that there was no violation of Article 10 of the Convention in the present case. ADDITIONAL DISSENTING OPINION OF JUDGE SILVIS, TO WHICH JUDGES CASADEVALL, BERRO AND KŪRIS JOIN

134

MINISTRY OF JUSTICE 1.This additional dissenting opinion refers mainly to the majority vote in favor of not applying Article 17 of the Convention.

As noted in the joint dissenting opinion on the decision that a violation of Article 10 of the Convention had occurred, some judges who signed it would have preferred that Article 17 be applied. I am one of those judges who respectfully differs from the majority on this spot.

2.It is true that, in relation to genocide denial and other forms of hate speech, Strasbourg's position on Article 17 has not been uniform. In his essay honoring Sir Nicolas Bratza, Judge Villiger classified the existing cases in four groups, with very different positions.

3.The first of them consists of the direct application of article 17, so that the application is there and is declared inadmissible. An example is the frequently cited decision of the Commission in Glimmerveen and Hagenbeek v. Netherlands (nos.8348 /78 and 8406/78, Commission decision of October 11, 1979, Decisions and Reports (DR) 18, p.

187).The applicants defended strongly racist views, with a political program that the Commission considered contrary to the letter and spirit of the Convention and which would contribute to the destruction of human rights. Under Article 17, the applicants could not

claim the protection of article 10.

The Court followed the same approach in other cases, with *Norwood v. United Kingdom* ((dec.), no.23131/03, ECHR 2004-XI). *Garaudy v. France* ((dec.) no.65831/01, ECtHR 2003-IX) is another example of this approach, in which the analysis ends with the conclusion that Article 17 is applicable and the claim under Article 10 is rejected as inadmissible *ratiomateriae*.

This approach remains valid, as demonstrated by settled case law (e.g. *Kasymakhunov and Saybatalov v. Russia*, nos.26261/05 and 26377/06, March 14, 2013). It is worth noting that the *Kasymakhunov and Saybatalov* case can be seen as a response to the criticism that the appearance of Article 17 is a sign of a lack of appropriate legal analysis.

The Court explained its analysis of the political ideas of the plaintiffs (those of the fundamentalist group Hizb ut-Tahrir) in some detail, giving the reasons why it was withdrawing the protection of articles 9, 10 and 11 through the application of the article 17.4. The second approach is a combination that has been used in a number of cases where the plaintiff had denied the Holocaust and/or had spread some other anti-Semitic message and/or had propagated Nazi-type ideas (see, for example, *Kühnen v.*

Germany, no.12194/86, Commission decision of May 12, 1988, DR 56, p.205). Here articles 10 and 17 are combined, in the sense that the case is submitted to the standard analysis of the article 10 § 2. When talking about "necessity", support is sought in article 17, leading to the conclusion that the claim is manifestly unfounded (without merit, but not outside the scope of application of article 10).

5. These two approaches are not mutually exclusive, as demonstrated by the case of *Molnar v. Romania* ((dec.), no.16637/06, October 23, 2012). By using the first approach described above, the Court noted in this case that, while the plaintiff's actions were

135

MINISTRY OF JUSTICE incompatible with democracy and human rights, the plaintiff could not use article 10.

However, this was not the last word. The Court completed its analysis in this case by making an "even if it were" analysis: even assuming that there had been an interference with the plaintiff's freedom of expression, this would have been justified by the second paragraph of article 10.

6. The third group in this classification is made up of cases in which Article 17 could have been applied, but was not applied, as exemplified by the case *Leroy v. France* (no.36109/03, October 2, 2008). The plaintiff in this case had been convicted of condoning terrorism for a cartoon he had drawn regarding the terrorist attack on the World Trade Center and published two days later.

Following his conviction for condoning terrorism, he sued under Article 10 of the Convention. The Court did not find persuasive the government's arguments that the case should be considered

outside the spectrum of Article 10 – in essence, distinguished it from a typical Article 17 application case such as those we have already referred to, in which the hateful and injurious intention of the person had been unequivocal.

I should add that the Court ultimately decided that the interference with the plaintiff's freedom of expression had been justified and the sanction proportionate.⁷ Finally, and although this approach may not be genuinely different, in certain cases the Court's approach has been to leave the question of article 17 open until after having analyzed the merits of the case, and then decide.

This can be seen in *Soulas et al v. France* (no.15948/03, July 10, 2008) and also in *Féret v. Belgium* (no.15615/07, July 16, 2009). Both cases concerned to restrictions on racist and Islamophobic speech that the Tribune ultimately found justified. Having reached this conclusion, the Court added, incidentally, that the expressions in question did not justify the application of Article 17.

This could be putting the bull behind the cart. 8. A characteristic aspect of the Strasbourg approaches to Article 17 is that the Court has kept its options open. There is more than one tool in the box that can be used depending on the need in each case. It seems to me that it can also be said that the Court has made rather moderate use of article 17.

Outside of what are recognized as the most clearly hateful and aberrant forms of expression, the Court tends to seek the response to claims against restrictions on freedom of expression within the limits of Article 10. In the present case, the Court has found that the question of whether Article 17 should apply must be resolved together with the merits of the plaintiff's claim under Article 10 of the Convention, taking as the decisive element under Article 17 whether the plaintiff's statements "sought to stir up hatred or violence".

In my opinion, racist speech and genocide denial, combined with the intention to insult someone or make them suffer, can, in themselves, be characterized as activities aimed at destroying any of the rights and freedoms established in the Convention, within the framework of article 17.

This was the position of the Court in *Hizb ut-Tahrir et al v. Germany* ((dec.) no.31098/08, § 72, of 12

136

MINISTRY OF JUSTICE June 2012). The Court held, in particular, that Article 17 of the Convention extracts from the scope of protection of Article 10 a "commentary contrary to the underlying values of the Convention" (see *Lehideux and Isorni v.*

France, September 23, 1998, § 53, Reports of Judgments and Decisions 1998-VII, and Garaudy, cited above). Thus, in Garaudy, which referred, in particular, to the conviction for denial of crimes against humanity of the author of a book that systematically denied those crimes committed by the Nazis against the Jewish community, the Court decided that the plaintiff's claim, based on Article 10, was incompatible, ratiomateriae, with the provisions of the Convention.

9.I consider that the intention to insult the memory of the victims of the Armenian Genocide was evident in this case and that the applicant's statements were contrary to the underlying values of the Convention. However, the specific procedural position of the Grand Chamber was that the claim based on article 10 had already been admitted by the Chamber.

Therefore, the application of Article 17 could not lead to a declaration of inadmissibility of the claim related to Article 10. In that context, I would have preferred an approach that involved the application of Article 17 to the merits of the matter, before entering into the Article 10. In my opinion, only after analyzing the application of Article 17 to the substance of the case could the Court adopt the subsidiary approach of applying Article 17 as a principle of interpretation of Article 10 in relation to the "necessity" of Article 10 § 2.

10. (Judge Silvis only:) Finally, having voted against there being a violation of Article 10, I cannot agree with the determination that the declaration of violation is sufficient compensation for the plaintiff. Without a doubt, this is a A matter of personal taste, I of course agree with the decision not to award any monetary compensation to the plaintiff.

MINISTRY OF JUSTICE