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Navigating the hierarchy of memories: the ECtHR judgment in *Perinçek v Switzerland*

Malwina Wojcik

This case note analyses the judgment of the European Court of Human Rights (ECtHR) in *Perinçek v Switzerland*, a case concerning the compatibility of criminalising the Armenian genocide denial with the right to free speech enshrined in Article 10 of the ECHR. *Perinçek* was the first case in which the ECtHR was called to adjudicate on the expanded form of denial laws, which prohibit denial of international crimes beyond the Holocaust. Facing this challenge, the ECtHR chose to divert from its well-established case-law on Holocaust denial. This case note argues that by affirming different legal treatment of Holocaust denial and denial of other genocides, the Strasbourg Court has created a hierarchy of memories which is highly problematic. The note starts with a brief introduction outlining the tension between the freedom of speech and criminalisation of the denial in its original and expanded form. The following section explores the reasoning of the Chamber and the Grand Chamber in *Perinçek*. The final section critically examines the key arguments for distinct legal treatment of Holocaust denial and their application in the judgment.

Introduction

Law and history are interconnected. History shapes the law, making national constitutions ‘codified memories of an overthrown past’¹; law sometimes attempts to shape history by preserving a specific memory of the past. Fraser distinguishes two ways in which such a preservation can be achieved: the first one is a declarative recognition of certain historical events by the legislature, while the second involves attaching a criminal sanction to the denial of such events.² In Europe, this phenomenon is demonstrated predominantly by the laws criminalising the denial of Holocaust and other international crimes. The first legislation of this type was introduced in France in 1990 by the Gaysot law, amending the Freedom of Press Act of 1881. The amendment made it an offence to contest the crimes against

¹ Eric Heinze, ‘Beyond “Memory Laws”: Towards a General Theory of Law and Historical Discourse’ in Uladzislau Belavusau & Aleksandra Gliszczynska-Grabias (eds), *Law and Memory: Addressing Historical Injustice by Law* (CUP 2017) 4.

² David Fraser, ‘Law’s Holocaust Denial. State, Memory, Legality’ in Ludovic Hennebel and Thomas Hochmann (eds.) *Genocide Denials and the Law* (OUP 2011) 29.

humanity, as defined by Article 6 of the London Charter 1945, on the basis of which the Nazi crimes were prosecuted by the Nuremberg Military Tribunal.³ In modern times, 21 out of 27 EU Member States recognise denialism either as a separate offence or as an aggravating circumstance.⁴ Out of these, four States explicitly limit the offence to Holocaust denial,⁵ while the others punish denial of other recognised international crimes.

The 'original' crime of denialism,⁶ limited to the Holocaust, was construed between two broad considerations. On the one hand, it is motivated by the need for preserving the truth about the Nazi crimes and protecting dignity of the victims. On the other hand, it must respect the fundamental right to free speech, which is the cornerstone of democracy. Garibian explains that these two considerations can be reconciled under the view that anti-democratic speech, such as Holocaust denial, should not be protected because it aims at destroying the democracy itself.⁷ This view was followed by the European Court of Human Rights (ECtHR) which has developed a unique legal regime for assessing compatibility of Holocaust denial laws with

³ Article 24 *bis* of the French Freedom of the Press Act 1881, amended by Article 173 of Law no. 2017-86 of 27 January 2017.

⁴ The EU countries prohibiting Holocaust denial (in chronological order): France (Article 24 bis of the Freedom of the Press Act); Austria (Article 3, para h of the National Socialism Prohibition Act of 1947, amended by law no. 148 of 19 March 1992); Germany (Article 130(3) Criminal Code amended by law of 28 October 1994); Belgium (Article 1 of the Law tending to repress negation, minimisation, justification or approbation of the genocide committed by the German National-Socialist regime during the Second World War of 23 March 1995); Spain (Article 510, para I, lett. c) Criminal Code, introduced by the Organic Law no. 1 of 30 March 2015 amending the measure originally provided by Article 607 Criminal Code by the Organic Law no. 10 of 23 November 1995); Portugal (Article 240, para II, lett. B) Criminal Code introduced by Law no. 65 of 2 September 1998); Poland (Article 55 of the Act on the Institute of National Remembrance - Commission for the Prosecution of Crimes against the Polish Nation of 18 December 1998); Romania (Article 6 of Law no. 217 of 27 July 2015 amending the Emergency Ordinance of 13 March 2002); Slovakia (Article 422d Criminal Code introduced by the law of 20 May 2005); the Czech Republic (Article 405 Criminal Code introduced by the law of 9 February 2009); Malta (Article 82B Criminal Code introduced by the law of 3 November 2009); Latvia (Article 74-1 Criminal Code introduced by the law of 21 May 21 2009 with the punishment provision amended in 2012); Lithuania (Article 170, para II Criminal Code introduced by law no. 75-3792 2010); Luxembourg (Article 457-3 of the Criminal Code introduced by the law of 13 February 2011); Bulgaria (Article 419a Criminal Code introduced by the law of 13 April 2011); Cyprus (Article 3 of law no. 134 (1) of 21 October 2011); Croatia (Article 325 Criminal Code introduced by the law of 26 October 2011); Slovenia (Article 297 Criminal Code introduced by the law of 2 November 2011); Hungary (Article 333 Criminal Code introduced by law no. XLVIII of 2013); Greece (Article 2 of law no. 4285 of 104 September 2014); Italy (Article 3 para 3 bis of law no. 654 of 13 October 1975, introduced by law no. 115 of 16 June 2016 and amended by Article 5 of law no. 167 of 20 November 2017. For a full review of the above legislation see: Emanuela Fronza, *Memory and Punishment. Historical Denialism, Free Speech and the Limits of Criminal Law* (T.M.C Asser Press 2018) 180-188.

⁵ Austria, Germany, France, Belgium.

⁶ Emanuela Fronza, *Memory and Punishment. Historical Denialism, Free Speech and the Limits of Criminal Law* (T.M.C Asser Press 2018) 10.

⁷ Sevane Garibian, 'Taking Denial Seriously: Genocide Denial and Freedom of Speech in the French Law' (2008) 9 *Cardozo J Conflict Resol* 479, 482.

the right to free speech, as in Article 10 of the European Convention on Human Rights (ECHR). The Court deployed Article 17 of the ECHR, also known as the 'abuse clause', to remove Holocaust denial from protection of the Convention, based on a presumption that it aims at destroying the rights enshrined therein.⁸ Article 17 states: 'Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.' Determined to avoid any future rise of totalitarian regimes, the drafters of ECHR introduced this provision to ensure that the Convention rights, such as the freedom of speech, are not used in a way which threatens the overall purpose of the document. Where the 'abuse clause' is engaged, it makes the case inadmissible, preventing its review on merits.

Further problems emerged with extension of denial laws beyond Holocaust. Calls of victims of other genocides led to broader criminalisation of negationist speech on both national⁹ and international scale. In particular, the EU Framework Decision on combating racism and xenophobia by means of criminal law,¹⁰ put an obligation on Member States to punish 'condoning, denying or grossly trivialising' international crimes established by the Statutes of the International Criminal Court¹¹ and the International Military Tribunal.¹² Broadening criminalisation of denial resulted in renewed tensions with the freedom of speech and historical research. This was particularly evident in the decision of the French *Conseil Constitutionnel* which struck down the Boyer Bill¹³ punishing denial of the Armenian genocide as unconstitutional.¹⁴ The proposed law prohibited the denial of genocides recognised under the French law. The only genocide autonomously recognised by the French Parliament at that time was the Armenian one. Nevertheless, the Council contended that such a political recognition was not enough to warrant a prohibition. Since the events in question were not uncontested, the bill was held to violate the freedom of speech.

A similar challenge concerning the violation of the freedom of speech by the law prohibiting denial of Armenian genocide was brought before the ECtHR in the case of *Perinçek v Switzerland*. This was the first time when the Strasbourg Court was asked to rule on the

⁸ See, among others, the cases of: *Lehideux and Isorni v France* App No 24662/94 (ECtHR, 23 September 1998); *Garaudy v France* App. No 65831/01 (ECtHR, 24 June 2003).

⁹ For example, the Law of Ukraine No. 376-V 'On Holodomor of 1932-33 in Ukraine' recognising the Holodomor as genocide and punishing its denial.

¹⁰ The Council of the EU 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.

¹¹ *ibid*, Article 1(c).

¹² *ibid*, Article 1(d).

¹³ The Boyer Bill (legislative proposal no. 690, registered on February 6th 2013, on the implementation of the 2008 EU Framework Decisions into the domestic legal system), presented by Valérie Boyer and others.

¹⁴ Décision No. 2012-647, 28 February 2012.

expanded form of denial laws. In two consecutive judgements, the Chamber¹⁵ and the Grand Chamber¹⁶ refused to apply Article 17 to dismiss the claims of Doğu Perinçek, a Turkish lawyer and politician who denied that the Armenian massacres constituted a genocide. The Court held that his statements were protected under Article 10. By affirming a different legal regime for Holocaust denial, the judgement exposed a crucial difficulty with broader criminalisation of negationism: the emergence of a judicially enforced hierarchy of memories.

1. Perinçek v Switzerland

1A: The background of the case

Between 1915 and 1916 the Young Turk government conducted a campaign of mass killings and deportations of Armenians from the Ottoman Empire. Before the First World War, the population of the Ottoman Armenians was about 2.5 million. It is estimated that around 1.5 million of them died as a result of the ethnic cleansing, while the majority of survivors migrated to the Middle East to escape persecution.¹⁷ According to the Armenian National Institute, as of this day, 30 countries recognise the events as genocide.¹⁸ The modern-day Republic of Turkey still refuses to do so.

Perinçek was convicted for denying the Armenian genocide contrary to Article 261 bis(4) of the Swiss Penal Code, which applies to ‘everyone [...] who publicly, [...] denies, grossly minimises or attempts to justify genocide or other crimes against humanity’. Importantly, Perinçek did not dispute the fact of the massacres themselves but rather the appropriateness of classifying them as genocide, a characterisation that he called an ‘international lie’. Perinçek asserted that the responsibility for the atrocities rests on the ‘imperialist powers’ which ignited the conflict between Turks and Armenians.

The Police Tribunal of Lausanne ruled that the Armenian genocide was protected by the law and that Perinçek acted intentionally to deny it. The conviction was upheld by the Criminal Court of Cassation and the Swiss Federal Court.¹⁹ The latter found that the provision of the Penal Code is not limited to the Nazi crimes but has an open-ended character. The Armenian genocide was protected by the law not only because it enjoyed political recognition in Switzerland but also because there was ‘a broad consensus within the community,’²⁰ including

¹⁵ *Perinçek v Switzerland* App no. 27510/08 (ECtHR, 17 December 2013) (the Chamber).

¹⁶ *Perinçek v Switzerland* App no. 27510/08 (ECtHR, 15 October 2015) (Grand Chamber).

¹⁷ Berch Berseroglu, ‘Nationalism and Ethnic Rivalry in the Early Twentieth Century’ (1991), 52 *Indian J Pol Sci* 458, 481.

¹⁸ The Armenian National Institute <https://www.armenian-genocide.org/current_category.7/affirmation_list.html> accessed 15 October 2020.

¹⁹ Tribunal fédéral (Switzerland), ATF 6B_398/2007, 12 December 2007.

²⁰ *ibid* [4.2].

the historians, that it constituted a genocide. It was held that Perinçek's motives for disputing this qualification were racist and nationalistic.²¹

1B: The applicability of Article 17

The practice of engaging Article 17 of the Convention in Holocaust denial cases evolved in three stages. Firstly, in jurisprudence of the former Commission, the abuse clause was reserved to cases of grossly racist conduct.²² Even in cases in which anti-Semitism was clearly involved, Article 17 was not triggered, and the Court assessed the alleged interference with the freedom of speech under Article 10 alone.²³ Subsequently, Article 17 became an interpretative aid in Article 10 analysis.²⁴ Thus, activities aimed at destroying 'the basic values underlying the Convention,'²⁵ such as anti-Semitism and denialism, were likely to render the interference with the freedom of speech legitimate. Finally, Article 17 emerged as a 'guillotine clause' resulting in a summary dismissal of the case. In *Lehideux and Isorni v France* the Court confirmed that the denial of 'clearly established historical facts, such as the Holocaust,' should be 'removed from the protection of Article 10 by Article 17.'²⁶

Thus, the primary issue in *Perinçek* was whether the last interpretation should be extended beyond Holocaust denial. The ECtHR took a step back, refusing to apply Article 17 as a 'guillotine clause'. While the Chamber contended that the abuse clause should not be applied at all,²⁷ the Grand Chamber decided to use Article 17 jointly with Article 10, as an interpretative aid.²⁸ The guillotine effect was precluded because it was not immediately obvious if Perinçek intended to incite hatred or violence and thus rely on the Convention to destroy the rights enshrined therein.²⁹

1C: The Interference with Perinçek's Freedom of Speech

According to the jurisprudence of the ECtHR, in order to comply with the Convention, an interference with Article 10 has to: (1) be prescribed by the law, (2) pursue a legitimate aim and (3) be necessary in a democratic society.

²¹ *ibid* [7].

²² *Glimmerveen and Hagenbeek v the Netherlands* App no 8348/78 & 8406/78 (EcommHR, 11 October 1979).

²³ *Lowes v UK* App no. 13214/87 (EcommHR, 9 December 1988).

²⁴ *Kühnen v Germany* App no 12194/86 (EcommHR, 12 May 1988).

²⁵ *ibid* [1].

²⁶ *Lehideux and Isorni v France* App no. 24662/94 (ECtHR, 23 September 1998) [47].

²⁷ *Perinçek* (the Chamber) (n 15) [54].

²⁸ *Perinçek* (Grand Chamber) (n 16) [115].

²⁹ *ibid*.

With regard to the first requirement, the majority of the Grand Chamber considered that the interference was prescribed by the law because the applicant 'could reasonably have foreseen that his statements in relation to these events might result in criminal liability.'³⁰ Judge Nußberger dissented, arguing that the law in question did not provide a precise definition of genocide.³¹ Therefore, he opted for finding a procedural violation of Article 10. While the majority judgement seems to refer to the applicant's subjective state of mind, Judge Nußberger perceives legal certainty as an objective standard. In this regard, Article 261 bis § 4 of the Criminal Code does not provide any clues as to what is considered a genocide, making it difficult to draw a boundary between the freedom of speech and prohibited denialism. It could be argued that the recognition of the Armenian genocide by the Swiss National Council implied that it was protected against denial. However, as we have seen in the case of the Boyer Bill, such a political recognition does not necessarily translate into a legal one.

With regard to the second requirement, the Swiss law was found to pursue a legitimate aim of protection of dignity of present day Armenians.³² The Court conceded that the desire to have the genocide recognised constitutes an important part of the Armenian self-identity.³³ Thus, negating the suffering of their descendants harmed the dignity of the Armenians.

The last requirement turned out to be the most problematic, as it involved balancing the Armenian community's right to respect for private life against the applicant's right to freedom of expression. The Grand Chamber started its assessment by considering the nature of Perinçek's statements. It underlined that their political character warranted heightened protection,³⁴ even if they would be 'offending, shocking or disturbing'.³⁵ Furthermore, the Court did not concede that the applicant's statements were intended to 'stir up hatred or violence', either directly or indirectly. This was because they did not dispute the fact of the genocide but merely its legal characterisation and were directed at the imperialist powers as opposed to the Armenians themselves.³⁶ This conclusion is not consistent with the Court's Holocaust denial jurisprudence, especially the judgment in *Witzsch v Germany*.³⁷ In this case, the applicant did not deny the very fact of the Holocaust but questioned Hitler's responsibility for orchestrating the Final Solution. Although no clear anti-Semitic intention was found, the Court still used Article 17 to strike down the case on the basis of the alleged 'disdain towards the victims of the Holocaust.'³⁸ Hence, it is troubling that the Court in *Perinçek* refused to

³⁰ *ibid* [138].

³¹ *Perinçek* (Grand Chamber) (n 16) the partly concurring and partly dissenting opinion of Judge Nußberger, 117.

³² *Perinçek* (Grand Chamber) (n 16) [157].

³³ *ibid* [156].

³⁴ *ibid* [231].

³⁵ *ibid* [196].

³⁶ *ibid* [233].

³⁷ *Witzsch v Germany* App no. 7485/03 (ECtHR, 13 December 2005).

³⁸ *ibid* [2].

recognise a similar lack of respect for the victims of the Armenian genocide, inherent in the applicant statements.

Apart from the lack of tangible harm, the Grand Chamber also emphasised the lack of 'pressing social need' to criminalise denial of the Armenian genocide in Switzerland due to weak geographical and temporal links between the Swiss society and the Armenian massacres. In this regard, the mere presence of Armenian minority in Switzerland was not considered enough.³⁹ Relying on this factor, the Court distinguished the Armenian Genocide from Holocaust, which was a common European experience.⁴⁰ In this way, the Grand Chamber affirmed a special legal regime for Holocaust denial, in case of which a hateful intention was presumed.⁴¹

Lastly, based on a comparative review of the European denial legislation, the Grand Chamber concluded that there was no international consensus regarding recognition of the Armenian genocide. It also noted that the Swiss legislation represents the broadest model of criminalisation of denial in Europe.⁴² Switzerland's argument that such an approach stems from its international obligations was rejected.⁴³ The Court found that none of the international conventions to which Switzerland is a party require criminalisation of genocide denial in clear and unequivocal terms. Similarly, no such obligation existed under international customary law because the state practice was not consistent.⁴⁴

Thus, taking into regard the above factors, The Grand Chamber found that the interference with applicant's Article 10 right was not necessary in a democratic society.⁴⁵

2 A Hierarchy of Memories: The Uniqueness of Holocaust Denial

The judgement in *Perinçek* marks a retreat from the trend of expanding criminalisation of genocide denial. On the one hand, stopping the 'slippery slope' of over criminalisation in memory laws, which can threaten the delicate balance between punishing denialism and protecting the freedom of speech, is a welcome development.⁴⁶ On the other hand, the difference that the Court draws between the legal treatment of Holocaust denial and denial of other genocides is highly problematic because it appears to create a hierarchy of mass

³⁹ *Perinçek* (Grand Chamber) (n 16) [244].

⁴⁰ *ibid* [243].

⁴¹ *ibid* [234].

⁴² *ibid* [257].

⁴³ *ibid* [268].

⁴⁴ *ibid* [266].

⁴⁵ *ibid* [280].

⁴⁶ Luigi Daniele, 'Disputing the Indisputable: Genocide Denial and Freedom of Expression in *Perinçek v Switzerland*' (2016) 25 Nottingham LJ 141, 149.

atrocities.⁴⁷ Treating denial of crimes of similar gravity in a substantially different way harms the idea of universal solidarity with their victims. The judge is put in an unenviable position of an arbiter of memories, selecting those worthy of heightened protection.

This section will re-evaluate the arguments for different treatment of the 'original' and expanded denialism, proving that translating the historical and social uniqueness of Holocaust into a *sui generis* legal regime is not an easy task.

2A: Holocaust denial as erosion of the 'ethical pact'

The first argument is that the denial of the Holocaust warrants special treatment because of the very nature of Shoah as the 'founding event'⁴⁸ behind the development of modern democracies. What was unique about the Final Solution is not only its scale but also the significant role that law played in its implementation. In 1933, two months after Hitler came to power, the Law for the Restoration of the Professional Civil Service was enacted. It prevented non-Aryans from being employed in the civil service. The Nuremberg Laws of 1935 provided a legal definition of a Jew and a part-Jew (*Mischlinge*) and established a special legal regime for the Jewish people, stripping them of citizenship and preventing marriages and sexual relations between Jews and Germans. The perverse pursuit of legality of the Nazi crimes caused Radbruch to develop his famous formula⁴⁹ which stated that positive law, if extremely unjust, can be disapplied in favour of natural justice. In this way, the lessons from the Nazi era contributed to the development of new common values, supported by a content-rich model of the rule of law. This, in turn, led to enshrining the protection of fundamental human rights in both national constitutions and new international instruments. The Holocaust thus resulted in the rise of what Fronza calls an 'ethical pact' – 'the common commitment to undoing the codification of the founding event: the Nazi genocide.'⁵⁰ Therefore, an argument can be made that the Holocaust denial is more harmful than denial of other international crimes because it 'attacks the democracy's constituent moment rather than its institutions.'⁵¹

There is a clear risk that by making seemingly neutral statements with hidden racist meaning,⁵² deniers can evoke the freedom of speech as an excuse to undermine the ethical pact. This threat justifies the use of Article 17 as a guillotine clause in Holocaust denial cases.

⁴⁷ Fronza (n 6) 108-110.

⁴⁸ Emanuela Fronza, 'The Criminal Protection of Memory. Some Observations About the offense of Holocaust Denial' in Hennebel and Hochmann (n 2) 178.

⁴⁹ Gustav Radbruch, 'Statutory Lawlessness and Supra-Statutory Law (1946)' (2006) 26 Oxford Journal of Legal Studies 1.

⁵⁰ Fronza (n 48) 179.

⁵¹ *ibid*, 180.

⁵² Thomas Hochmann, 'The Denier's Intent' in Hennebel and Hochmann (n 2) 282.

For example, in *Garaudy v France*⁵³ the Court reiterated that denial ‘undermines the values on which the fight against racism and anti-Semitism are based’ and is therefore ‘incompatible with democracy and human rights’.⁵⁴ It can be argued that to impose a similar blanket ban on denial of other international crimes would be a disproportionate interference with the freedom of speech. This was confirmed in *Perinçek*. Although the Court did not go so far as to exclude the possibility of criminalising denial beyond Holocaust, it nevertheless adopted rigorous criteria for determining the legitimacy of such convictions, refraining from applying Article 17 as a ‘guillotine clause’ and engaging in Article 10 analysis instead. The Court also underlined the need for proximity in time and space and some tangible harm, such as justification or incitement to hatred.

That said, the argument that Holocaust denial justifies stricter criminal measures because it is the constituent moment of modern democracies is problematic insofar as it ignores the preventive purpose of the ‘ethical pact’. The primary function of the new legal and ethical order is to ensure that atrocities similar to the Nazi crimes will not happen again. This aspiration is reflected, for example, in Article 1 of the Genocide Convention of 1948 which obliges the contracting parties to both punish and prevent genocide. Reinforcing the uniqueness of Holocaust, while refusing to afford equal treatment to crimes of similar gravity, fosters a flawed impression that Shoah was a one-off crime in human history, perpetrated by a bunch of madmen under the command of a fanatic. This view is highly simplistic and contributes to misunderstanding of the complex nature of both the Holocaust and genocide on general. In this regard, it is worth noting that Raphael Lemkin, who is considered the father of the Genocide Convention, advocated for the introduction of the crime of barbarity, involving extermination of racial, religious or social groups, as early as in 1933.⁵⁵ Thus, his ideas predate the Holocaust and are based on a variety of historical events, including the Armenian massacres.⁵⁶ Reconsidering Lemkin’s research suggests that no international crime should be afforded a special legal treatment. Although the Holocaust indisputably is the founding event, it should not be analysed in a historical vacuum, that is without any context and reference to other international crimes. Affirming nearly blanket ban on Holocaust denial, while offering more protection to deniers of crimes of equal gravity, such as the Armenian genocide, creates a hierarchy of memories which entrenches Holocaust as the prevailing image of genocide. This obscures a broader, comparative evaluation of the phenomenon which is necessary to prevent future international crimes. Hence, I argue that employing an exceptional legal regime for Holocaust denial is in fact incompatible with the ‘ethical pact’.

⁵³ *Garaudy v France* App no. 65831/01 (ECtHR, 4 June 2003).

⁵⁴ *ibid* [29].

⁵⁵ Raphael Lemkin, ‘Genocide as a Crime under International Law’ (1947) 41 *The American Journal of International Law* 145, 146.

⁵⁶ Peter Balakian, ‘Raphael Lemkin, Cultural Destruction and the Armenian Genocide’ (2013) 27 *Holocaust and Genocide Studies* 57.

2B: Presumption of Racist Intention

Another argument for differentiating between Holocaust denial and denial of other genocides is that in the former anti-Semitic intention is presumed, while in the latter, racist or hateful intention is not always present.⁵⁷ This is particularly evident in treatment of 'bare' denial, which disputes the mere fact or characterisation of genocide. Dealing with 'aggravated' denial, which includes racist or hateful comments, is rather straightforward. This type of denial can be punished under specific legislation or, if such is not in place, under laws prohibiting hate speech.⁵⁸ In case of 'bare' denial the situation is more complex since it is not immediately obvious if the statements are made with hateful intention. Kahn raises two simple arguments in favour of considering bare denial of Holocaust as hate speech.⁵⁹ Firstly, he rightly points out that 'even bare denial inflicts harm on Holocaust survivors, Jews, and other potential victims'.⁶⁰ He argues that it is possible for a hateful message to contain no explicitly hateful language. By 'merely' negating the facts of Holocaust, the denier disrespects the dead and ruins the societal solidarity with survivors and those connected to the victims. Secondly, Kahn argues that there exists a 'genealogical' connection between Holocaust denial and hate speech.⁶¹ While the first generation of hate speech laws prohibits racial, ethnic or religious incitement, the denial laws, constituting the next generation of hate speech legislation, are destined to prevent rehabilitation of Hitler and Nazism. Hence, the added value of a separate offence of Holocaust denial is that it allows to punish what the hate speech offences alone do not - 'bare' statements of facts that hide a hateful message.⁶²

Kahn's first argument appears universal and can be easily applied in cases of genocides other than the Holocaust. One can easily argue that Perinçek's statements, although disputing a 'mere' classification of the Armenian massacre as genocide, harms the memory of the victims by shifting the blame on them. Likewise, the bond of international solidarity with survivors and those connected with the victims is severed, as they are essentially labelled liars. Nevertheless, the Grand Chamber did not accept these arguments, disagreeing that the applicant's statements 'were so wounding to the dignity of the Armenians who suffered and perished in these events and to the dignity and identity of their descendants as to require criminal law measures in Switzerland'.⁶³ The Court also pointed out that the impact of the

⁵⁷ Paolo Lobba, 'From introduction to implementation. First steps of the EU Framework Decision 2008/913/JHA against racism and xenophobia' in Paul Behrens, Nicholas Terry and Olaf Jensen (eds), *Holocaust and Genocide Denial. A Contextual Perspective* (Routledge 2017) 202.

⁵⁸ See, for example, the Constitutional Court of Spain, Judgement, 7 November 2007, no. 235/2007, holding that Holocaust denial should be criminalised only as a form of hate speech.

⁵⁹ Robert A. Kahn, 'Holocaust Denial and Hate Speech' in Hennebel and Hochmann (n 2) 85-86.

⁶⁰ *ibid*, 85.

⁶¹ *ibid*, 86.

⁶² This problem was the subject of the judgment of the German Federal Court of Justice in *Deckert Bundesgerichtshof*, 15 March 1994, BGHSt no. 40/97.

⁶³ *Perinçek* (Grand Chamber) (n 16) [252].

statements was limited as they were repeated on only three public events. This is a controversial assertion, especially in the digital era when opinions are quickly disseminated in social media. It is also in sharp contrast with the Strasbourg jurisprudence on Holocaust denial; in *Witzsch v Germany* the Court did not have an issue with upholding a criminal conviction based on a private letter to a scholar disputing Hitler's intention to murder Jews. The Court's approach seems to reflect a lack of understanding of the nature of genocide denial and the role it plays in completion of the crime itself. Many scholars point out that denial is in fact an integral part of the genocide, a 'symbolic enactment' which ensures the effectiveness of physical extermination of a group by eradicating or reshaping the memory of the victims.⁶⁴ For the fulfilment of this purpose, simple negation of the facts of killings rarely suffices. Instead, more sophisticated techniques are deployed, such as shifting the responsibility to victims or third parties or questioning the characterisation of massacres as 'genocide'.⁶⁵ Needless, to say, this is precisely what Perinçek's statements consisted of. He had clearly pursued a 'moral equivalency argument'⁶⁶ aimed at universalisation of guilt, alleging that a section of the Armenian population, incited by 'the imperialists', shares responsibility for their own genocide. This went unnoticed by the Court which emphasized that Perinçek's criticism was not directed towards the victims themselves. Neither did the majority judgment concede that the statements amounted to justification, pointing out that the claimant 'did not draw [...] the conclusion that they [the Armenians] had deserved to be subjected to atrocities or annihilation'.⁶⁷ Summing up, the majority judgement of the Grand Chamber adopted a simplistic construction of denier's intention, again, in stark contrast with the Holocaust denial jurisprudence.

This brings us back to Kahn's second argument which is essentially based on the premise that even 'bare' Holocaust denial is based on anti-Semitism or desire to rehabilitate the Nazi regime. The Grand Chamber in *Perinçek* confirmed this assertion, stating that 'Holocaust denial, even if dressed up as impartial historical research, must invariably be seen as connoting an antidemocratic ideology and anti-Semitism'.⁶⁸ The judgment underlined that it is a well-established case law of the Strasbourg Court that statements denying Holocaust are classified as 'attacks on the Jewish community', 'intrinsically linked to Nazi ideology' and 'inciting to racial hatred, anti-Semitism and xenophobia'.⁶⁹ As we have seen, the Court was not ready to presume a similar racist or hateful intention in case of the Armenian genocide.

⁶⁴ Daniel Feierstein, *Genocide as Social Practice: Reorganizing Society under the Nazis and Argentina's Military Juntas* (Rutgers University Press 2014) 120.

⁶⁵ Roger W Smith, 'Legislating against Genocide Denial: Criminalizing Denial or Preventing Free Speech' (2010) 4 U St Thomas JL & Pub Pol'y 128, 129.

⁶⁶ *ibid.*

⁶⁷ *Perinçek* (Grand Chamber) (n 16) [252].

⁶⁸ *ibid* [253].

⁶⁹ *ibid* [209]-[211].

One might wonder whether the intention behind denying Holocaust is truly so distinct from the intention behind denying other genocides that it justifies a different legal test. In attempting to answer this question it is helpful to refer to various studies concerning the motives behind negating genocide. Those studying Holocaust denial in particular, have indeed concluded that 'all revisionists are resolute anti-Zionists'⁷⁰ and that 'most are anti-Semites or bigots'⁷¹ with 'no interest in scholarship or reason'.⁷² Charny and Fromer provide some insight into the thought process behind the Armenian genocide denial, analysing the comments made by seventeen scholars who contested the massacres.⁷³ The conclusion of the study was that the respondents displayed various 'thinking defence mechanisms', such as rejecting the empirical evidence as inconclusive or engaging in 'definitionalism', i.e., acknowledging the deaths but refusing to accept Turkish responsibility and hence, opposing the label 'genocide'. Again, one can easily see how Perinçek's statements fall into the latter category - - while he did not deny the fact of the killings, he contended that the Ottoman Empire had no genocidal intent and the responsibility for escalation of the conflict lies on the 'imperialist powers' and the Armenians themselves.

While studies like those described above cannot be determinative in ascertaining denier's intention, they are nevertheless helpful in identifying common patterns of behaviour in denial of Holocaust and other genocides. For example, one can reason that the thinking defence mechanisms can be a result of implicit racism.⁷⁴ If we adopt a broader view, focusing 'not on the content of the motivation [like anti-Zionism or anti-Semitism], but on its form (ideology) and goals (political and psychological purposes), then the motivations for denial in these two cases [the Holocaust and the Armenian genocide] may have more in common than appear at first glance'.⁷⁵ This is a valid argument against distinct legal treatment of denier's *mens rea* in the case of Holocaust.

2C: A Universal Test for Denier's Intention?

Even if we agree that the intention of a Holocaust denier and a denier of any other genocide should be assessed according to uniform legal criteria, it is difficult to ascertain how the test should be construed. As evidenced by the Court's unsatisfactory analysis of Perinçek's

⁷⁰ Pierre Vidal-Naquet, *Assassins of Memory: Essays on the Denial of the Holocaust* (Columbia University Press, 1992) 57.

⁷¹ Deborah E. Lipstadt, *Denying the Holocaust The Growing Assault on Truth and Memory* (The Free Press 1993) 206.

⁷² *ibid.*

⁷³ Israel W Charny and Daphna Fromer, 'A Follow-up of the Sixty-Nine Scholars Who Signed an Advertisement Questioning the Armenian Genocide' (1990) 25/26 *Internet on the Holocaust and Genocide*, Special Double Issue 6-7.

⁷⁴ Hochmann (n 52) 283.

⁷⁵ Roger W Smith, Eric Markusen and Robert Jay Lifton, 'Professional Ethics and the Denial of Armenian Genocide' (1995) 9 *Holocaust & Genocide Stud* 14.

statements, particularly complicated issues arise with respect to ascertaining the intention underlying 'bare denial'. In his thought-provoking chapter, Hochmann explores whether such denial can ever be made *bona fide*.⁷⁶ For the purpose of his argument, he distinguishes between hateful denial and *mala fide* denial, claiming that one does not necessarily follow the other.⁷⁷ Under this perspective, he proposes four hypotheses concerning the mental state of a denier.⁷⁸ The first one, which was already pointed out in our analysis, involves conscious use of denial as a vehicle for hate speech (*mala fide* and hateful denial). The second hypothesis is fame motivated denial, which is *mala fide* but not hateful, since it is based on careerism as opposed to racism. The third hypothesis is wishful thinking – denial based on fanaticism that leads to fixed ideas, similar to 'thinking defence mechanisms' described in the study of Charny and Fromer. Hochmann suggests that although such reasoning is hateful (motivated by racism), it can be considered *bona fide* insofar as the denier genuinely believes in his statements. The last hypothesis concerns denial as a product of national policy. Deniers educated in states which adopt denialism as the official vision of history can be considered *bona fide* and not hateful, because they are indoctrinated and often deprived of access to impartial sources.

Hochmann's scale of deniers' moral culpability is interesting but not easy to translate into a legal test. In particular, the distinction between the first and the third hypothesis appears tricky – wishful thinking and hidden racist intent are difficult to discern. At the same time, this distinction appears crucial because, according to Hochmann, one is made in good and the other in bad faith. This delicate issue was explored in *Irving v Penguin Books and Lipstadt*,⁷⁹ a libel case brought by a negationist historian, Irving, against a Holocaust scholar, Lipstadt, for describing him as a Holocaust denier in one of her books. Lipstadt raised a defence of justification, which put a burden on her to establish that the representations she made were substantially true. Irving submitted that his misrepresentation of evidence regarding Holocaust was made *bona fide*, as a result of an honest mistake. In determining the intention of the claimant, the Court took into account a variety of factors, including Irvin's research method, as well as his political beliefs and affiliations with Neo-Nazis and right-wing extremists, from which the Court inferred racism and anti-Semitism. It thus contended that Irving purposely manipulated the evidence to fit his vision. What is crucial, although the Court noticed that the claimant could have actually believed in his statements,⁸⁰ it refused to acknowledge lesser culpability for such a *bona fide* denial.

A similar approach was taken by the Swiss courts when assessing Perinçek's intention. The Police Court purported to determine whether the defendant, being an educated lawyer and

⁷⁶ Hochmann (n 52) 281.

⁷⁷ *ibid.*

⁷⁸ *ibid.*

⁷⁹ [2000] EWHC QB 115.

⁸⁰ Hochmann (n 52) 296.

politician, 'could have believed, in good faith, that he was not acting wrongfully'⁸¹ in denying the Armenian genocide. The factors that the national courts considered were similar to those in *Irving*. The judges underlined that Perinçek refused to involve in an objective historical debate, having proclaimed no evidence will ever change his mind. The Swiss courts also took a note of Perinçek political sympathies, including Talaat Pasha, one of the main figures behind the Armenian genocide. On this basis, the racist and nationalistic intention was found. While the Police Court pointed out that genocide denial could have been a matter of faith for Pericek,⁸² none of the Swiss courts saw this as an extenuating circumstance. In other words, it did not matter whether the statements were a result of an elaborate hate technique, desire to provoke, wishful thinking or indoctrination caused by Turkey's persistent denial of the Armenian genocide. What did matter was their objective interpretation.

Comparing the judgement in *Irving* with the approach of Swiss courts in *Perinçek* is interesting because it illustrates that a similar method can be applied when determining the intention of a Holocaust denier and a denier of any other genocide. This analysis is based on an objective assessment focused on two major factors. The first one is the research method of the defendant,⁸³ which helps to discern acceptable historical revisionism from wishful thinking underlying denialism. The second one is denier's political associations and beliefs, which allow to infer a racist motivation. These factors were however downplayed by the ECtHR which concluded that Perinçek 'spoke as a politician, not as a historical or legal scholar'⁸⁴ and his political associations were not conclusively evidenced.⁸⁵ It is not entirely clear why the Court refused to give more weight to Perinçek's political and professional background. It is interesting to note that the applicant himself argued that as a lawyer, a politician and a historian he would like to draw Switzerland's attention to its incorrect recognition of the Armenian massacres as genocide.⁸⁶ This means that he did not consider his arguments to be confined merely to the political speech. Therefore, it would be appropriate for the Court to scrutinise his historical and legal research methods. The ECtHR contended that Perinçek's political sympathies and refusal to acknowledge opposing arguments were not important, because he was 'convicted for racially discriminating by denying "a genocide", not by making other utterances.'⁸⁷ However, the same time, in the Holocaust denial jurisprudence, the Court was prepared to examine additional circumstances to find malice, even where it was not obvious, as in the case of *Witzsch*.

⁸¹ See *Perinçek* (Grand Chamber) (n 16) 10.

⁸² *ibid*.

⁸³ See also: the case of *Theil*, High Court of Lyon (2006), No. 0564977.

⁸⁴ *Perinçek* (Grand Chamber) (n 16) [231].

⁸⁵ *ibid* [234].

⁸⁶ *ibid* [161].

⁸⁷ *ibid* [175].

2D: Distinction Based on Clearly Established Facts and Their Qualification

It can be argued that the Holocaust could be distinguished from other genocides because it is a well-established historical fact with uncontested legal qualification. The same might not necessarily be true for all international crimes, including the Armenian massacres.

In *Garaudy v France* the Strasbourg Court drew a distinction between 'clearly established historical facts' that cannot be subject to revisionism, such as the Holocaust, and 'facts about which there is still an ongoing debate among historians.' Perinçek submitted that his statements were justified because the Armenian genocide does not enjoy such a wide recognition as the Holocaust. Responding to this argument, the Chamber agreed that there is not enough consensus, particularly among the academics, regarding the Armenian massacres.⁸⁸ Moreover, the Court distinguished Holocaust denial based on the recognition of the Nazi crimes by the Nuremberg Military Tribunal. The Grand Chamber avoided elaborating on the nature of the Armenian massacres, focusing mainly on distinction between denial of facts and legal qualification of facts. The Court adopted a strictly legal approach, emphasising that the crime of genocide requires a specific double intention: to destroy, in whole or in part, a national, ethnical, racial or religious group as such.⁸⁹ This is usually very hard to prove in the absence of a judgement of an international tribunal.

It can be argued that Court places too much weight on the international legal recognition of genocide. Although such a judgement undoubtedly reflects a degree of consensus on the characterisation of events, it does not mean that the consensus is absolute.⁹⁰ The obvious problem concerning the Armenian case is that the killings and deportations happened before the Genocide Convention came into effect. Moreover, the country in which the events took place, and which has the jurisdiction to try them, adopted a clear negationist policy supported by criminal sanctions.⁹¹ These considerations prevented the official legal recognition of the massacres as genocide. However, it could be argued that the legal truth should not be conclusive in determining whether the 1915 events constituted a genocide; the historical truth might be equally important.

The Strasbourg Court refrained from designating a preferable historical interpretation of the events. Its desire to stick to 'clearly established facts' and 'legal qualification of facts' is justified by the reluctance serve as an arbiter of history. Despite these efforts, it is impossible for the judges to completely avoid adjudicating on history. This is because the line between

⁸⁸ *Perinçek* (the Chamber) (n 15) [117].

⁸⁹ The Genocide Convention 1948, Article 2.

⁹⁰ Nicolas Hervieu, 'Le négationnisme, prisme révélateur du dilemme européen face à la lutte contre l'extrémisme' (2014) *La Revue des droits de l'homme*, para 38
<<http://journals.openedition.org/revdh/503>> accessed 15th May 2020.

⁹¹ Article 301 of the Turkish Criminal Code is used to punish recognition of the Armenian genocide.

facts and their qualification is difficult to draw. As Fronza underlines, 'Within a narrative of historical memory, the facts and the meaning attributed to them are inevitably interrelated'.⁹² Assessment of historical events by judges is problematic because of the divergence in legal and historical methods. While a court issues a final judgement of innocence or guilt beyond reasonable doubt, based on the evidence it is presented with, a historian's task is to constantly reevaluate the past while looking for new evidence and, if necessary, redistributing the guilt. If the courts became the guardians of the official historical truth, the freedom of research would be impeded. The Grand Chamber in *Perinçek* appeared to understand this tension. It thus underlined that the different treatment of Holocaust 'lies not so much in that it is a clearly established historical fact but in that, in view of the historical context in the States concerned'.⁹³

2E: The Contextual Argument

The main argument used by the Court to distinguish Holocaust denial from denial of Armenian genocide is based on the geographical context and the passage of time. The reasoning of the Court was that Holocaust denial laws are necessary in a democratic society because of Europe's common experience of Nazi crimes; on the other hand, laws prohibiting denial of the Armenian genocide in Switzerland are not necessary because of lack of sufficient link in time and space.

These arguments are very problematic because they seem to halt the worldwide effort to end the impunity for international crimes. They contrast with recent examples of transnational justice including the Italian trial of crimes committed in Argentina during Operation Condor or Gambia's intervention in case of the Rohingya genocide in Myanmar. The reasoning of the Court appears to negate the *erga omnes* character of human rights obligations, the concept of a universal jurisdiction and lack of limitation period for international crimes. Theoretically, it could lead to a perplexing conclusion that the Rwandan genocide could not be recognised in Europe or that the Holocaust denial laws could lose their legitimacy as the time passes. The majority approach was criticised by Judge Nußberger who pointed out that '[l]egislation expressing solidarity with victims of genocide and crimes against humanity must be possible everywhere, even if there are no direct links to the events or the victims, even if a long period of time has elapsed, and even if the legislation is not directly aimed at preventing conflicts'.⁹⁴ This argument puts a shadow of doubt on the relevance of the Court's findings on general consensus regarding criminalisation of denial of the Armenian genocide. Under the universalist approach this should be a matter of the national consensus alone, which was arguably achieved by recognition of the Armenian genocide by the Swiss Parliament. In their dissenting opinion Judges Spielmann, Casadevall, Berro, De Gaetano, Sicilianos, Silvis and

⁹² Fronza (n 6) 111.

⁹³ *Perinçek* (Grand Chamber) (n 16) [243].

⁹⁴ *ibid*, 118.

Kuris opined that the lack of international consensus should in fact contribute to expanding the Swiss authorities' margin of appreciation.⁹⁵ Although the Court was entitled to find no international obligation to criminalise genocide denial beyond Holocaust, it should have recognised that there are international instruments, such as EU Framework Decision or CERD, that allow, or even encourage, an expanded approach towards denialism.

Some commentators argue that the Court should have adopted a broader, international and historical context, taking into account of Turkish consistent policy of negating the Armenian genocide.⁹⁶ Particularly interesting is the suggestion that emphasising a distinction between Holocaust and the Armenian massacres is one of Turkey's primary tactics of denial.⁹⁷ This double standard is visible in the letter from the Turkish Ambassador in the US to a Holocaust scholar, Lifton, in which the ambassador alleges that Lifton's book, which draws similarities between Shoah and the Armenian genocide, is based on unreliable sources.⁹⁸ It is worth noting that Turkey submitted a similar argument in *Perinçek*, seeking to prove that 'any attempt to draw a parallel with the Holocaust was unconvincing'.⁹⁹

Contextualising genocide denial in time and space inevitably leads to imposing a limit on the acceptable criminal protection of genocides other than Holocaust. In addition, this approach can undermine the unique regime governing Holocaust denial itself, as it suggests that criminal sanctions are only appropriate in countries which were directly affected by the Nazi crimes.¹⁰⁰

Conclusion

While the crime of genocide enjoys a specific international legal definition, the same is not true for the offence of genocide denial. The line between historical revisionism and negationist speech is often blurred. This makes balancing the prohibition of genocide denial against freedom of speech a very delicate exercise, especially beyond the case of Holocaust.

The *Perinçek* judgment highlights these tensions. In order to protect the freedom of expression, the Strasbourg Court refused to extend the 'guillotine effect' of Article 17 to denial of the Armenian genocide. A retreat to using the abuse clause as an interpretative aid is a welcome

⁹⁵ *ibid*, 122.

⁹⁶ Shant N Nashalian, 'A Critique of *Perinçek v Switzerland*: Incorporating an International and Historical Context Is the More Prudent Approach to Genocide Denial Cases' (2018) 24 Sw J Int'l L 147, 171.

⁹⁷ Smith et al (n 75) 11.

⁹⁸ *ibid*.

⁹⁹ *Perinçek* (Grand Chamber) (n 16) [106].

¹⁰⁰ Paolo Lobba, 'Testing the "Uniqueness": Denial of the Holocaust vs Denial of Other Crimes before the European Court of Human Rights' in *Belavusau et al* (n 1) 16.

development, allowing for a transparent scrutiny of the denial laws. More problematic is the Court's affirmation of a *sui generis* legal regime for Holocaust denial. While in the case of *Perinçek* the Court required proof of a tangible harm, such as incitement to hatred, in Holocaust denial such harm is presumed.

The Grand Chamber purported to avoid adjudicating on history by deploying a context-specific analysis, focusing on temporal and geographical factors. However, such an approach is manifestly contrary to the universal character of human rights and leads to an erosion of solidarity with the victims. Despite its efforts to the contrary, the Court ended up creating a hierarchy of memories.

None of the arguments for distinct treatment of Holocaust denial are fully satisfactory, insofar as they all lead to downplaying the suffering of the victims of the Armenian genocide and the dignity of their ancestors, protection of which is one of the main purposes of criminalising negationism. Hence, the Court should aim at adopting a more universal approach to genocide denial. In this regard, the judgment in *Pastors v Germany*¹⁰¹ can be mentioned as a positive development. In this Holocaust denial case, the Court refused to apply Article 17 as a 'guillotine clause', using it as an interpretative aid, as it did in *Perinçek*.

With so many ethical dilemmas raised by genocide denial jurisprudence, the inevitable conclusion appears to be that criminal law seems ill-equipped to deal with genocide denial, especially in its expanded form. Perhaps, the duty to counter denialist speech should be predominantly moral, not legal. Promotion of such a moral obligation is best done not through courtroom, but soft law, education, and limiting the curtailment of the freedom of speech.

¹⁰¹ *Pastors v Germany* App no. 55225/14 (ECtHR, 3 October 2019).