A European Halt to Laws Against Genocide Denial?

In Perinçek v. Switzerland, the European Court of Human Rights Finds that a Conviction for Denial of Armenian 'Genocide' violates Freedom of Expression

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In Perınçek v. Switzerland*, the European Court of Human Rights ruled that a conviction for denial of the legal characterisation as genocide of the Armenian massacre violated freedom of expression. The judgment is a turning point in the general approach on the crime of denialism. First of all, the Court narrowed the scope of the abuse clause to expressions of denial which are directed to incite to hatred or violence – a condition to be assessed on a case-by-case basis. Secondly, it doubted that a «general consensus» over the events' legal classification could be derived from political recognition and agreement among historians. Thirdly, it conducted a comparative analysis – citing inter alia the French and Spanish constitutional courts – that questioned the existence of a pressing social need to punish these radical historical opinions.*

The article begins by recalling the context of the case and setting out the principles established therein. Then it seeks to address the following questions: (i) whether – and if so, under which conditions – the abuse clause may still be applied to denialism; (ii) whether the ruling undermines the possibility to punish the denial of the Armenian genocide; (iii) whether, and to what extent, the judgment affects Europe-wide legislation banning the denial of the Holocaust and other serious crimes.

The article argues that: (i) the judgment did not entirely rule out the applicability of the abuse clause to denialism; (ii) the possibility to punish the denial of the legal characterisation as genocide of the Armenian massacre has been significantly reduced; (iii) whilst the crime of Holocaust denial is not affected by the ruling, it transpires from the reasoning that the denial of other serious crimes may be punished only in so far as the conduct exhibits tangible symptoms of harm, e.g. by qualifying as incitement to hatred or attacking the victims' dignity.

I. Introduction

On 17 December 2013, the European Court of Human Rights (hereinafter ECtHR or 'the Court') rendered its judgment in the case of *Perınçek v. Switzerland*,[1] in which it held that a criminal conviction for denial of the Armenian genocide violates the right to freedom of expression guaranteed by Article 10 of the European Convention on Human Rights (ECHR or 'the Convention').

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[1] *Perınçek c. Suisse*, 17 December 2013, 27510/08.

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Great significance should be attached to this ruling, which represents a *turning point* in the ECtHR approach to the broader phenomenon of 'denialism' – a term employed here to include a wide array of conduct consisting in the denial, justification, approval or gross minimisation of a number of serious international crimes.[2] Departing from its previous jurisprudence, the Court examined the *Perinçek* case pursuant to Article 10 ECHR, that is, the ordinary test applied to evaluate State restrictions on free speech. Hence, the application was decided through a balancing exercise involving all interests at stake, in light of the circumstances of the case.

The judgment further suggests that, from a legal viewpoint, Holocaust denial remains *unique*, such that it may justify restrictions on free speech that the denial of other grave crimes may not. Whereas the denial of the Holocaust is *presumed* to be a subtle form of anti-Semitism – as such warranting an *ad hoc* legal regime – other types of denialism do not necessarily entail comparable harm, thereby calling for a case-specific analysis.

The ruling was given widespread coverage by the world's media outlets, and sparked conflicting reactions, with some (e.g. members of the Turkish government) celebrating the verdict as a victory for freedom of expression, and others (e.g. the Armenian diaspora) regretting that it undermines the fight against racism in Europe.[3] However, the impact of the judgment should not be overestimated. Like all rulings delivered by the ECtHR, the decision is indissociable from the factual circumstances of the case, and its binding legal effects remain confined to the application at hand. Although this judgment is not amenable to be automatically generalised, it may nonetheless become an authoritative precedent.

In this regard, the questions to be addressed centre on whether, and to what extent, *Perinçek* requires Switzerland to amend the provision against genocide denial envisaged in its Penal Code; whether the ruling puts an end to the possibility to penalise the denial of the Armenian genocide, and, more generally, whether it affects Europe-wide legislation banning the denial of a broad range of serious crimes (including but not limited to the Holocaust).

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[2] Academic literature on the crime of denialism is vast. Listed here are some of the main monographic works: T. Hochmann, *Le négationnisme face aux limites de la liberté d'expression. Etude de droit comparé* (Paris: Pedone, 2013); E. Fronza, *Il negazionismo come reato* (Milan: Giuffrè, 2012); R. Kahn, *Holocaust Denial and the Law. A Comparative Study* (New York: Palgrave-Macmillan, 2004); T. Wandres, *Die Strafbarkeit des Auschwitz-Leugnens* (Berlin: Duncker und Humblot, 2000); G. Werle, T. Wandres, *Auschwitz vor Gericht: Volkermord und bundesdeutsche Strafjustiz: mit einer Dokumentation des Auschwitz-Urteils* (Munich: Beck, 1995). Notable articles on the matter include: those collected in L. Hennebel, T. Hochmann (eds), *Genocide Denials and the Law* (Oxford: OUP, 2011); W. Brugger, 'Ban on or Protection of Hate Speech? Some Observations Based on German and American Law', 17 *Tulane European & Civil Law Forum* (2002) 1; P. Wachsmann, 'Liberté d'expression et négationnisme', 46 *Revue trimestrielle des droits de l'homme (RTDH)* (2001) 585; D. Beisel, 'Die Strafbarkeit der Auschwitzlüge', 48 *Neue Juristische Wochenschrift* (1995) 997; G. Werle, 'Der Holocaust als Gegenstand der bundesdeutschen Strafjustiz', 45 *Neue Juristische Wochenschrift* (1992) 2529.

[3] See e. g. www.aydinlikdaily.com/Perin%C3%A7ek-ECHR-Victory-Resounds-Internationally-1670; www.hurriyetdailynews.com/turkey-says-echr-ruling-on-genocide.aspx?pageID=238&nID=59808&NewsCatID=339; http://armenpress.am/eng/news/744258/echr-decision-to-contribute-to-strengthening-turkish-fascism-in-europe-hayk-demoyan.html (last access to all websites cited in this paper: 26 December 2013).

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II. Background

Doğu Perıncek ('the applicant') is a Turkish politician, holding the position of incumbent president of the Workers of Turkey's Party. Born in Gaziantep in 1942, he is not unknown in Strasbourg. Prior to the present case, the ECtHR had already ruled in his favour in two cases brought against Turkey.[4] Currently, Perıncek is serving an aggravated life sentence, due to his first-instance conviction in the so-called Ergenekon trials for directing a terrorist organisation attempting to overthrow the Turkish government.

The present case originates in a restrictive measure against genocide denial enforced against him in Switzerland. More specifically, the applicant was found responsible for racial discrimination pursuant to Article 261 bis(4) of the Swiss Penal Code,[5] following his public statements that the legal characterisation as genocide of the extermination and deportations perpetrated against Armenians in 1915 and following years is an «international lie». It is crucial to underline that the conduct did not consist in denial of the *existence* of the massacre as such, rather it disputed its *legal classification* as genocide.

In Europe, this verdict represents the first (but not the only) criminal conviction for denial of the Armenian genocide.[6] The prosecution focused on the opinions uttered during three conferences held in Switzerland, in which the applicant maintained that the massacre committed by the Ottoman Empire was justified by the laws of war, owing to the Armenians' allegiance to Russia that rendered them a threat to Ottoman interests. In his view, it follows that the deportations and exterminations thereby perpetrated – the occurrence of which was not questioned – cannot qualify as genocide.

On 9 March 2007, Perıncek was found guilty by the Lausanne district court (*Tribunal de police*) of genocide denial with a racist and nationalistic motivation, and accordingly fined CHF 12,000. The holding was upheld, first, by the Vaud appeal court (*Cour de cassation pénale du Tribunal cantonal du canton de Vaud*) and, finally, by the Federal Tribunal on 12 December 2007.[7]

The Swiss courts reasoned that Article 261 bis(4) of the Penal Code applies to any genocide and crime against humanity – not only to the Holocaust – as long as there exists a «general agreement» over the underlying facts and legal characterisations; a general agreement that must be «comparable» to that concerning the Nazi

[4] *Perıncek c. Turquie*, 21 June 2005, 46669/99 (violation of Art. 10 ECHR); *Socialist Party and Others v. Turkey*, Grand Chamber, 25 May 1998, 21237/93 (violation of Art. 11 ECHR).

[5] Art. 261 bis(4) of the Swiss Penal Code reads as follows: «any person who publicly denigrates or discriminates against another or a group of persons on the grounds of their race, ethnic origin or religion in a manner that violates human dignity, whether verbally, in writing or pictorially, by using gestures, through acts of aggression or by other means, or any person who on any of these grounds denies, trivialises or seeks justification for genocide or other crimes against humanity» (emphasis added).

[6] Subsequent to the case of *Perıncek*, another three individuals (yet again of Turkish descent) have been convicted in Switzerland for denial of the legal characterisation as genocide of the Armenian massacre: see *Tribunal fédéral*, ATF 6B_297/2010, 16 September 2010 (so-called *Ali Mercan* case). Moreover, a civil proceeding involving similar issues was concluded on 21 June 1995 in France, resulting in an order against Bernard Lewi to make (symbolic) reparation in favour of Armenian victims' associations (see *Tribunal de grande instance de Paris*, judgment of 21 June 1995).

[7] *Tribunal fédéral*, 12 December 2007, ATF 6B_398/2007, available online at *http://www.bger.ch*.

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extermination of European Jewry.[8] In respect of the qualification as genocide of the acts committed against Armenians, the Federal Tribunal took note of a «broad consensus of the community» that may be inferred from a number of declarations by domestic and supranational political organs.[9] Most importantly, there is a general consensus among historians on such genocidal nature. In this regard, the Tribunal made clear that the notion of general consensus does not require unanimity, but is satisfied by the absence of a «sufficient doubt» on the classification as genocide attached to the events in question.[10]

Consequently, it was established that Perıncek had disputed the generally-accepted legal characterisation of the acts committed by the Ottoman Empire against Armenians. Considering that he attempted to justify the massacre depicting the Armenians as aggressors, and that he also sided with Talak Pacha (who promoted the commission of the said crimes), the Swiss courts found that his conduct underlay racist and nationalistic motives, which have nothing to do with historical debate.[11] The Federal Tribunal concluded that, even if the massacre were to be considered a crime against humanity instead of genocide, all the ingredients of the crime provided for in Article 261 bis(4) of the Penal Code have been established, and thus the conviction was to be upheld.[12]

III. The ECtHR judgment in *Perıncek v. Switzerland*

In his application before the Strasbourg organ, Perıncek submitted that the conviction for racial discrimination – based on his expressions disputing the legal characterisation of a genocide – violated the right to freedom of speech enshrined in Article 10 ECHR. The Court, by a 5-2 majority, granted the application and held that the finding of a violation constitutes in itself just satisfaction for any damage suffered by the applicant. Below is a summary of the Court's argument.

1. Preliminary Issue: The Applicability of Article 17 ECHR

At the outset, it had to be evaluated whether the application is admissible under Article 17 ECHR.[13] This provision – also known as the 'abuse clause' – removes

[8] *Tribunal fédéral*, ATF 6B_398/2007, *supra* fn. 7, para. 3.4 and sub-paragraphs.

[9] *Tribunal fédéral*, ATF 6B_398/2007, *supra* fn. 7, para. 4 and sub-paragraphs.

[10] *Tribunal fédéral*, ATF 6B_398/2007, *supra* fn. 7, paras 4.4 and 4.5.

[11] *Tribunal fédéral*, ATF 6B_398/2007, *supra* fn. 7, paras 5.2 and 7. It should be noted that Swiss jurisprudence has refrained as of yet to determine whether racist motives must be established, for the crime under Article 261 bis(4) to be made out: see e. g. *Tribunal fédéral*, ATF 126 IV 20, para. 1(d), p. 26; *Tribunal fédéral*, ATF 6B_398/2007, *supra* fn. 7, para. 5.2; *Tribunal fédéral*, ATF 6B_297/2010, *supra* fn. 6, para. 4.2.1.

[12] *Tribunal fédéral*, ATF 6B_398/2007, *supra* fn. 7, para. 7.

[13] On the abuse clause, see generally H. Cannie, D. Voorhoof, 'The abuse clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection?', 29 *Neth. Q. Hum. Rts.* (2011) 54; D. Keane, 'Attacking Hate Speech Under Article 17 of the [ECHR]', 25 *Neth. Q. Hum. Rts.* (2007), 641; S. van Drooghenbroeck, 'L'article 17 de la Convention européenne des droits de l'homme est-il indispensable?', 46 RTDH (2001) 541; Y. Arai, 'Prohibition of Abuse of the Rights […]', in P. Van Dijk, F. Van Hoof, A. Van Rijn, L. Zwaak (eds), *Theory and Practice of the [ECHR]* (Oxford: OUP, 4th ed., 2006), 1083; P. Le Mire, *sub* Article 17, in L.-E. Pettiti, E. Decaux, P.-H. Imbert (dir.), *La Convention européenne des droits de l'homme* (Paris:

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from the protection of the Convention any activity aimed at destroying any of the rights set forth therein. Expressions considered to fall under this provision are categorically excluded from the subject-matter scope of the Convention. In other words, a complaint based on conduct of this sort need not be examined on the merits, but declared inadmissible on a *prima facie* assessment.

According to ECtHR well-established jurisprudence, Article 17 ECHR is applicable to activities that «run counter to the basic values underlying the Convention».[14] The Court constantly affirmed that expressions ascribable to denialism are to be considered included within this category. More specifically, the Court declared that the reach of the abuse clause extends to expressions denying «clearly established historical facts»[15] or «crimes against humanity»,[16] and to those aimed at «justifying war crimes such as torture or summary executions»[17] or at the «glorification of war crimes, crimes against humanity or genocide».[18] In practice, however, Article 17 ECHR has been thus far applied only to one specific type of denialism, namely the denial of the Holocaust.[19]

In *Perinçek*, the Court declined to invoke the abuse clause, on the ground that the expressions at hand did not intend to incite to hatred or violence.[20] Key to this finding is the fact that the applicant did not deny the existence of the massacre against Armenians, but only the legal classification of 'genocide' given to those events. In the judges' view, such an opinion does not amount *per se* to incitement to hatred against Armenians, nor does it display contempt for the victims of the crimes. Therefore, ordinary rules under Article 10 ECHR apply, meaning that the respondent State must present compelling reasons to show that the interference with the applicant's right is necessary in a democratic society.

Interestingly, the judgment left open the question as to whether Article 17 ECHR is applicable to conduct justifying – and not merely denying – the Ottoman acts.[21] The Court did not feel compelled to address this issue, given that the applicant was neither prosecuted nor punished for this modality of expression.

Economica, 2nd ed., 1999), 509; J.-F. Flauss, *L'abus de droit dans le cadre de la Convention européenne des droits de l'homme*, RTDH (1992), 462.

[14] This principle has been constantly upheld in the ECtHR case law since its first declaration by the former European Commission of Human Rights in *Kühnen v. Federal Republic of Germany*, (dec.), 12 May 1988, 12194/86, (the law), para. 1.

[15] *Lehideux and Isorni v. France*, Grand Chamber, 23 September 1998, 24662/94, para. 47.

[16] *Janowiec and Others v. Russia*, 16 April 2012, 55508/07 and 29520/09, para. 165; *Garaudy c. France*, (déc.), 24 June 2003, 65831/01, (en droit), para. 1(i), p. 29.

[17] *Orban et autres c. France*, 15 January 2005, 20985/05, para. 35.

[18] *Fáber v. Hungary*, 24 July 2012, 40721/08, para. 58.

[19] See e. g. *F. P. v. Germany*, (dec.), 29 March 1993, 19459/92; *Walendy v. Germany*, (dec.), 11 January 1995, 21128/92; *Remer v. Germany*, (dec.), 6 September 1995, 25096/94; *Honsik v. Austria*, (dec.), 18 October 1995, 25062/94; *Nationaldemokratische Partei Deutschlands v. Germany*, (dec.), 29 November 1995, 25992/94; *Rebhandl v. Austria*, (dec.), 16 January 1996, 24398/94; *Pierre Marais v. France*, (dec.), 24 June 1996, 31159/96; *D. I. v. Germany*, (dec.), 26 June 1996, 26551/95; *Hennicke v. Germany*, (dec.), 21 May 1997, 34889/97; *Nachtmann v. Austria*, (dec.), 9 September 1998, 36773/97; *Witzsch v. Germany (1)*, (dec.), 20 April 1999, 41448/98; *Garaudy c. France*, *supra* fn. 16; *Witzsch v. Germany (2)*, (dec.), 13 December 2005, 7485/03.

[20] *Perinçek c. Suisse*, *supra* fn. 1, paras 51-52.

[21] *Perinçek c. Suisse*, *supra* fn. 1, para. 53.

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In conclusion, the application was declared admissible and, accordingly, decided pursuant to ordinary criteria envisaged in Article 10 ECHR.

2. Whether the State Interference Is Necessary in a Democratic Society

The analysis under Article 10 ECHR consists of a three-tier test.[22] For the State interference to comply with the right to freedom of expression, the Court must satisfy itself that such a restrictive measure: (i) was prescribed by law; (ii) pursued a legitimate aim; and, (iii) was necessary in a democratic society and proportionate to the legitimate aim pursued. The key element of the test is represented by its last step, in which the judges ascertain the necessity and proportionality of the interference, striking a balance between the various interests at stake and so deciding the case in the light of all its factual circumstances. Furthermore, the Court has developed the doctrine of margin of appreciation, according to which domestic authorities are granted a certain measure of discretion.[23] The breadth of discretion varies depending on the type of expression: whereas States are given wide latitude in relation to the fields of morality and religion, the Court exercises a strict scrutiny on political speech.[24]

Turning to the case under examination, the Strasbourg organ reiterated that its task is not that of disposing of the issues surrounding either the existence or the legal characterisation of the acts committed against Armenians.[25] Rather, its analysis is limited to review the decisions taken by domestic authorities in the light of Article 10's criteria. In this regard, two countervailing interests must be balanced: the honour of the relatives of the Armenian victims and the applicant's freedom of speech.

The thrust of the decision in *Perıncçek* focused on whether the interference was necessary in a democratic society, namely whether it was justified by a «pressing social need». Recalling its constant position on the matter, the Court affirmed that the freedom of speech clause also protects information and ideas that are likely to

[22] Recent analysis of the Strasbourg case law on Article 10 include: D. Voorhoof, 'Freedom of Expression under the European Human Rights System […]', 1-2 *Inter-American and European Human Rights Journal* (2009), 3; J.-F. Flauss, 'The European Court of Human Rights and the Freedom of Expression', 84 *Indiana Law Journal* (2009), 809; *La liberté d'expression en Europe – Jurisprudence relative à l'article 10 de la Convention européenne des Droits de l'Homme (Dossiers sur les droits de l'homme n° 18)* (Strasbourg: Council of Europe, 3rd ed., 2006).

[23] On the margin of appreciation doctrine, see *ex amplius*, in English, A. Legg, *The Margin of Appreciation in International Human Rights Law* (Oxford: OUP, 2012); Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Antwerpen: Intersentia, 2002); S. Greer, *The Margin of Appreciation: Interpretation and Discretion under the [ECHR]* (Strasbourg: Council of Europe, 2000); H. C. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (The Hague [etc.]: Kluwer, 1996); see also Y. Arai-Takahashi, 'The Margin of Appreciation Doctrine: A Theoretical Analysis of Strasbourg's Variable Geometry', in A. Føllesdal, B. Peters, G. Ulfstein (eds), *Constituting Europe* (Cambridge [etc.]: Cambridge University Press, 2013), 62; D. Spielmann, 'Allowing the Right Margin: The [ECtHR] and the National Margin of Appreciation', 14 *Cambridge Y. B. Eur. Legal Stud.* (2012), 381; P. Mahoney, 'Marvellous Richness of Diversity or Invidious Cultural Relativism?', 19 *Human Rights Law Journal* (1998), 1; M. O'Boyle, 'The Margin of Appreciation and Derogation under Article 15: Ritual Incantation or Principle?', 19 *Human Rights Law Journal* (1998), 23.

[24] See e. g. *Sürek v. Turkey (No. 1)*, Grand Chamber, 8 July 1999, 26682/95, para. 61; *Wingrove v. United Kingdom*, 25 November 1996, 17419/90, para. 58; *Otto-Preminger-Institut v. Austria*, 20 September 1994, 13470/87, para. 50.

[25] *Perıncçek c. Suisse*, *supra* fn. 1, para. 111.

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offend, shock or disturb any sector of the population.[26] This precept holds true in relation to historical debate.[27] As for the margin of appreciation, the Court considered that, in the present case, its scope is limited, the expression involving historical, legal and political issues over a matter of public interest.[28]

That said, the evaluation of the existence of the pressing social need tackled two critical issues: the first revolving around the concept of «general consensus» adopted by the Swiss judiciary, and the second, ascertaining whether and to what extent a similar repressive exigency exists in other European countries.

a) The Notion of «General Consensus»

The Court took the view that the notion of general consensus – that was utilised by Swiss courts to ground the applicant's conviction – gives rise to several problems.

First, there is no unanimity in the community as a whole over the legal characterisation of the said events as genocide. This is testified, for instance, by the differing views expressed thereupon by the Swiss political organs themselves, as well as by the fact that only a minority of States has officially recognised the Armenian genocide.[29]

Secondly, the legal definition of genocide is firmly established, and reflected in a very narrow legal concept. In the crime's legal definition, the role of the so-called *dolus specialis* is key, as this mental element requires the perpetrator's specific intent to destroy all or part of a particular group, as such.[30] The Court doubted that the general consensus to which Swiss courts referred could relate to this kind of very specific legal issues.[31]

Thirdly, the Court doubted that the academic community is able to express a general consensus over events like those at hand, considering that historical research is, by definition, open to continuous debate and does not lend itself to definitive conclusions and objective truths. In this regard, the present case must be distinguished from those regarding the denial of the Holocaust. In the latter: (i) expressions of denial challenged the existence of specific historical facts, not their legal classification; (ii) Nazi crimes – the denial of which was in issue – had a clear legal basis, provided for by the Statute of the Nuremberg Tribunal; and, (iii) such historical facts had been declared to be clearly established by an international court.[32]

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[26] *Perinçek c. Suisse*, *supra* fn. 1, paras 51, 102. This essential principle has been firstly proclaimed in the celebrated case of *Handyside v. United Kingdom*, 7 December 1976, 5493/72, para. 49.

[27] *Perinçek c. Suisse*, *supra* fn. 1, para. 102.

[28] *Perinçek c. Suisse*, *supra* fn. 1, paras 112-113.

[29] *Perinçek c. Suisse*, *supra* fn. 1, para. 115.

[30] The generally-accepted legal definition of genocide is still the one that was set out for the first time in Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the United Nations General Assembly on 9 December 1948. Its first application by an international criminal tribunal dates back to the case of International Criminal Tribunal for Rwanda (ICTR), *Akayesu*, Trial Chamber, 2 September 1998, paras 494 ff.

[31] *Perinçek c. Suisse*, *supra* fn. 1, para. 116.

[32] *Perinçek c. Suisse*, *supra* fn. 1, para. 117.

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b) Assessing the «Pressing Social Need»: A Comparative Approach

This section of the judgment begins with yet another comparison between denial of the Armenian massacre and denial of the Holocaust.[33] Whilst the latter expression is nowadays the main vehicle of anti-Semitism – a phenomenon requiring continuous vigilance by the international community –, the denial of the legal characterisation of the acts of the Ottomans cannot be said to have the same impact. In fact, the utterances under scrutiny here were not deemed to be tantamount to incitement to hatred or violence.

The Court proceeded to conduct a comparative analysis, finding that Switzerland had failed to demonstrate that there was a pressing social need in its national context demanding punishment as racial discrimination of expressions disputing the aforementioned legal classification. Observing that only very few European States introduced legislation banning the denial of any genocide, the judges were not convinced by the respondent State's submissions that a comparatively stronger social need existed in Switzerland.[34]

Moreover, two decisions by the Spanish and French constitutional courts were taken into consideration.[35] In 2007, the *Tribunal Constitucional* struck down a provision punishing genocide denial, while affirming the validity of the prohibition of genocide justification.[36] In 2012, the *Conseil constitutionnel* annulled a law which criminalised the denial of genocides recognised as such by the law.[37] In the Court's view, the latter pronouncement demonstrates that the official recognition by law of a specific genocide is not necessarily in contradiction with the unconstitutionality of provisions punishing expressions calling into question the official position.[38]

The judgment also recalled that the United Nations Human Rights Committee, in its latest General Comment on the right to free speech, criticised laws that penalise the expression of opinions about historical facts, even where such opinions are erroneous interpretations of past events.[39]

As for the *proportionality* of the restrictive measure, the Court considered that the fine imposed on the applicant, though of a moderate amount, might produce a chilling effect, that is, to deter the public from discussing questions that are of interest for the life of the community.[40]

In conclusion, and with special regard to the above-outlined comparative analysis, the Court found that Switzerland failed to convincingly justify the applicant's criminal conviction.[41] Under the circumstances, domestic authorities exceeded the

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[33] *Perinçek c. Suisse*, *supra* fn. 1, para. 119.
[34] *Perinçek c. Suisse*, *supra* fn. 1, para. 120.
[35] *Perinçek c. Suisse*, *supra* fn. 1, paras 121-123.
[36] *Tribunal Constitucional* (Constitutional court of Spain), judgment No. 235 of 7 November 2007, available in English at *www.tribunalconstitucional.es/es/jurisprudencia/restrad/Paginas/JCC2352007en.aspx*.
[37] *Conseil constitutionnel* (Constitutional court of France), judgment No. 2012-647 DC of 28 February 2012.
[38] *Perinçek c. Suisse*, *supra* fn. 1, para. 123.
[39] *Perinçek c. Suisse*, *supra* fn. 1, para. 124 (quoting United Nations Human Rights Committee, General Comment No. 34, para. 49).
[40] *Perinçek c. Suisse*, *supra* fn. 1, para. 127.
[41] *Perinçek c. Suisse*, *supra* fn. 1, para. 129.

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narrow margin of appreciation to which they were entitled, hence the violation of Article 10 ECHR.

IV. The Abuse Clause *vis-à-vis* Denialism: A New (More Restrictive) Take?

1. The Judgment's 'Positive Note'

The *Perinçek* judgment may be hailed as commendable revision of the ECtHR case law that declared the abuse clause to be unconditionally applicable to denialism as a whole. In order to better substantiate the impact of this decision, it is worth recalling the principles that have been set forth in this matter.

Bearing in mind the collapse of democratic systems in pre-World War II Europe, Article 17 ECHR was initially conceived as an additional safeguard against the threats posed by groups or individuals pursuing totalitarian aims.[42] In this early stage, its application proved to be infrequent, being confined to two cases in which the Court applied it to exclude anti-democratic or blatantly racist activities from the protective umbrella of the Convention.[43]

Then, during the 1990s, the abuse clause came into play principally in respect of Holocaust denial cases, which were all rejected as inadmissible, due to their connection to pro-Nazi propaganda.[44] It is worth noting that this incorporation of Holocaust denial into the category of totalitarian activities has never been based on a specific assessment of the factual circumstances of the case, but considered as self-evident even where it had not been ascertained by domestic courts.

In its most recent developments, the Court *expanded the scope* of Article 17 ECHR. First of all, the provision was declared to be applicable not only to Holocaust denial, but to denialism at large, without explicitly requiring that the conduct display any further indicia of harm. As mentioned above, the abuse clause was proclaimed to cover the denial of *any* clearly established historical fact or *any* crime against humanity, along with the justification of war crimes and the glorification of war crimes, crimes against humanity or genocide.[45] Aside from these abstract declarations, Article 17 ECHR was *effectively applied* to a wide range of expressions with little to no connection with its original anti-totalitarian spirit.[46]

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[42] P. Le Mire, *sub* Article 17, *supra* fn. 13, at 510-512.

[43] *Parti Communiste d'Allemagne c. Allemagne*, (déc.), 20 July 1957, 250/57 ; *Glimmerveen and Hagenbeek v. the Netherlands*, (dec.), 11 October 1979, 8348/78 and 8406/78.

[44] See cases cited *supra* fn. 19.

[45] See *supra*, III.1.

[46] See e. g. *W.P. and Others v. Poland*, (dec.), 2 September 2004, 42264/98 (anti-Semitism); *Norwood v. United Kingdom*, (dec.), 16 November 2004, 23131/03 (Islamophobia); *Pavel Ivanov v. Russia*, (dec.), 20 February 2007, 35222/04 (anti-Semitism); *Hizb Ut-Tahrir and Others v. Germany*, (dec.), 12 June 2012, 31098/08 (call for violent destruction of Israel and justification of suicide attacks); *Molnar c. Roumanie*, (déc.), 23 October 2012, 16637/06 (hate speech devoid of calls to violent or unlawful action).

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Prior to *Perinçek*, though, the Court had never dealt with conduct denying a crime other than the Holocaust. Therefore, the present case constituted the first occasion to test the real validity of the far-reaching principles stated in the jurisprudence developed around Holocaust denial. Pursuant to the recalled ECtHR case law, the application based on denial of the Armenian genocide could have been summarily dismissed as inadmissible pursuant to Article 17 ECHR, without a detailed examination of the merits. Even more so the case, given that Perinçek's conduct was tainted by racist and nationalistic purposes – and the abuse clause is indubitably applicable to racist speech.[47]

Yet the Court decided to refine its jurisprudence on the point, holding that Article 17 ECHR may be applied to denialism insofar as expressions are directed to incite to hatred or violence.[48] They do so, for example, when the author intends to debase the victims of the disputed crime.[49] Accordingly, Article 17 ECHR was not applied to the present case, since it was not demonstrated that the denial of the legal characterisation as genocide of the Armenian massacre did in itself qualify as incitement to hatred.[50]

Admittedly, it may be argued that the abuse clause was not invoked because of the Court's perplexity on the classification of the said massacre as genocide. Nevertheless, the text of the decision is clear in that the vital factor for Article 17 ECHR to remove an expression from the protection of freedom of speech lies in the conduct's aim to incite to hatred or violence. Thus, this provision's scope has been laudably clarified, implicitly – but necessarily – excluding that it may be applied to denialism as such, absent a case-specific assessment on whether utterances are likely to provoke hatred or violent action. In this manner, the Court stood by its announced intention to *confine the abuse clause to* «*extreme cases*».[51]

2. The Judgment's 'Dark Side'

In spite of such positive aspects, the Court's interpretation of Article 17 ECHR remains problematic for the following reasons.

First, the judgment falls short of challenging the Court's comprehensive approach to denialism. On the one hand, the exceptional regime elaborated with regard to Holocaust denial – according to which such conduct amounts *per se* to incitement to hatred, thereby calling for the automatic application of Article 17 ECHR – was not questioned. On the other hand, the Court did not exclude the possibility that this presumption could be applied to other forms of denialism. This may still occur,

[47] See e. g. *Glimmerveen and Hagenbeek v. the Netherlands*, (dec.), *supra* fn. 43; *B.H., M. W., H. P. and G. K. v. Austria*, (dec.), 12 October 1989, 12774/87; *Jersild v. Denmark*, Grand Chamber, 23 September 1994, 15890/89, para. 35.

[48] *Perinçek c. Suisse*, *supra* fn. 1, para. 52.

[49] See *Perinçek c. Suisse*, *supra* fn. 1, para. 52; *Fatullayev v. Azerbaijan*, 22 April 2010, 40984/07, paras 81, 98; *Fáber v. Hungary*, *supra* fn. 18, para. 58; *Witzsch v. Germany (2)*, *supra* fn. 19, (the law), para. 2, p. 8; *Leroy c. France*, 2 October 2008, 36109/03, para. 27; *Vajnai v. Hungary*, 8 July 2008, 33629/06, para. 25.

[50] *Perinçek c. Suisse*, *supra* fn. 1, para. 52.

[51] *Paksas v. Lithuania*, 6 January 2011, 34932/04, para. 87 (emphasis added).

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in particular, where the disputed events and legal classifications have been established by an international tribunal pursuant to a clear legal basis.[52]

Secondly, even though the Court apparently added the requirement of incitement to hatred or violence, Article 17 ECHR remains subject to broad (and discretionary) application. To begin with, this requirement must be seen in relation to the Court's settled position about hate speech, which includes within the scope of the abuse clause even expressions devoid of any calls for unlawful conduct or acts of violence.[53] Most importantly, the notion of 'incitement to hatred' is vague, and thus prone to unpredictable interpretations. The risk is that certain forms of denialism are held to *inherently* qualify as incitement to hatred, absent any specific evaluation of the circumstances of the case – indeed, this is the *modus iudicandi* adopted by the Court in relation to Holocaust denial. Such danger appears to be concrete, given that disputing the existence or the magnitude of a crime cannot but cause anguish for victims. And it might prove artificial to assess whether or not such suffering signals a contemptuous attitude on the part of the author of the expression.

Finally, the Court left unresolved the issue of the application of Article 17 ECHR to the justification of genocide (and, presumably, that of crimes against humanity and war crimes).[54] Interestingly, it did so by arguing that the applicant had been neither prosecuted nor punished for justifying genocide, but for denying it. This finding would have deserved a more exhaustive elaboration, considering that the applicant's conviction was grounded on expressions closely resembling justification.[55] Be that as it may, distinguishing between denial and justification will surely prove to be a thorny operation.

In conclusion, although the Court laudably revised its expansive jurisprudence on Article 17 ECHR, its holding does not foreclose the possibility of future applications of the abuse clause to expressions of denialism.

V. The End of Prosecutions for Denial of the Armenian Genocide?

This section seeks to assess whether the judgment in *Perinçek* implies that Switzerland is under an obligation to amend its legislation on genocide denial, and whether, more generally, convictions for denial of the Armenian genocide may still be entered without violating Article 10 ECHR.

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[52] See *Perinçek c. Suisse*, *supra* fn. 1, para. 117. In this regard, it should be noted that an increasing array of historical facts are being adjudicated by international criminal tribunals such as those for the former Yugoslavia, Cambodia, Sierra Leone and Rwanda, as well as by the permanent International Criminal Court.

[53] See e. g. *Molnar c. Roumanie*, *supra* fn. 46, para. 23; *Vejdeland and others v. Sweden*, 9 February 2012, 1813/07, para. 55; *Féret c. Belgique*, 16 July 2009, 15615/07, para. 73.

[54] *Perinçek c. Suisse*, *supra* fn. 1, para. 53.

[55] Cf. *Tribunal fédéral*, ATF 6B_398/2007, *supra* fn. 7, paras 5.2 (recalling that the applicant described Armenians as aggressors and sided with Talak Pacha, who was one of the Ottoman crimes' promoters) and 7 (relating the applicant's conviction to his «justification» of the crimes committed against Armenians, which was implied by the reference to the right to war and security reasons).

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1. The Impact of the Judgment on the Swiss Legal System

The first question may be addressed on the basis of Articles 41 and 46 ECHR, which concern remedies to make good the damage caused by a violation of the Convention, and States' obligation to execute ECtHR rulings. In short, following the finding of a violation, a two-fold obligation might be imposed on the respondent State: (i) to disburse the sum awarded by the Court to the applicant by way of just satisfaction; and, (ii) to take general and individual measures to put an end to the violation and to redress as far as possible the damage suffered by the applicant.[56] The Court has been reluctant to directly instruct States to implement concrete measures, such as to change its legislation or re-open judicial proceedings. In the absence of such an order, the respondent State is, however, obliged to «abide by the final judgment of the Court», execution being supervised by the Committee of Ministers of the Council of Europe.[57] This means that the State must take appropriate action to safeguard not only the right of the applicant, but also the rights of those in the same position, addressing the problems giving rise to the violation.[58]

In *Perinçek*, the Court has not so much criticised the norm prohibiting denialism as its judicial interpretation. In fact, the Strasbourg organ's task is not that of scrutinising national laws in the abstract, but is limited to assess whether a concrete measure comport with the Convention.[59] As a result, Swiss (judicial) authorities are bound to rectify the interpretation given to Article 261 bis(4) of the Penal Code, rather than passing legislative amendments.

In particular, Swiss courts are required to reconsider the notion of «general consensus». They should devise a different method to establish whether a historical event qualifies as genocide or crime against humanity for the purposes of Article 261 bis(4). The judgment implicitly provided some guidelines. First, it seems that political recognition should in principle be preferred to academic agreement over the legal characterisation of past events;[60] this option would improve the precision of the norm, and thus its foreseeability.[61] Secondly, considering that historical research does not lend itself to definitive conclusions, and that international crimes enjoy a precise legal definition, Swiss jurisprudence should perhaps derive significant guidance from the judgments of international tribunals ruling on the existence and classification of facts.[62]

The Strasbourg organ also emphasised that there must be a pressing social need, for restrictions on freedom of expression to be justified. It is not entirely clear why the Court embarked on a (inaccurate)[63] comparative analysis, instead of conducting

[56] See e. g. *Del Río Prada v. Spain*, Grand Chamber, 21 October 2013, 42750/09, para. 137.
[57] Article 46 of the ECHR.
[58] *Torreggiani et autres c. Italie*, Grand Chamber, 8 January 2013, 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 and 37818/10, para. 83 and cases thereby cited.
[59] See *Perinçek c. Suisse*, *supra* fn. 1, paras 98 (subpara. iii of the quoted text) and 111.
[60] See *Perinçek c. Suisse*, *supra* fn. 1, paras 115, 117.
[61] See *Perinçek c. Suisse*, *supra* fn. 1, para. 71.
[62] See *Perinçek c. Suisse*, *supra* fn. 1, paras 116-117.
[63] While the Court relied on a 2006 third-party report alleging that only 2 countries out of 16 punished the denial of all genocides, the actual figure is quite different: see *infra*, fn. 79.

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the usual assessment of the content, form, aim and context of the applicant's opinion, as it commonly does in Article 10 ECHR cases.[64] As noted above,[65] it also referred to two remarkable decisions of the constitutional organs of France and Spain that had struck down anti-denialism provisions. The Court's intent was probably to show that its criticism against the crime of denialism is not isolated in Europe.

These two pronouncements, though, may be distinguished from the case at hand. Whereas the Spanish *Tribunal Constitucional* invalidated the ban against genocide denial *as such*, Perıncek was convicted for racial discrimination, meaning that his expression of denial was *qualified by racist motives*. It follows that, contrary to the Spanish supreme organ's findings, the applicant's conduct could not be seen as a «mere expression of a point of view on specific acts».[66]

The decision of the French *Conseil constitutionnel*, in turn, annulled a bill banning the denial of genocides recognised as such by the law. The reasoning censured the method to select genocides the denial of which were to be criminalised, i. e. their identification by the Parliament itself on a case-by-case basis.[67] To begin with, the judges noted that a provision aimed at the recognition of genocide is devoid of the «normative scope» that the law must have. They further contended that the Parliament intended to punish the denial of the existence and legal classification of crimes that it had itself recognised as such, thereby imposing a sort of undisputable official version.

The legal framework, though, is different in *Perıncek*. Contrary to the law annulled by the *Conseil constitutionnel*, the crime of denialism envisaged in the Swiss Penal Code entrusts *the judiciary* – not the legislature itself – with the power to determine which facts are subsumed under the open-ended notion of genocide under Article 261 bis(4). And the judiciary is in no way bound by eventual recognitions of this sort made by the law, which are nothing more than one of the factors – not even the most important[68] – that may be considered by the courts in this inductive reasoning. It cannot be said, therefore, that the French decision is truly related to this case; at most, it may be considered as an illustration of the *liaisons dangereuses* between law and history arising from the criminalisation of denialism.

2. Perıncek's Impact on the Criminalisation of the Denial of the Armenian Genocide at Large

It was pointed out that the judges' argument in *Perıncek* did not linger on the context in which the expressions were uttered, but rather focused on the notion of general consensus and the comparative existence of a pressing social need. By opting for this course of reasoning, the Court set out principles that are likely to have a

[64] See e. g. *Jersild v. Denmark*, *supra* fn. 47, para. 31; *Karataş v. Turkey*, Grand Chamber, 8 July 1999, 23168/94, paras 49, 52.

[65] See *supra*, III.2.b.

[66] *Tribunal Constitucional*, judgment No. 235/ 2007, *supra* fn. 36, para. 7.

[67] *Conseil constitutionnel*, decision No. 647/2012, *supra* fn. 37, paras 4, 6.

[68] Cf. *Tribunal fédéral*, ATF 6B_398/2007, *supra* fn. 7, paras 4.3 and 4.4.

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general impact. Even though the Court refrained from censuring penal measures against denialism altogether, it put forth some conditions for a conviction based thereupon to be compliant with freedom of speech. We shall examine *Perıncek*'s impact on the criminalisation of – first – denialism in general and – second – denial of the Armenian genocide.

Significant import throughout the judgment has been given to the distinction between the denial of the *existence* of a historical fact and the dispute over its *legal characterisation*, the former being a graver form of attack to the victims' dignity.[69] Accordingly, future prosecutions for this kind of expression should consider whether the denial called into question the existence of well-established facts, or 'merely' cast doubt on their legal nature. Of course, in the latter case, speech may nonetheless be considered abusive, where questioning such legal classification is tantamount to justifying the crimes – which would likely trigger the application of Article 17 ECHR, causing the Article 10 ECHR-based complaint to be dismissed summarily.[70]

Another essential element appears to be the *aim pursued* by the author. In *Perıncek* the Court repeatedly stressed that, notwithstanding the applicant's racist motives, the expressions were not intended to incite to hatred or violence.[71] Thus, regardless of the crime's definition in the law,[72] domestic courts are called upon to evaluate whether the opinions under scrutiny are directed towards offensive goals. As a rule, a criminal conviction based on mere denial is unlikely to pass European scrutiny. Expressions may legitimately be punished if they exhibited a *tangible symptom of harm*, such as a threat to public peace, incitement to hatred or contempt to victims.

Whereas these arguments hold true for the crime of denialism at large, a separate issue arises from the judgment with regard to the punishment of denial of the Armenian massacre in particular. The Court apparently ruled out the possibility that there might be a general consensus on its qualification as genocide in a reasonably near future. On the one hand, it took note of limited political recognition. On the other hand, it seemed disinclined to rely on academic agreement in general. Considering the unlikelihood that an international tribunal will be established to adjudicate the existence and legal nature of the Armenian genocide, it is improbable that the Court will uphold similar restrictive measures in future cases.

However, other avenues might exist which could allow for the legitimate punishment of the denial of the Armenian massacre. Where expressions are contemptuous for a certain group of victims, the crux of their blameworthiness lies less in the act of denial and more in the manner in which they are intended as an insult against the putative victims. It follows that such expressions might well be subsumed under

[69] See *Perıncek c. Suisse*, *supra* fn. 1, paras 51, 117, 119.

[70] See *Perıncek c. Suisse*, *supra* fn. 1, para. 53; *Orban et autres c. France*, supra fn. 17, para. 35; *Leroy c. France*, *supra* fn. 49, para. 27.

[71] *Perıncek c. Suisse*, *supra* fn. 1, paras 52, 119.

[72] In this regard, it should be noted that Art. 161 bis(4) of the Swiss Penal Code bans denial to the extent it amounts to racial, ethnic or religious discrimination. Yet the Court found that the applicant's expressions did not justify a criminal conviction. Therefore, restricting a crime's definition to racially-motivated conduct may not suffice to satisfy an Art. 10 ECHR-based test.

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other (more general) offences against racial, ethnic or religious discrimination, whose definitions are irrespective of the denied crime's legal characterisation. Article 261 bis of the Swiss Penal Code provides some examples of this kind of legislation, making it a crime, inter alia, to publicly incite hatred or discrimination, to publicly disseminate denigrating or defamatory ideologies, and to denigrate or discriminate against a group in a manner that violates human dignity.[73] In this case, denial is nothing more than a specific conduct falling under hate speech crimes, provided that it satisfies relevant conditions of applicability.

Another avenue to punish denial of the Armenian massacre may be to shift attention away from genocide toward the potential characterisation of the facts as crimes against humanity – that are legally not less serious than genocide.[74] This was indeed the path followed by the Swiss Federal Tribunal, which grounded Perıncek's conviction on the qualification of the massacre as either genocide or crime against humanity – without adequately elaborating on the latter, regrettably.[75] It is true that the characterisation as genocide or as a crime against humanity may raise similar problems with regard to the existence of general consensus. But crimes against humanity are perhaps easier to establish, due to the absence of the aforementioned element of *dolus specialis* specific to the crime of genocide.[76]

3. Conclusion

The two initial questions may be succinctly answered as follows.

First: Switzerland is not that bound to amend its legislation so as to reconsider the judicial interpretation given to the crime of denialism. In accordance with the judgment, courts should: (i) reconsider the notion of «general consensus», giving prominence to the facts established by international tribunals; (ii) attach significant weight to the author's aim; and, (iii) confine the crime's scope to conduct qualified by tangible symptoms of harm.

Second: the possibility that denial of Armenian massacre be prosecuted in compliance with Article 10 ECHR has been considerably restricted. First of all, this prospect is hindered by the allegedly[77] unsettled debate over the legal characterisation of those events. Moreover, it is doubtful that a conviction based solely on the denial of such qualification will be considered as imposed by a pressing social need. Calling into question the Armenian massacre, nevertheless, may still be validly punished inasmuch as: (i) expressions amount to a justification of the crimes; (ii)

[73] Art. 261 bis(1), (2) and (4) of the Swiss Penal Code.

[74] Despite the well-known statement that genocide is «the crime of crimes», international criminal tribunals have rejected, in principle, the idea of a hierarchy of international crimes (see e. g. ICTR, *Rutaganda*, Appeals Chamber, 26 May 2003, para. 590), holding that they all constitute «serious violations of international humanitarian law» (see e. g. ICTR, *Zigiranyirazo*, Trial Chamber, 18 December 2008, para. 451).

[75] *Tribunal fédéral*, ATF 6B_398/2007, *supra* fn. 7, para. 7.

[76] Art. 7 of the Statute of the International Criminal Court identifies the «widespread or systematic attack directed against any civilian population» as the key element of crimes against humanity.

[77] *Perıncek c. Suisse*, *supra* fn. 1, paras 115, 117.

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tangible symptoms of harm are ascertained, such as the author's goal to incite to hatred or violence; or, (iii) conduct satisfies general provisions against hate speech.

VI. The Fate of Far-Reaching Criminalisation of Denialism in Europe

1. Introductory Remarks

Contrary to the figures cited by the Court in its comparative analysis,[78] a conspicuous number of European States have extended the scope of the crime of denialism beyond the Holocaust, generating a multifaceted legal panorama.[79] The European Union (EU) has also encouraged Member States to adopt widely-framed anti-denialism provisions. In its Framework Decision 2008/913/JHA, it requested, inter alia, the criminalisation of public condoning, denial and gross trivialisation of genocide, crimes against humanity and war crimes, when the conduct is carried out in a manner likely to incite to hatred or violence.[80]

Pre-*Perinçek* ECtHR jurisprudence was no obstacle against far-reaching penalisation of denialism. The Court had constantly upheld – perchance even tacitly encouraged – the punishment of Holocaust denial, adding that it would have likewise applied the Article 17 ECHR-based unfavourable treatment to expressions disputing clearly established historical facts.[81] In *Perinçek*, though, the Court inaugurated a more restrictive approach that may produce pervasive effects beyond the case at hand.

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[78] *Perinçek c. Suisse*, *supra* fn. 1, para. 120.

[79] By way of illustration – States punishing only the denial of the Holocaust include: Germany (Penal Code, Section 130(3)), France (Law on Freedom of Press of 29 July 1881 as amended by Law No. 90-615 of 13 July 1990 ('Loi Gayssot'), Art. 24 bis), Austria (Law Against National-Socialist Activities ('Verbotsgesetz'), effective 18 February 1947, as amended on 26 February 1992, Section 3(h)) and Belgium (Law of 23 March 1995, Art. 1); States banning denial of a wider class of crimes: Spain (Penal Code, Art. 607(2) against genocides' justification), Luxembourg (Penal Code, Art. 457-3 targeting Holocaust and other genocides), Liechtenstein (Penal Code, Section 283(1)(5), genocide and other crimes against humanity), Switzerland (Penal Code, Art. 261 bis(4), genocide and crimes against humanity), Malta (Penal Code, Art. 83B, genocide, crimes against humanity and war crimes), Slovenia (Penal Code, Art. 297, genocide, crimes against humanity and war crimes) and Latvia (Penal Code, Art. 74.1, genocide, crimes against humanity, crimes against peace and war crimes). Furthermore, a number of (ex Soviet-bloc) countries additionally prohibit denial of crimes committed by former communist regimes: See e.g. Czech Republic (Penal Code (New), effective 01 January 2010, Section 405), Poland (Law Establishing the Institute of National Remembrance of 18 December 1998, Arts 1 and 55), Hungary (Penal Code as amended in June 2010, Art. 269(c)), Slovakia (Penal Code, Art. 422(d)) and Lithuania (Penal Code as amended on 15 June 2010, Art. 170-2).

[80] Art. 1(1)(c) of the Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ L 328/55, 6 December 2008. For some comments on this Decision, see e.g. L. Pech, 'The Law of Holocaust Denial in Europe: Towards a (qualified) EU-wide Criminal Prohibition', in L. Hennebel and T. Hochmann, *supra* fn. 2, 185; P. Lobba, 'Punishing Denialism Beyond Holocaust Denial: EU Framework Decision 2008/913/JHA and Other Expansive Trends', 5(1) New J. Eur. Crim. L. (2014), forthcoming; S. Bock, 'Die (unterlassene) Reform des Volksverhetzungstatbestands', 44(2) *Zeitschrift für Rechtspolitik* (2011) 46; M. Hellmann and J. Gärtner, 'Neues beim Volksverhetzungstatbestand – Europäische Vorgaben und ihre Umsetzung', 64(14) *Neue Juristische Wochenschrift* (2011) 961; B. Renauld, 'La décision-cadre 2008/913/JAI du Conseil de l'Union Européenne: du nouveau en matière de lutte contre le racisme?', 81 RTDH (2010) 119; J.J. Garman, 'The European Union Combats Racism and Xenophobia by Forbidding Expression: An Analysis of the Framework Decision', 39 *University of Toledo Law Review* (2008) 843.

[81] See *supra*, III.1.

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The question is whether, and to what extent, this judgment impacts on the legitimacy of Europe-wide provisions against denialism as a whole.

At the outset, it must be clarified that the Article 46 ECHR obligation to conform to the final judgment of the Court affects only the States that were parties to the proceedings in Strasbourg – in the present case, Switzerland. Other countries may abide by the findings of the cases decided against third parties – especially where they find them to be persuasive and generalisable – but are not formally bound thereto.

On the other hand, the principles established within the ECHR system have a «special significance» for the European Union, since they play a crucial role in defining the contours of fundamental rights, and the respect for such fundamental rights is «a condition of the lawfulness» of all EU measures.[82] It follows that the mentioned Framework Decision could be declared null and void by the Court of Justice of the EU, should it be found to violate the right to freedom of expression as derived, in part, by the case law of the ECtHR.

2. A Decision in Favour of a 'Qualified' Model of Penalisation

Turning to the main issue, it is appropriate to separately consider Holocaust denial and other forms of denialism. The judgment in *Perinçek* abstained from touching upon the firmly established principles concerning the former expression. The association of Holocaust denial with totalitarian ideology, along with its insulting nature for victims, has never been assessed *in concreto* by European judges, but has instead been considered to be an intrinsic feature of the conduct. As confirmed in *Perinçek*,[83] this special regime is related to the fight against anti-Semitism – a pernicious end presumed by the Court to underlie any expression denying the Holocaust. Hence the constant removal of this opinion, by virtue of Article 17 ECHR, from the protection of Article 10 ECHR. The consequence is that States remain at liberty to punish Holocaust denial as such, without being called upon to establish in each case the expression's harmful or threatening character.

Following *Perinçek*, the conclusion is different for the other forms of denialism. The Court recognized that the nature of these expressions is not such as to justify the presumption on which the crime of Holocaust denial generally rests. While sanctioning Holocaust denial by itself might be reasonable in view of the arguably invariable anti-Semitic motives behind it, the same does not hold true for other acts of denial, which remain context-dependent.

The judgment suggests that it cannot be assumed that discriminatory or otherwise malicious intentions necessarily underlie or result from opinions disputing, for instance, the nature of the Armenian massacre. It follows that such restrictions on freedom of expression are to be justified demonstrating the existence of compelling circumstances that mark the conduct as harmful, to be assessed on a case-by-case basis.

[82] European Court of Justice, *Kadi v. Council and Commission*, Grand Chamber, 3 September 2008, C-402/05 P and C-415/05 P, paras 283-284. See also Art. 52(3) of the Charter of Fundamental Rights of the European Union.

[83] *Perinçek c. Suisse*, *supra* fn. 1, para. 119.

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This is a laudable development that appears to prohibit European States from banning denialism as such, that is, irrespective of further indicia of harm – the so-called 'unqualified' (or 'simple') denialism.[84] In the first place, the crime's domestic definitions should include elements requiring proof of, for example, the perpetrator's insidious aims, the expression's insulting nature or its capacity to pose a threat to public peace. But – as emerged in *Perinçek* – this may not be the determining factor to pass the Strasbourg scrutiny. What matters is the judicial interpretation of the crime's ingredients, that must strike a reasonable balance between freedom of expression and the victims' (and their relatives') honour.

3. Massacre or Genocide? In Search of a Method

An unresolved problem concerns the adequate methodology to determine which historical facts may be subsumed under the legal notions of genocide, crimes against humanity and war crimes that are normally embedded in the normative definition of the crime of denialism. While the Court criticised the concept of «general consensus» adopted by Swiss authorities, it refrained from providing much guidance in regard to an alternative formulation. Notably, the Court was sceptical of reliance on historians' general agreement, seeming to favour adjudication by an international tribunal.[85]

In the author's opinion, determining whether the historical fact object of negation falls within a crime's legal definition is one of the most troubling issues surrounding the crime of denialism. It is true, on the one hand, that a general consensus among historians over a fact's legal characterisation is hardly achievable. And, in any event, such an academic finding should not be automatically transplanted into the legal field, in which the contours of crimes' definitions do not necessarily correspond to the notions employed by historians;[86] and in which the methods to reach the truth are different.[87]

On the other hand, confidence in international tribunals should not be overstated. For one thing, international prosecution is very selective and not necessarily related to the gravity of the facts. Protecting only victims of events that have been internationally adjudicated would raise, as a minimum, issues of fair and equal

[84] The distinction between plain (*einfache Auschwitzlüge*) and qualified (*qualifizierte Auschwitzlüge*) denial of the Holocaust was conceived within the German legal system: see e. g. *Bundesgerichtshof* (BGH) (German Federal High Court), judgment of 15 March 1994, 1 StR 179/93 (known as 'Deckert case'), published in 47(21) *Neue Juristische Wochenschrift* (1994), 1421.

[85] *Perinçek c. Suisse*, *supra* fn. 1, para. 117.

[86] On the different notions of genocide adopted by historians, see e. g. S. Straus, 'Contested Meanings and Conflicting Imperatives: A Conceptual Analysis of Genocide', 3 *Journal of Genocide Research* 3 (2001), 349, at 349, 359, 370; T. Barta, N. Finzsch, D. Stannard, 'Three Responses to 'Can There Be Genocide Without the Intent to Commit Genocide?'', 10 *Journal of Genocide Research* 1 (2008), 111.

[87] See P. Calamandrei, 'Il giudice e lo storico', *Rivista di diritto e procedura civile*, (1939), 105 (a pioneering article describing the differences between legal and historical methods and outcomes). More specifically on the complex intersections between law and history in international criminal justice, see R. A. Wilson, *Writing History in International Criminal Trials* (Cambridge-New York: Cambridge University Press, 2011); F. Gaynor, *Uneasy Partners – Evidence, Truth and History in International Trials*, in 10 *Journal of International Criminal Justice* (2012), 1257; M. Damaška, *What is the Point of International Criminal Justice?*, 83 *Chi. Kent L. Rev.* (2008), 329, at 335-338.

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treatment. Moreover, the decisions of international tribunals are not always consistent, and, most importantly, their *dicta* are not necessarily indicative of a general consensus concerning the facts' legal characterisation.[88]

It is now for domestic courts to develop a novel paradigm to associate a certain past event to a legal category. It remains doubtful, however, that mere disagreement over a fact's legal classification may attract criminal sanctions in the absence of additional factors serving as evidence of a pressing social need. Different is the case of expression tending to justify the underlying crimes, which is likely to fall within the scope of application of the abuse clause.[89] However, the distinction between denial and justification may prove to be a fine line in practice. A useful criterion has been delineated by the Spanish *Tribunal Constitucional*, which focused on whether or not the expression conveys (positive) value judgments on, or implies adherence to, the crimes or their unlawful nature.[90]

4. Conclusion

To summarise, the principles flowing from the judgment in *Perinçek* that are relevant to European domestic systems appear to be the following: (i) Holocaust denial may continue to be punished as such; (ii) denial of other crimes' legal characterisation may be punished only insofar as the conduct is shown to be threatening or harmful in the circumstances; and, (iii) the existence of a general consensus over a crime's nature is insufficient to outlaw the denial thereof.

As for the import of the judgment on the mentioned EU Framework Decision, the same directives remain valid. In this regard it should be observed that this European act already conforms to some of the above-outlined principles. Indeed it requests the punishment of denialism only to the extent the expression is directed against a group or a person defined by race, religion or other grounds, and is carried out in a manner likely to incite to hatred or violence.[91] In addition, the Framework Decision allows EU Member States to further reduce the scope of the prohibition, for example, by requiring that utterances jeopardise public order or cause damage to others.[92] As such, it may be concluded that there is no contradiction between the *Perinçek* principles and the text of this European act. It remains to be seen, though, whether the Court of Justice of the EU will adhere entirely to the findings of this ECtHR judgment when called upon to interpret the Framework Decision.

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[88] For example, although the legal characterisation as genocide of the massacre of Srebrenica is well-established at the legal level (see e. g. International Court of Justice, *Bosnia and Herzegovina v. Serbia and Montenegro* (Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide), 26 February 2007, para. 297; International Criminal Tribunal for the former Yugoslavia (ICTY), *Krstić*, IT-98-33-T, *Judgement*, Trial Chamber, 2 August 2001, paras 560, 594-599), it is still a matter of debate among scholars (see e. g. K. G. Southwick, *Srebrenica as Genocide? The Krstić Decision and the Language of the Unspeakable*, in 8 *Yale Human Rights & Development Law Journal*(2005) 188).

[89] *Perinçek c. Suisse*, *supra* fn. 1, para. 53.

[90] *Tribunal Constitucional*, judgment No. 235/ 2007, *supra* fn. 36, paras 7-8.

[91] Art. 1(1)(c) and (d) of the Framework Decision 2008/913/JHA, *supra* fn. 80.

[92] Art. 1(2) and (4), and Art. 7 of the Framework Decision 2008/913/JHA, *supra* fn. 80.

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