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

(Translation)

1. We are unable to agree with the conclusion that there has been a violation of Article 10 of the Convention in the present case.

2. First of all, we note the decidedly timid approach on the Court's part in reiterating the Chamber's position that it is not required to determine whether the massacres and deportations suffered by the Armenian people at the hands of the Ottoman Empire can be characterised as genocide within the meaning of that term in international law, but also that it has no authority to make legally binding pronouncements, one way or the other, on this point (see paragraph 102 of the judgment). That the massacres and deportations suffered by the Armenian people constituted genocide is self-evident. The Armenian genocide is a clearly established historical fact.[1] To deny it is to deny the obvious. But that is not the question here. The case is not about the historical truth, or the legal characterisation of the events of 1915. The real issue at stake here is whether it is possible for a State, without overstepping its margin of appreciation, to make it a criminal offence to insult the memory of a people that has suffered genocide. In our view, this is indeed possible.

3. That being so, we are unable to follow the majority's approach as regards the assessment of the applicant's statements (I). The same applies to the impact of geographical and historical factors (II), the implications of the time factor (III) and of the lack of consensus (IV), the lack of an obligation to criminalise such statements (V), and the assessment of the balancing exercise performed by the national authorities (VI).

I. Assessment of the applicant's statements

4. Our dissent mainly concerns the majority's understanding of the applicant's statements (see paragraphs 229-41 of the judgment). His particularly pernicious speech and its consequences have been played down throughout the judgment. While the statements in issue do not necessarily constitute speech falling within the scope of Article 17 of the Convention – although some of us are of the view that they do – such statements, as we understand them, amount to a distortion of historical facts going well

1. For an in-depth analysis of both the existence of the crimes and the intentional element on the part of those who perpetrated them, see Hans-Lukas Kieser and Donald Bloxham, in *The Cambridge History of the First World War*, Cambridge, Cambridge University Press, 2015, Vol. I, "Global War", Ch. 22 (Genocide), pp. 585-614

beyond mere denial of the Armenian genocide in terms of its legal characterisation. The statements in question contain an intent (*animus*) to insult a whole people. They are a gross misrepresentation, being directed at Armenians as a group, attempting to justify the actions of the Ottoman authorities by portraying them almost as acts of self-defence, and containing racist overtones denigrating the memory of the victims, as the Federal Court rightly found. To the extent that it sought to discredit the "obvious", the speech in question – as was unequivocally confirmed by the applicant at the hearing – can even be said to constitute a call, if not for hatred and violence, at least for intolerance towards Armenians. Far from being historical, legal and political in nature, the applicant's speech depicted the Armenians as the aggressors of the Turkish people and described as an "international lie" the use of the term "genocide" to refer to the atrocities committed against the Armenians. Furthermore, the applicant claimed to be a follower of Talaat Pasha, one of the protagonists in these events, who was described at the hearing as "the best friend of the Armenians" (*sic*). These statements, in our view, overstep the limits of what might be acceptable under Article 10 of the Convention.

5. In this way, the case concerns quite simply the limits of freedom of expression. Applying in turn the various requirements of Article 10 of the Convention, we have no difficulty in finding that there was an interference and that it was lawful. In its decision of 9 March 2007 the Lausanne District Police Court found that the applicant had denied the Armenian genocide by justifying the massacres. The Federal Court, in its judgment of 12 December 2007, dealt at length with the *mens rea* of the offence (motives of racial discrimination – points 5.1 and 5.2), concluding that the findings of fact "provide sufficient evidence of the existence of motives which, above and beyond nationalism, can only be viewed as racial, or ethnic, discrimination". The applicant was prosecuted under Article 261 *bis* of the Criminal Code, a provision that does not in itself raise any issues in terms of its content and its legitimacy in relation to the values safeguarded by the Convention. The courts examined the facts and assessed the applicant's statements. The applicant was aware that making the offending statements rendered him liable to punishment under Article 261 *bis* of the Code. This Article, moreover, pursues the legitimate aims of protecting the rights of others and preventing disorder.

II. Impact of geographical and historical factors

6. Beyond this aspect, we believe that the methodology applied by the majority is problematic in places. This is especially true of the "geographical and historical factors" discussed in detail in paragraphs 242-48 of the judgment. Minimising the significance of the applicant's statements by seeking to limit their geographical reach amounts

to seriously watering down the universal, *erga omnes* scope of human rights – their quintessential defining factor today. As has been forcefully asserted by the Institute of International Law, the obligation for States to ensure the observance of human rights is an *erga omnes* obligation; "it is incumbent upon every State in relation to the international community as a whole, and every State has a legal interest in the protection of human rights" (Resolution on "The Protection of Human Rights and the Principle of Non-intervention in Internal Affairs of States", *Yearbook of the Institute of International Law*, 1989, vol. II, p. 341, Article 1). In a similar vein, the Declaration and Programme of Action adopted by the World Conference on Human Rights in Vienna states that "the promotion and protection of all human rights is a legitimate concern of the international community" (UN doc. A/CONF/123, I, paragraph 4, 1993).

7. Clearly, this universalist approach contrasts with that adopted by the majority in the present judgment. Drawing all the logical inferences from the geographically restricted approach apparently adopted by the majority, one might come to the view that denial in Europe of genocides perpetrated in other continents, such as the Rwandan genocide or the genocide carried out by the Khmer Rouge regime in Cambodia, would be protected by freedom of expression without any limits, or with scarcely any. We do not believe that such a vision reflects the universal values enshrined in the Convention.

III. Impact of the time factor

8. Similar problems are raised, in our view, by the emphasis on the time factor (see paragraphs 249-54 of the judgment). Are we to infer that in twenty or thirty years' time, Holocaust denial itself might be acceptable in terms of freedom of expression? How can this factor be squared with the principle that statutory limitations are not applicable to war crimes and crimes against humanity?

IV. Lack of consensus

9. The lack of consensus on which the majority base their findings in paragraphs 255-57 could at the very most be seen as a further factor broadening the Swiss authorities' margin of appreciation. At the risk of repeating ourselves, we consider that a legislature is perfectly entitled to criminalise statements such as those made by the applicant. The question of consensus, as a limit to the national authorities' margin of appreciation, would arise only if there were a consensus that criminalising such conduct was explicitly forbidden. That is not the case, however.

V. Lack of an obligation to make a criminal offence

10. With regard to the finding that there was no obligation on Switzerland to criminalise the applicant's statements (see paragraphs 258-68), we confess to having serious doubts as to the relevance of the reasoning. Can it not be maintained, on the contrary, that a (regional) custom is gradually emerging through the practice of States, the European Union (Framework Decision 2008/913/JHA) or ECRI (Policy Recommendation no. 7)? We would also note that beyond Europe, the United Nations Committee on the Elimination of Racial Discrimination has repeatedly recommended criminalising negationist discourse. Can all these developments be disregarded at a stroke by examining the case in terms of an alleged conflict of obligations?

11. Besides these developments, which point in the opposite direction to the approach pursued by the majority, it should be noted that the Court of Cassation of the Canton of Vaud emphasised in its judgment of 13 June 2007 that the particularity of Swiss anti-racism legislation was that the national parliament had decided that, in the case of genocide and other crimes against humanity in particular, the law should go beyond the minimum standards set by the 1965 International Convention on the Elimination of All Forms of Racial Discrimination. In our opinion, a legislature is perfectly entitled to criminalise statements such as those made by the applicant. The Swiss national parliament, following lengthy debates, took the view that speeches such as those given by the applicant deserved to attract criminal penalties. We consider that the need to criminalise such conduct in a democratic society is a matter falling within the State's margin of appreciation in the present case.

VI. Balancing of the rights at stake

12. Lastly, as regards the balance struck between the different rights at stake (see paragraphs 274-80 of the judgment), we consider that the Federal Court did an excellent job, producing a measured, detailed and reasoned judgment. It devoted point 6 to freedom of expression as enshrined in Article 10 of the Convention, holding as follows:

> "... the appellant is in essence seeking, by means of provocation, to have his assertions confirmed by the Swiss judicial authorities, to the detriment of the members of the Armenian community, for whom this question plays a central role in their identity. The applicant's conviction is thus intended to protect the human dignity of members of the Armenian community, who identify themselves through the memory of the 1915 genocide. Criminalisation of genocide denial is, lastly, a means of preventing genocides for the purposes of Article I of the Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature in New York on 9 December 1948 and approved by the Federal Assembly on 9 March 2000 ..."

13. There was therefore a proper balancing exercise in this case. Accordingly, there is no justification for the conclusion in paragraph 280.

14. In short, we are persuaded that there has been no violation of Article 10 of the Convention in the present case.